

**BIG GOVERNMENT LAWSUITS: ARE  
POLICY-DRIVEN LAWSUITS IN THE  
PUBLIC INTEREST?**

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**HEARING**

BEFORE THE

**COMMITTEE ON THE JUDICIARY**

**UNITED STATES SENATE**

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

EXAMINING THE SPATE OF CERTAIN GOVERNMENT LAWSUITS FILED  
AGAINST DIFFERENT INDUSTRIES

NOVEMBER 2, 1999

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## **BIG GOVERNMENT LAWSUITS: ARE POLICY-DRIVEN LAWSUITS IN THE PUBLIC INTEREST?**

**TUESDAY, NOVEMBER 2, 1999**

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The committee met, pursuant to notice, at 11:25 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Sessions, Kennedy, and Schumer.

### **OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH**

The CHAIRMAN. I apologize to everybody for having to start this hearing so late. Let's allow as many people into the hearing room as we possibly can from those standing in the hallway. Allow people to stand if they have to.

Today's hearing is entitled "Big Government Lawsuits: Are Policy-Driven Lawsuits in the Public Interest?" The purpose of the hearing is to examine the spate of government lawsuits filed against different industries. The aim of these lawsuits is clearly to establish and enforce social policy preferences.

Many of the social goals of the lawsuits appear to be worthwhile, but to me, these lawsuits raise the issue of whether the courts and the trial attorneys, or the democratically-elected legislatures of this country, should set policy for the American people. I believe that our Constitution has already provided an answer to this question. In a democratic republic, the people, through their elected representatives, must set fundamental policy.

The scope of these lawsuits happens to be immense, and the American public is taking notice. A Federal suit was filed against the tobacco industry on September 22 of this year, ostensibly to recoup Medicaid and Medicare costs for treating tobacco-related illnesses. In a recent Kaiser/Harvard report, the Federal Government's civil lawsuit against the tobacco industry was rated America's top health news story in September of this year, followed by 62 percent of the public.

Besides the Federal tobacco suit, the Housing and Urban Development Agency, HUD, has recommended to the Department of Justice that a Federal suit be filed against the firearms industry to recoup the costs to public housing of illegal firearm use.

Twenty-nine cities and counties have filed suits against gun manufacturers, claiming that the manufacturers have negligently marketed and distributed firearms, resulting in increased criminal use of guns. State actions have also been filed against the lead paint manufacturers. It has been reported that other suits may be brought against the alcohol and beverage industry, the automobile industry, the fast-food industry, and the pharmaceutical industry. The latter is not at all far-fetched, given the recent announcement by President Clinton that the Government will investigate the pharmaceutical industry, although no violation of law was stated to justify such an investigation.

Certainly, the social goals of reducing cigarette smoking and decreasing firearm injuries and crimes are worthwhile. Let me say up front that I am no friend of tobacco use, nor an apologist for the tobacco industry. Indeed, I have never used tobacco products in my life and I am opposed to tobacco use. I have never inhaled or chewed tobacco, although I have wondered from time to time.

Along with my cosponsor, Senator Feinstein, I worked hard last Congress to pass legislation that would have gone a long way in helping Americans kick the habit in reducing teen smoking. The legislation required the tobacco companies to pay \$429 billion to settle existing lawsuits. In return for the settlement of those lawsuits, the companies would have stopped targeting children, and they would also have funded anti-smoking cessation efforts.

While this measure has yet to pass, I strongly believe that the fairest and most efficient solution to the use of tobacco is omnibus legislation such as the Hatch-Feinstein bill, rather than relying on dubious legal lawsuits. Litigation cannot effectively deal with important public policy problems such as what measures the industry must take to reduce youth smoking or to what effect will rising prices have on the black market for cigarettes.

The courts indeed have never been considered the proper institution to determine such policy. The judiciary, according to Alexander Hamilton in Federalist No. 78, is the, "least dangerous," branch because courts exercise neither, "force nor will," but "judgment." By that, Hamilton meant that the judiciary should not exercise executive powers nor promulgate legislative activity and policy.

The only proper role for the courts, therefore, to Hamilton and other Framers is to render, "judgment," by interpreting the laws in particular cases or controversies. Using the courts to create or enforce policy objectives, no matter how worthwhile an end, may very well distort the constitutional system of separation of powers, and may weaken republican democracy.

But the Clinton administration appears to be doing just that. In fact, they openly admit it. In an article in *USA Today*, dated February 11, 1999, former Clinton guru and Secretary of Commerce Robert Reich applauded the then prospective Federal lawsuit against the tobacco industry, as well as other policy-driven lawsuits, such as those against the firearms manufacturers. Reich conceded that, "In the old days, state legislatures or Congress would enact laws which would be administered by regulatory agencies."

Now, this constitutional procedure born of separation of powers is no longer effective, according to Reich, because, "the era of big government," is over and laws and regulations are just too hard to

promulgate. Consequently, Reich advocates litigation as a replacement for regulation. He is also really saying that, because the administration can't get its policy agenda through Congress, the trial lawyers and the attorneys should do the job of setting and enforcing legislative policy.

Now, that this anti-constitutional thinking is rather a blatant attempt to bypass Congress is apparent to some, and it appears to be a manipulation of the judiciary as well and it is shown by the fact that Reich brazenly acknowledges that it does not even matter whether a bona fide suit exists. He recognizes that for tobacco, "many legal experts doubt that the federal government has the authority to launch a lawsuit." But according to Reich, "that's irrelevant," because, "the lawsuit would be a bargaining chip to settle the case." So much for legal ethics, so much for the Constitution.

Robert Reich's conclusion is, "The era of big government may be over, but the era of regulation through litigation has just begun." What a blessing for our country, I am sure. I surely hope that this statement is an exaggeration, but it does appear to be accurate.

The hearing today hopefully will shed light on the issues arising from government public policy-driven lawsuits, and I want to welcome all of our guests and witnesses here today. I am very concerned about these issues and they are not easy ones, and I have to say they are among the most interesting issues I have ever seen come before the Judiciary Committee. I will look forward to hearing both sides on these issues and I will try and keep an open mind with regard to both sides because I am one who believes that litigation can in many respects cure many public policy problems in the sense that sometimes honest litigation brought pursuant to real rules of law can basically correct some wrongs in our society. But I do have some questions about some of the litigation that is being advocated by authorities such as Mr. Reich.

I will turn to Senator Kennedy at this point.

**STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR  
FROM THE STATE OF MASSACHUSETTS**

Senator KENNEDY. Thank you, Mr. Chairman, and thank you for having this hearing. In recent years, the judicial branch of the Government has been deeply involved in the impact of the tobacco industry, gun manufacturers, and lead paint manufacturers on the Nation's health and well-being. To a large extent, the courts have been asked to deal with these problems because the legislative and executive branches have failed to deal with them adequately.

Several of today's witnesses will argue that government lawsuits against the manufacturers of hazardous products usurp the taxing authority of the legislative branch. I strongly disagree with that view. In fact, litigation is an effective way of assessing responsibility and providing remedies for obvious harm in accordance with longstanding traditions of law.

Those who oppose the lawsuits which have been brought by Federal and State governments against the producers of unreasonably dangerous products are arguing, in essence, that there is no difference between a tax and a judicial penalty. In fact, they are very different. The considerations which influence a legislative decision

to levy a tax are totally different from those that govern a judicial decision to award financial damages to an injured party.

Legislation to levy a tax is not based on any finding of wrongdoing by the entity being taxed. The key consideration is the government's need for revenue to finance public programs to enhance the health, safety and welfare of its citizens. If certain products threaten public health and safety, Congress or a State legislature may reasonably decide to subject them to higher taxes, but that is only one of many factors influencing tax policies.

In contrast, the entire focus of current government is the wrongdoing of the defendant corporation. The authority of the court to award damages against the defendant requires a judicial finding that the company engaged in misconduct in the manufacture and marketing of its product. In the absence of such a finding, there is no liability. A tax requires no finding of wrongdoing. A judicially-imposed penalty cannot be imposed without it.

Mr. Chairman, that is true with regard to the findings in the tobacco industry. I believe it is also true with regard to the gun industry, and it is increasingly true with regard to the lead paint industry as well, as we find more and more documents that go back to the 1930's where industry was warned about the dangers of lead in paint and the efforts to hide and conceal that, a very similar pattern to what happened with regard to the tobacco industry.

So I think there is a very broad and definable distinction between these two situations, but we will look forward to hearing from the witnesses on that point.

I would like to ask if I could have Senator Leahy's statement included in the record.

The CHAIRMAN. Without objection, we will put Senator Leahy's statement in the record.

Senator KENNEDY. I have a lengthier statement, if that could be put in the record as well.

The CHAIRMAN. We will put that statement in the record as well.

Senator KENNEDY. Thank you.

[The prepared statements of Senators Leahy and Kennedy follow:]

PREPARED STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE  
STATE OF VERMONT

Mr. Chairman, I am pleased that the Committee is considering the value of governmental lawsuits in the public's interest. I believe that the Department of Justice's lawsuit against the tobacco industry, like the multi-state attorneys general litigation against the tobacco industry, was brought in the public's interest.

Attorney General Reno and the professional prosecutors at the Department of Justice have made a sound legal decision to try to recoup the Federal government's spending of more than \$20 billion a year to treat ill smokers. The Department of Justice has presented serious and credible evidence on the tobacco industry's 45-year campaign of deception about the dangers of cigarettes.

The Department of Justice's case should be judged on its merits in the proper court, just as the state attorneys general litigation was judged by the appropriate state courts.

The settlements of the state attorneys general litigation has brought about profound changes in the corporate culture of the tobacco industry. Indeed, the tobacco industry is now admitting on its web sites that smoking causes cancer and is addictive. Before the state attorneys general litigation, the executives of these same companies denied under oath to Congress that smoking is addictive.

Mr. Chairman, I applaud the Republican and Democratic state attorneys general for their leadership and courage in taking on tobacco interests in pursuit of a

healthier America and in attempting to free our youth from captivity to this deadly addiction.

The very existence of the multi-state tobacco settlements is a credit to our civil justice system. In fact, without the use of class action and the likelihood of punitive damage recoveries, does anyone believe that the tobacco companies would have ever come to a negotiating table? Without the willingness of private attorneys acting on behalf of their clients, taking significant financial and professional risks, and pursuing these matters so diligently, the 50 states would not have settlement payments for the next 25 years, which may be devoted to promote the public health of its citizens.

At a time when some are trying to limit legal rights and remedies through national legislation, the multi-state tobacco settlements remind us that our state-based tort system remains one of the greatest and most powerful vehicles for justice anywhere in the world.

These private citizens and their attorneys deserve appreciation for what they have made possible. They laid the groundwork for the work of our state attorneys general. Then, the attorneys general cases turned the corner. I commend them all for their diligence on behalf of the public.

When tobacco companies were fighting any and all lawsuits against them, a combination of legal challenges by private citizens and public officials were pursued against great odds.

Men and women whose lives were cut short by cancer and other adverse health consequences from tobacco deserved better treatment than the years of obstruction and denial by the tobacco industry. Only when the internal documents were being discovered and the legal tide began to turn did the tobacco companies decide to change their strategy and pursue a settlement. The tobacco industry did not agree to the multi-state settlement out of some new-found sense of public duty.

The truth is that giant tobacco corporations came to the bargaining table only after they realized that they were beginning to lose in court and after President Clinton initiated tough new regulatory efforts.

I am grateful that Matt Myers from the Campaign For Tobacco-Free Kids is here to testify about the public health benefits of governmental litigation against the tobacco industry. I want to thank him for appearing before the Committee on short notice.

I know that some Members of Congress want to pass Federal legislation to place limits on the use of class actions and punitive damage awards on governmental litigation. I want to remind some of my colleagues that the possibility of punitive damages and class action lawsuits are two important factors that brought us the historic multi-state tobacco settlement. Class actions make it possible for state attorneys general to band together to take on the powerful tobacco conglomerates in ways that an individual could not afford to take on alone.

Punitive damages are awarded to punish egregious behavior—like the deceit or concealment of research that some have accused tobacco company officials of practicing. It would be criminal to leave some people with valid claims against tobacco interests with no effective way to seek relief, in order to obtain partial reimbursement of public expenses. I will be extremely hesitant to restrict these legal rights and remedies without substantial evidence that such restrictions are justified.

Mr. Chairman, I look forward to working with you and the other members of the Committee to learn more about the value of governmental litigation in the public's interest. I also look forward to hearing from Senator Durbin, Senator McConnell and Senator Reed today and from our other witnesses. Finally, I want to thank Don Ryan from the Alliance To End Childhood Lead Poisoning for appearing today. I am particularly interested in learning more about the dangers of lead poisoning to our nation's children.

I hope this hearing is only the beginning of a balanced and fair inquiry by the Committee into the value of governmental litigation in the public's interest.

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PREPARED STATEMENT OF SENATOR EDWARD M. KENNEDY

Mr. Chairman, I welcome today's hearing on this important issue.

In recent years, the judicial branch of the government has been deeply involved in the impact of the tobacco industry, gun manufacturers, and lead paint manufacturers on the nation's health and well-being. To a large extent, the courts have been asked to deal with these problems because the legislative and executive branches have failed to deal with them adequately.

Several of today's witnesses will argue that government lawsuits against the manufacturers of hazardous products usurp the taxing authority of the legislative

branch. I strongly disagree with that view. In fact, the litigation is an effective way of assessing responsibility and providing remedies for obvious harm, in accord with the long-standing traditions of the law.

Those who oppose the lawsuits which have been brought by federal and state governments against the producers of unreasonably dangerous products are arguing, in essence, that there is no difference between a tax and a judicial penalty. In fact, they are very different. The considerations which influence a legislative decision to levy a tax are totally different from those which govern a judicial decision to award financial damages to an injured party. Legislation to levy a tax is not based on any finding of wrongdoing by the entity being taxed. The key consideration is the government's need for revenue to finance public programs to enhance the health, safety, and welfare of its citizens. If certain products threaten the public health and safety, Congress or a state legislature may reasonably decide to subject them to higher taxes, but, that is only one of many factors influencing tax policy.

In contrast, the entire focus of the current government lawsuits is the wrongdoing of the defendant corporation. The authority of the court to award damages against the defendant requires a judicial finding that the company engaged in misconduct in the manufacturing or marketing of its product. In the absence of such a finding, there is no liability. A tax requires no finding of wrongdoing. A judicially imposed penalty cannot be imposed without it.

In the case of tobacco, the federal government spends more than \$20 billion a year to provide medical care for persons suffering from tobacco-induced diseases. The federal lawsuit seeks to recover a portion of that enormous expenditure for American taxpayers. The litigation also seeks to prevent the tobacco industry from continuing the massive campaign of deception perpetrated for the last forty years on the public. If this suit succeeds, the ultimate winners will be future generations of children who are shielded from the tobacco industry's relentless effort to addict them to this lethal product.

Not surprisingly, the tobacco companies and their allies have been quick to criticize the Justice Department for bringing this litigation. Their statements about the federal suit parrot similar objections by the industry when the state tobacco cases were first filed. As those cases went forward, industry claims that the state suits lacked merit were proven false. The viability of those lawsuits was ultimately conceded by the tobacco companies, and they agreed to pay a total of \$246 billion to settle them. In light of that history, current industry claims that the federal suit lacks merit have no credibility.

The most implausible of all the industry's assertions is their claim that the federal lawsuit is an assault not only on cigarette manufacturers, but on every legitimate business enterprise in the country. Contrary to this claim, the facts against the tobacco companies are truly unique.

- No other industry in America produces a product which, when used exactly as intended and marketed, kills four hundred thousand people each year.
- No other industry has so vociferously denied the addictiveness of its product in the face of overwhelming evidence. Medical experts say nicotine is more addictive than heroin or cocaine.
- No other industry has chemically altered its product to make it even more addictive, while publicly denying that it was addictive at all.
- No other industry has conspired over decades to market its addictive product to children, in violation of the laws of nearly every state. More than 90 percent of smokers become addicted as children, before they are mature enough to understand and act on the health dangers.

The tobacco industry's claim that it is no different from "other legal industries" is only the latest in its long history of deceptions. No other industry presents such a shameful forty year track record of unlawful behavior. Cigarettes are uniquely lethal and the conduct of the tobacco industry has been singularly unscrupulous.

The tobacco companies and their allies in Congress have harshly attacked the federal lawsuit—but the attack is just another industry smokescreen. The federal claims are strong. The American people are finally getting their day in court, and the tobacco companies fear that justice will be done.

Gun manufacturers face a similar situation.

Everyday, 13 more children across the country die from gunshot wounds. Yet, the national response to this death toll continues to be grossly inadequate. The gun industry has fought against reasonable gun control legislation. It has failed to use technology to make guns safer. It has attempted to insulate itself from its distributors and dealers, once the guns leave the factory door.

Studies estimating the total public cost of firearm-related injuries put the cost at over one million dollars for a single shooting victim. According to the Centers for

Disease Control, cities, counties and states have incurred billions of dollars in costs each year as a direct result of gun violence—including the costs of medical care, law enforcement, and other public services.

Our communities have attempted to deal with the epidemic of gun violence that claims the lives of so many young people. Law enforcement officials, community leaders, parents and youth are struggling to counter this epidemic. But, the gun industry and Congress, and most state legislatures have persistently ignored these concerns.

It appears that litigation may well be the only means to hold gun manufacturers accountable for the harm caused by their products and force them to acknowledge the facts. As we have seen with litigation against the tobacco industry, manufacturing secrets and marketing secrets often come to light in a courtroom. Public interest lawsuits can change and have changed the dynamic between the public and mammoth industries long thought to be invincible.

The legal system is just starting to review the important questions that must be answered regarding the impact of lead paint on children. But, we know some of the sad facts. Sixty-six million American homes are contaminated with lead paint, and 890,000 children have high levels of lead in their blood. Many of these children will never fulfill their true potential—physical, psychological, and developmental disabilities caused by lead will forever plague their lives. We also know that paint manufacturers were aware of the dangers posed by lead many, many years ago—long before serious efforts were made to eliminate lead from paint used in homes.

Janessa Lascko is one child affected by lead paint. In 1990, she and her mother moved from a California homeless shelter to a home in Cleveland, Ohio. By the time Janessa was two-years old, her blood had more than five times the amount of lead that federal health authorities consider to be normal. Janessa and others have taken their cases to the courts, where testimony will be heard, facts examined, and a determination made whether lead paint manufacturers should be held liable for this harm.

The litigation brought by Janessa Lascko and others in Cleveland, as well as the lawsuits pending in New York City, Buffalo, Baltimore, and Rhode Island, are necessary to ensure fairness and justice. We believe in the jury system, the wisdom of the judiciary and the basic principles of equal justice under law. Congress should not undermine the role of courts and lawyers in vindicating these basic rights.

The right to trial by jury is one of the great historical achievements of Anglo-American law. In the criminal justice system, we are willing to entrust our liberty and even our very lives to a jury of our peers. How can we say that the many other basic rights guaranteed by the civil justice system deserve less protection?

Our laws are the wise restraints that make us free. It would be a travesty of these basic principles of the law for Congress to put its thumb on the scales of justice and try to tilt the balance in favor of these powerful industries and against the citizens harmed.

The CHAIRMAN. To help all better understand the far-reaching effects of government-sponsored lawsuits, we are fortunate to have distinguished witnesses who I know will illuminate the issues.

Our first panel today consists of three of our distinguished colleagues from the Senate. First, we will hear from the Honorable Mitch McConnell, the Senator from Kentucky. Following his remarks will be the Honorable Jack Reed, Senator from Rhode Island. And lastly, we will hear from the Honorable Richard J. Durbin, Senator from Illinois.

Senator McConnell.

**STATEMENT OF HON. MITCH McCONNELL, A U.S. SENATOR  
FROM THE STATE OF KENTUCKY**

Senator McCONNELL. Thank you, Chairman Hatch, for conducting a full committee hearing on this new and frightening trend of big government lawsuits. These suits are becoming the great American hoax, pulled off by conspiring governments and trial lawyers.

The hoax is really quite simple. The governments and trial lawyers talk about sympathetic victims, innocent children and injured people. Then they twist the law to file a suit on behalf of the gov-

ernment, not the victims. The result: the government gets bigger, the trial lawyers get richer, and the injured people get nothing.

The key to the hoax is that a government lawsuit is not about injured people. It is about more money for big government. Put simply, in these cases governments file multi-billion-dollar civil lawsuits allegedly to recover the medical or other expenses the government incurred taking care of the individual who is allegedly harmed by the defendant's product.

Yes, under the theories used in these big government lawsuits, the governments and the trial lawyers conveniently have managed to eliminate the injured client completely. Why? Because that way, there will be more money for the government plaintiff and the trial lawyers. You don't have to take my word for it. Even our colleague Senator John Edwards, who is a talented and noted trial lawyer, has summarized the Federal tobacco lawsuit as nothing but a, "Federal money grab."

I have been concerned about this trend for some time. As a Senator from a State that has 45,000 tobacco farmers—I might say we had 60,000 before President Clinton came to office—I was deeply concerned when the State attorneys general started partnering with the trial lawyers to sue the tobacco industry.

In addition to my deep concerns about my State's number one cash crop and our tobacco farmers, I feared that the tobacco lawsuit would be the start of a very dangerous trend, one not limited to tobacco. When I and others expressed this fear, government officials and trial lawyers said these kinds of lawsuits would never be filed against any other industry. It was also said that the U.S. Department of Justice would never pursue such absurd cases. Janet Reno even testified before this committee that the Federal Government did not have the legal authority to file this kind of lawsuit.

Unfortunately, a few short months have shown that my greatest fears were right. The State tobacco case was just the beginning, the model act, if you will, for hungry and enterprising trial lawyers and their big-government friends. The past year has demonstrated that, left unchecked, there will be no limits on these government-sponsored lawsuits. The proof is before us.

First, the Clinton-Gore administration suddenly determined they could pursue a Federal lawsuit against tobacco. Next, governments filed lawsuits against gun manufacturers. Then rumors surfaced that the next targets would be automobile manufacturers, Internet providers, paint manufacturers, and, yes, even the fast-food industry.

While this sounds absurd, we are now living in the world of the absurd. We have a Yale professor espousing the theory that, "There is no difference between Ronald McDonald and Joe Camel." They both market products that are, "luring our children into killer habits." Some are now advocating that caffeine-pushing coffee and soft drink companies are good targets as well.

Now that the Rhode Island Attorney General has filed a suit against the lead paint industry, who is next? What Senator's State products will be the next target? Well, we may not have to wait very long. The Rhode Island Attorney General has his sights set on a new lawsuit against the makers of latex gloves.

Now that I have put to rest the question of whether these government-sponsored lawsuits are really a widespread phenomenon, I would like to discuss two of the fundamental problems with these offensive lawsuits.

First, government plaintiffs should not have rights superior to the rights of private plaintiffs. In these cases, the government is using the court to tilt the system in their favor, which is fundamentally unfair for the individual citizens who may have their own right to sue. Government entities are not ashamed to change the law so they can win these meritless cases.

Just look at Maryland. According to the Maryland State Senate president, "We agreed to change the tort law, which was no small feat. We changed centuries of tort law to ensure a win in the tobacco case." Now, governments are supposed to uphold the law, not bring lawsuits whose sole intent is to distort the law.

Second, Mr. Chairman, these suits are simply efforts of governments to tax and regulate through litigation. The power to tax is a legislative function. Our Founding Fathers wisely believed that it would be important for those who raise taxes to be directly accountable to the voters. Fortunately, it is getting more and more difficult to raise taxes in the Congress and in the State legislatures, something I am really glad about.

Regretfully, this brings about a situation where trial lawyers and big-government public officials are bypassing legislatures to engage in taxation and regulation through litigation. We cannot allow this blatant violation of the separation of powers to go unchecked.

The unconscionable distortion of the law that goes on in these government-sponsored lawsuits prompted me to introduce the Litigation Fairness Act of 1999. I am pleased that Chairman Hatch is also a cosponsor of that common-sense legislation which says that whenever the government sues private sector companies to recover costs, the government plaintiff gets no more rights than the ordinary citizen. If the law is good enough for an average citizen, then it is good enough for the government.

The Litigation Fairness Act does not prohibit government lawsuits. It does not close the courthouse door to injured parties. This legislation will simply ensure that the government plays by the very same rules as its citizens. I look forward in the future to have an opportunity to discuss this legislation in this forum. However, Mr. Chairman, I know today is not about any particular piece of legislation. It is rather about discussing these lawsuits and exposing the tremendous problems created by governments bringing such suits.

So I just want to thank you again, Chairman Hatch, for your interest in this extraordinarily important subject, and I think this hearing is quite timely. Thank you for the opportunity to be here.

The CHAIRMAN. Thank you, Senator McConnell. We will certainly allow you to go. I know your time is very valuable, as are all our Senators.

[The prepared statement of Senator McConnell follows:]

PREPARED STATEMENT OF SENATOR MITCH MCCONNELL

I first want to thank Senator Hatch for conducting a full committee hearing on this new and frightening trend of "big government lawsuits."

These suits are becoming the “Great American Hoax”—pulled off by conspiring governments and trial lawyers. The Hoax is really quite simple: The governments and trial lawyers talk about sympathetic victims, innocent children, and injured people, then they twist the law to file a suit on behalf of the government—not the victims. The result? The government gets bigger, the trial lawyers get richer—and the injured people get nothing.

The key to the Hoax is that a government lawsuit is not about injured people—it is about more money for big government. Put simply, in these cases governments file multi-billion dollar civil lawsuits allegedly to recover the medical or other expenses the government incurred taking care of the individual who was allegedly harmed by the defendant’s product.

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I have been concerned about this trend for some time. As a Senator from a state that has 45,000 tobacco farmers, I was deeply concerned when the state Attorneys General started partnering with the trial lawyers to sue the tobacco industry. In addition to my deep concerns about my state’s tobacco farmers, I feared that the tobacco lawsuit would be the start of a very dangerous trend—one not limited to tobacco.

When I and others expressed this fear, government officials and trial lawyers said these kinds of lawsuits would never be filed against any other industry. It was also said that the United States Department of Justice would never pursue such absurd cases. Janet Reno even testified before this Committee that the federal government did not have legal authority to file this kind of lawsuit.

Unfortunately, a few short months have shown that my greatest fears were right. The state tobacco case was just the beginning—the “*Model Act*” for hungry and enterprising trial lawyers and their big-government friends.

The past year has demonstrated that, left unchecked, there will be no limits on these government-sponsored lawsuits. The proof is before us. First, the Clinton/Gore administration suddenly determined they could pursue a federal lawsuit against tobacco. Next, governments filed lawsuits against gun manufacturers. Then rumors surfaced that the next targets would be automobile manufacturers, Internet providers, paint manufacturers, and even the fast food industry. We are now living in the world of the absurd. We have a Yale professor espousing the theory that “*There is no difference between Ronald McDonald and Joe Camel.*” They both market products that are “luring our children into killer habits” ultimately increasing healthcare costs for the public. Some are now advocating that “caffeine-pushing” coffee and soft drink companies are good targets, too.

Now that the Rhode Island Attorney General has filed a suit against the lead paint industry, who is next? What Senator’s home state products will be the next target? We may not have to wait long. The Rhode Island Attorney General has his sights on a new suit against the makers of latex gloves.

Now that I’ve put to rest the question of whether these government-sponsored lawsuits are really a widespread phenomenon, I’d like to discuss two of the fundamental problems with these offensive lawsuits.

First, government plaintiffs should not have rights superior to the rights of private plaintiffs. In these cases, the government is using the courts to tilt the system in their favor—which is fundamentally unfair for the individual citizens who may have their own rights to sue. Governments are supposed to uphold the law—not bring lawsuits whose sole intent is to distort the law.

Second, these suits are simply efforts of governments to tax and regulate through litigation. The power to tax is a *legislative* function. Our founding fathers wisely believed it important that those who raise taxes should be directly accountable to the voters. Fortunately, it is getting more and more difficult to raise taxes in the Congress and the state legislatures—so trial lawyers and big-government public officials are bypassing legislatures to engage in taxation and regulation through litigation. We cannot allow this blatant violation of the separation of powers to go unchecked.

The unconscionable distortion of the law that goes on in these government-sponsored lawsuits prompted me to introduce the Litigation Fairness Act of 1999. Senator Hatch joined me in offering this common sense legislation, which says that whenever the government sues private-sector companies to recover costs, the government plaintiff gets no more rights than the ordinary citizen. If the law is good enough for the average citizen, then it is good enough for the government. The Liti-

gation Fairness Act does *not* prohibit government lawsuits. It does *not* close the courthouse door to injured parties. My legislation will simply ensure that the government plays by the same rules as its citizens.

I look forward to future opportunities to discuss my legislation in this forum. However, today is not about my legislation. It is about discussing these lawsuits and exposing the tremendous problems created by governments bringing such suits. After we explore the issue, we can talk about solutions.

The CHAIRMAN. Senator Reed, we will turn to you, and then we will go to Senator Durbin.

**STATEMENT OF HON. JACK REED, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND**

Senator REED. Thank you, Mr. Chairman. Before discussing my legislation to permit the Federal Government to recover damages from child lead poisoning, I believe it is important to note the crucial role that government litigation is playing in shaping public health policy.

Consider the \$100 million that Philip Morris announced it would spend on its anti-youth-smoking advertising campaign. On TV screens, in convenience stores, and in magazines, the largest tobacco company in America is urging young people to avoid smoking, and retailers to stop selling tobacco to children.

In addition, Philip Morris has now added the following information to its Web site, "There is an overwhelming medical and scientific consensus that cigarette smoking causes lung cancer, heart disease, emphysema and other serious diseases in smokers. Smokers are far more likely to develop serious diseases, like lung cancer, than non-smokers. There is no 'safe' cigarette."

There is also this quote from the same Web site: "Cigarette smoking is addictive, as that term is most commonly used today. It can be very difficult to quit smoking, but this should not deter smokers who want to quit from trying to do so."

Compare these claims to the sworn testimony of the major tobacco CEO's before the House Commerce Committee in the early 1990's and you will see a remarkable change of heart on the question of whether cigarettes are addictive and dangerous. These items represent no less than a sea change in the behavior of the tobacco industry, for one simple reason: the \$500 billion lawsuit brought against Big Tobacco to recover damages and to provide remedial relief. Indeed, were it not for this lawsuit and other legal actions, there is no compelling reason to believe that any of these steps would have been undertaken at all.

Now, with regard to the issue of childhood lead poisoning, as you may know, Senator Torricelli and I have introduced the Lead Poisoning Expense Recovery Act, which provides clear authority for the Federal Government to recover from the manufacturers of lead paint the significant public resources already expended to mitigate childhood lead poisoning. This includes dollars spent on medical care and treatment, special education, and funds spent to make homes lead-safe for children.

Today, nearly one million preschoolers nationwide have excessive levels of lead in their blood, making lead poisoning the leading environmental health disease among children. Even low levels of lead exposure can cause serious injury to the developing brain and nerv-

ous system of children. And at high levels of exposure, lead can cause mental retardation and even death.

Lead-based paint in housing is the major remaining source of exposure and is responsible for most cases of childhood lead poisoning. An estimated 3 million tons of lead still coat the walls of American homes. Approximately half of America's housing stock, or roughly 64 million units, contain some lead-based paint. My home State of Rhode Island has the fifth oldest housing stock in the country and, as a result, has a lead poisoning rate that is 3 times the national average.

Taxpayers have already paid over \$1 billion to deal with the tragic consequences of childhood lead exposure, including significant expenditures for medical care, special education, and lead abatement in housing. However, what has been spent so far is barely a drop in the bucket. Protecting our children's health doesn't come cheap. Medical costs typically run in the thousands of dollars for each child with elevated lead levels, and they are far more if hospitalization is required.

And lead abatement is expensive. In Rhode Island, we are looking at a bill of \$300 million to clean up just the most dangerous housing units. Despite our efforts to address childhood lead poisoning legislatively, the fight has been slow and inadequate. At the current rate, it could be decades longer, and millions of poisoned children more, until we can finally say that we have got the lead out.

In contrast to the public funds which have been expended to date, an industry that has over \$30 billion in assets has yet to make a significant contribution to efforts to address the problems associated with its product. Take the State of Maryland, for example. Since 1992, the Federal Government has spent \$28.5 million to make Maryland homes lead-safe. The industry's contribution, on the other hand, was \$481,900.

Mr. Chairman, the magnitude of this problem and the unwillingness of the industry to respond has already sparked legal action at the State level. In Rhode Island, Attorney General Sheldon Whitehouse recently filed a 10-count lawsuit against the manufacturers of lead paint and the industry's trade association. The lawsuit documents nearly a century-long record of industry culpability.

The complaint lays out compelling evidence about the activities of the lead industry, showing that it aggressively marketed its product as safe while knowing fully of its harmful effects. Although the lead industry knew since the early 1900's that lead was hazardous to human health, the evidence suggests that they continued producing and marketing the product well into the 1960's for consumption in the home.

Glidden actually marketed a, "lead-free" and, "non-poisonous" paint for use by farmers that, in their words, "eliminates all possibility of lead poisoning in livestock." At the same time, it sold lead-based paints for use in children's bedrooms and play rooms.

Because of the severity of the problem and the behavior of the industries, Senator Torricelli and I have introduced legislation that will ensure that justice is served. As cities and States stand up and say enough is enough, it is only appropriate for the Federal Government to join them in the effort to hold the industry responsible.

The seriousness of childhood lead poisoning and the considerable expenses borne by taxpayers to clean up the industry's mess demands action now. I urge my Senate colleagues to join me in supporting this legislation so that we can move aggressively toward our goal of ending childhood lead poisoning.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Reed. Of course, we are happy to let you go as well.

[The prepared statement of Senator Reed follows:]

PREPARED STATEMENT OF SENATOR JACK REED

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And, lead abatement is expensive. In Rhode Island alone, we are looking at a bill of \$300 million to clean up just the most dangerous housing units. Despite our efforts to address childhood lead poisoning legislatively, the fight has been slow and inadequate. At the current rate, it could be decades longer, and millions of poisoned children later, until we can finally “get the lead out.”

In contrast to the public funds which have been expended; to date, an industry that has over \$30 billion in assets, has yet to make a significant contribution to efforts to address the problems associated with its product. Take the State of Maryland for example. Since 1992, the federal government has spent \$28.5 million to make Maryland homes lead-safe. The industry’s contribution, on the other hand, was \$481,900.

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Because of the severity of the problem and the behavior of the industries, Senator Torricelli and I have introduced legislation that will ensure that justice is served. As cities and states stand up and say enough is enough, it is only appropriate for the federal government to join them in the effort to hold the industry responsible. The seriousness of childhood lead poisoning and the considerable expense borne by taxpayers to clean up the industry’s mess demands action now. I urge my Senate colleagues to join me in supporting this legislation so that we can move aggressively towards our goal of ending childhood lead poisoning.

Senator KENNEDY. Mr. Chairman, just before Senator Durbin—I am going to have to leave—just before he goes, could I just ask that we include in the record—I was the person that asked Janet Reno the question about the case, and that has been referred to frequently actually by members of the cigarette industry that she responded to those questions, saying that the Federal Government didn’t have a case.

I would like to put into the record the exchange with Attorney General Reno that is quite clear that what she was talking about was Medicaid, because that was the issue, which the States bring, but not the Medicare, which was the principal issue where Janet Reno was bringing the case. I think it is important just for the record. I am sure that Senator McConnell wasn’t trying to mislead us, but I think in fairness of this record that that be put in at an appropriate place.

The CHAIRMAN. Without objection, we will put it in the record.

Senator KENNEDY. I thank the chairman.

[The information referred to follows:]

#### INFORMATION SUBMITTED BY SENATOR KENNEDY

Senator Kennedy: Spokesmen for the tobacco industry routinely assert that Attorney General Reno stated in testimony before the Senate Judiciary Committee on April 30, 1997 that the federal government had no cause of action against the tobacco companies to recover the cost of treating smoking-induced disease. Senator McConnell repeated that claim in his testimony today. Such a characterization of her testimony is completely inaccurate. I was the Senator who raised the subject of tobacco litigation with her at that hearing, and her response was clearly addressed to Medicaid claims only.

After explaining that representatives of the Department of Justice had met with the state attorneys general, Attorney General Reno said:

“What we have determined was that it was the state’s cause of action and that we needed to work with the states, that the federal government does not have

an independent cause of action. But I will continue to review it and see if there are new issues.”

Her answer only makes sense in the context of the Medicaid claims, because the states have no role in Medicare, Veterans Administration or other exclusively federal health care programs. Only Medicaid is a state administered, program. At that point in time, the Justice Department had not even conducted a thorough examination of federal claims against the industry arising under these exclusively federal programs. The only issue which she was prepared to address in April of 1997 was whether to intervene in the states’ Medicaid suits. I concluded the dialogue by asking her to have the Department look into a suit to recover for the federal Medicare costs.

I would like to make the full text of the exchange from the April 30, 1997 hearing part of today’s record.

Senator Kennedy: General I want to ask you, an issue with regards to the position of the administration on tobacco, and this is the important issue of whether the administration will sue the tobacco companies to reimburse the government for Medicare and Medicaid costs associated with the tobacco use.

I know that some in the Senate, led by our friend and colleague Senator Lautenberg, wrote you recently, urging you to pursue this. I support this effort as tobacco costs Americans millions and millions of dollars in the health care costs. Can you tell us whether you plan legal action against the tobacco companies?

Reno: Senator, at the time, we met—representatives of the Department of Justice met with the state attorneys general and with the Department of Health and Human Services to determine what was our role.

It was determined at the time that we should make sure that there was an appropriate exchange of information. And if I may, let me go back and see exactly where we stand and advise you subsequently.

Senator Kennedy: All right.

I just raised this—our estimates is that it’s about \$10 billion in Medicare, \$5 billion a year in the Medicaid. Other federal programs are about \$5 billion, approximately \$20 billions of dollars, so this is a matter of very important, per year. We could do a lot with that \$20 billion and \* \* \*

Reno: But Senator, again, let me point out to you that it is the state—what we have determined was that it was the state’s cause of action and that we needed to work with the states, that the federal government does not have an independent cause of action. But I will continue to review it and see if there are new issues.

Senator Kennedy: All right. Would you? Because I imagine in some states, they’re not pursuing this, and they would still have the Medicare costs. But I would be interested in how—what the position is of the Justice Department in this area in terms of recovering those kinds of costs.

The CHAIRMAN. Senator Durbin.

**STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR  
FROM THE STATE OF ILLINOIS**

Senator DURBIN. Thank you, Mr. Chairman. It is good to be back with the Judiciary Committee. I miss you, and I know you miss my comments from time to time.

The CHAIRMAN. We do miss them, but we get plenty of them on the floor.

Senator DURBIN. I am sure you do. [Laughter.]

Our colleague, Senator McConnell, said that this trend toward government lawsuits was new and frightening. I couldn’t disagree more. Consider the history of this country and where we would be today as a Nation were it not for government-related lawsuits in two or three specific areas.

If the government had not moved forward to file lawsuits in the area of civil rights, where would we be today? When the government decided that it was the right of every American, regardless of color to vote, and African Americans were being discriminated against by businesses and landowners because they registered to vote, it was a government lawsuit brought against these business

and individual interests that really gave African Americans their opportunity to become full participants in this democracy. That was a government lawsuit. It set a policy. Thank God it did.

Think where we would be today if the government had not initiated lawsuits to protect the environment, as it has over the course of this century. Time and time again, we can credit clean water and clean air to the fact that the government stood up against the biggest polluters. Did the government lawsuit set policy? Yes, it did, and thank God it did.

Throughout this century, starting with President Teddy Roosevelt, and beyond, government agencies have stepped in to break up monopolies that were discriminating against the consumers of America so that families would have a fighting chance in the marketplace. Did these government-inspired lawsuits set policy? Yes, they did, policies of competition, and thank God they did.

Mr. Chairman, the first point I would like to make concerns the title of today's hearings, "Big Government Lawsuits: Are Policy-Driven Lawsuits in the Public Interest." Let me comment on the first part.

To me, lawsuits such as those filed against tobacco and gun industries are not about big government; they are about individuals and families across America who count on the people they elect to be willing to fight to protect them. These lawsuits are about the 13-year-old in my hometown who starts smoking cigarettes, becomes addicted, and faces a lifetime of disease and possibly death because of the addiction. These lawsuits are about the nearly one in five Americans who will die a tobacco-related death.

These lawsuits are about the 90 people who die and 200 people who are wounded everyday in our country by guns. These lawsuits represent the 13 kids killed each day by firearms, the equivalent of a Columbine shooting every day of the week in the United States of America.

In addition to the crushing human costs of tobacco and guns, these so-called big government lawsuits are about taxpayers, taxpayers who are forced to pick up the tab for the devastation caused by these well-heeled defendants. Both the tobacco industry and the gun industry impose staggering health-related costs on government programs that are ultimately paid for by taxpayers.

Tobacco disease is the number one preventable cause of death in America today. The Federal Government spends approximately \$25 billion every year for health care costs related to tobacco-caused diseases, and America's taxpayers pick up the tab. And the health care costs associated with gun violence continue to grow. According to the National Center for Injury Prevention and Control, 80 percent of the economic costs of treating firearm injuries are paid for by taxpayers. Federal taxpayers pick up the tab for disability payments through SSI, Veterans Administration, unemployment, Medicare, and a host of other programs for gunshot victims.

I would also like to comment on the second part of the title of this hearing, "Are Policy-Driven Lawsuits in the Public Interest?" To me, the simple answer is yes, particularly when Congress time and again puts special interests ahead of the public interest. The issue is whether the refusal of Congress to address compelling so-

cial issues of our time should insulate specific businesses from being held accountable.

For decades, tobacco was advertised by its manufacturers as a benign luxury. The truth is it was manipulated to addict Americans. The truth is cigarette makers targeted our kids to replace the thousands of smokers who die every year from tobacco-related disease. The truth is the tobacco industry engaged in misconduct knowing that their product would kill a large percentage of those who became addicted.

The gun industry has been equally irresponsible in the design, manufacture, distribution, and marketing of its products. The gun maker Navistar advertised its Tech-9 assault pistol, used by two teenagers in the Columbine shooting, as being, "tough as your toughest customer," and bragged about the gun's, "resistance to fingerprints."

As we sit here today, we have to acknowledge that last year special interests, Big Tobacco, killed comprehensive legislation in Congress to protect our children. And as we sit here today, we must acknowledge that Congress will likely recess next week without taking final action on the juvenile justice bill, a bill which contains a modest but important provision to help keep guns out of the hands of kids and criminals. It is my understanding that Chairman Hyde in the House announced today the conference is over. There will be no juvenile justice bill.

So in answer to the second part of the hearing title, these lawsuits are in the public interest—the interests of the families who lose loved ones to tobacco-related disease and gun violence, the interests of the taxpayers and the communities where they live. There are a lot of courageous mayors out there, in towns like Chicago, New York, New Orleans, Atlanta. They filed lawsuits to protect their citizens when it comes to guns, and I am glad they had the courage to do that. And I hope we don't send them a message in this hearing that they have done the wrong thing. I don't believe they have. So, basically, the public interest must be pursued in courts when the special interests create gridlock in Congress.

Why are we here today? We are here because the special interests, like tobacco and the gun industry, are afraid to be held accountable for their conduct. We are here because special interests who cause some politicians to cower before them are scared to death to face a jury of ordinary Americans.

When Congress abdicates its responsibility to fight for and protect American families, fortunately the doors of courthouses across America are still open, allowing a jury of our peers to face the tough problems Congress will not. The bottom line is this: do you trust the men and women who elect us to sit as juries, to reject frivolous claims, to find justice, to stand up for the voiceless, or do you believe the special interests in America should constitute some privileged class beyond the reach of Congress and beyond the jurisdiction of our courts? History tells us in America it is best to stand with the people.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Durbin. I might add that the instances that you gave, the civil rights, the environmental lawsuits and the antitrust lawsuits, were all pursuant to statutes en-

acted by Congress or pursuant to the Constitution, but basically statutes by Congress. One of the issues we are deciding here is can the government bring actions where there is no legal authority to do so just by creating actions out of thin air, if that is the case, or should they have to have, before they can bring actions to accumulate huge, massive amounts of money for government expenditure, comply with some sort of a statute or some sort of an authorization by Congress.

These are important questions, and you have raised a lot of important questions here today. Thank you for being here.

We are going to turn to Senator Schumer, who would like to make a statement.

**STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR  
FROM THE STATE OF NEW YORK**

Senator SCHUMER. Thank you, Mr. Chairman. I thank you for holding this hearing. I think it is an important subject. I would certainly agree that the ideal way to make law is by statute. It is fairer, it is more uniform, it is not based on a particular case. But as has been said here, I mean I think the point that has to be made is that the Founding Fathers envisioned many ways for citizens to redress grievances. And when there is a deadlocked Congress, when there is no other way, the courts have always been and should be open.

Perhaps the most important Supreme Court case ever issued, *Brown v. Board of Education*, was not based on a statute, and it was certainly based on the inability of Congress to act, for a whole variety of reasons. If there had been no lawsuit on *Brown v. Board of Education*, which admittedly was a private lawsuit, we wouldn't have had the kinds of changes we have now, or they would have occurred in a different kind of way.

Yet, when *Brown v. Board of Education* occurred, we heard all the same cry—wait for statutes, States' rights. But we all knew what everyone was saying; they were against the thrust of the lawsuit. If you want a stark reason for what has happened today, for why we have these lawsuits, just look across the Hill at what Congressmen Hyde just said. We are not going to legislate on the gun show loophole. We are not even going to do a juvenile justice bill because people don't want to talk about it.

Well, my view is very simple. Eighty, ninety percent of the American people are for closing that loophole. The Congress doesn't act, and we can argue why, but I would argue because of responding to a special and narrow interest that happens to have a lot of political power, given the peculiar makeup of how we elect people. And so mayors and governors and attorneys general seek redress. I think that is the American way. You know, I think that is called for.

If there hadn't been a mounting frustration with the Congress, say, on the issue of guns and its inability to act—we didn't see a whole lot of lawsuits up until 1994, and then it became clear that any bill that was not blessed by the NRA on guns would never be able to see the light of day on the House side, where they have a rules committee. Fortunately, in this Senate we were allowed to

bring up amendments, and a scant few passed, but at least we had the opportunity to debate them.

I don't want to say to the mayor of my city or the Governor of my State or the attorney general of my State don't bring up a lawsuit, wait until the Congress acts, on something that we know the public is strongly for and we know, except for sort of narrow power, narrow special interest power, would happen. I think you can repeat that argument in many different places.

Should the courts be careful when these lawsuits are brought? Yes, and they generally are careful. But should we preclude them from being brought? No. The real antidote, in my judgment, is for Congress to get with it, to understand that in certain areas, not in every area, but in certain areas there are huge frustrations, and that particularly our local governments and our State governments, fed up with the inability of Congress to act, have moved on their own. So I don't like the lawsuit way of going, but sometimes it is the only way to go.

Thank you, Mr. Chairman.

The CHAIRMAN. Well, I appreciate your point of view. All I can say is *Brown v. Board of Education*, in my opinion, was a constitutionally-based decision, although there are those who argue that it was not, but I happen to be a strong supporter of it. And I appreciate your remarks.

Our second panel consists of six witnesses from various backgrounds. We will first hear from Professor Jonathan Turley, the Shapiro Professor of Public Interest Law at George Washington University. He has also taught tort law and products liability for over a decade. Professor Turley is best known for his scholarly commentary on the impeachment trial of President Clinton. It is not true that Professor Turley was chosen as a witness because of his kind words about me in the media during the trial, although that had just merely slipped my mind.

Our second witness today is Mr. Don Ryan, Executive Director of the Alliance to End Childhood Lead Poisoning, which he helped found in 1990. Mr. Ryan was also instrumental in founding the National Center for Lead-Safe Housing, which was launched in 1992 with the Fannie Mae Foundation's largest grant ever. Along with his very active interest in ending childhood lead poisoning, Mr. Ryan has also spent over 25 years working with the executive branch and on Capitol Hill. So we welcome you, Mr. Ryan, as well.

Next, we will hear from Mr. Matthew Myers, Executive Vice President and General Counsel for the National Center for Tobacco-Free Kids. Mr. Myers was the primary public health representative in the negotiations between the tobacco industry and the State attorneys general in the spring of 1997 that led to an agreement between these two parties. Mr. Myers has appeared before Congress and before executive branch agencies representing organizations such as the American Lung Association, the American Cancer Society, and the American Heart Association. I have worked with Matt over the years and have found him to be truly a gentleman and a scholar. We look forward to your testimony very much.

Then we will hear from Mr. Victor E. Schwartz. Mr. Schwartz is a senior partner at the law firm of Crowell and Moring LLP, in

Washington, DC, and Chairs the firm's Torts and Insurance Practice Group. Mr. Schwartz is recognized for his coauthoring of one of the most widely used law case books in the United States, Prosser, Wade and Schwartz' *Cases and Materials on Torts*. Mr. Schwartz was a professor and former dean of the University of Cincinnati School of Law, and currently is an adjunct professor at the Georgetown Law Center. For those of you who may not know, Victor Schwartz is an accomplished impersonator.

Victor, I hope you appear as yourself today and not as the President or any former President of the United States.

Mr. SCHWARTZ. I would never do that, sir, under any circumstances.

The CHAIRMAN. Also testifying today will be retired U.S. Marine Corps Lt. Gen. William Keys. General Keys is currently the chief executive officer and president of New Colt's Holding Corporation. General Keys has a long and distinguished list of accomplishments in the armed forces, including his last active duty assignment as the commander of the U.S. Marine Corps Forces Atlantic. I understand that General Keys is a true American hero, having led the U.S. Marines 2nd Division during the Persian Gulf War. I am certainly looking forward to hearing your testimony, General Keys, both as a high-ranking military officer and CEO and President of New Colt's Holding Corporation.

Our final witness today will be Mr. R. Bruce Josten. Mr. Josten, Executive Vice President for Government Affairs, is the second ranking officer at the U.S. Chamber of Commerce and the organization's senior government and political affairs executive. Mr. Josten is also considered one of America's most effective strategists in the ongoing battle with the trial lawyer lobby, from product liability issues to class action and tort reform. So we are happy to have you here as well.

I would like to thank each of our witnesses for taking time out of their busy schedules and appearing before the committee. These experts will, no doubt, shed light on the issues which accompany government-sponsored mass tort liability lawsuits. I am sure each of our witnesses today agree with me that the ramifications of such lawsuits are worth discussing. I look forward to today's hearing as a careful and considered first step toward a better understanding of government lawsuits as a substitute for regulation itself.

So we will start with you, Professor Turley, and we will go right across the board.

**PANEL CONSISTING OF JONATHAN TURLEY, SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW, GEORGE WASHINGTON UNIVERSITY, WASHINGTON, DC; DON RYAN, EXECUTIVE DIRECTOR, ALLIANCE TO END CHILDHOOD LEAD POISONING, WASHINGTON, DC; MATTHEW L. MYERS, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, NATIONAL CENTER FOR TOBACCO-FREE KIDS, WASHINGTON, DC; VICTOR E. SCHWARTZ, CROWELL AND MORING LLP, WASHINGTON, DC; WILLIAM M. KEYS, CHIEF EXECUTIVE OFFICER, NEW COLT'S HOLDING COMPANY, HARTFORD, CT; AND R. BRUCE JOSTEN, EXECUTIVE VICE PRESIDENT, U.S. CHAMBER OF COMMERCE, WASHINGTON, DC**

**STATEMENT OF JONATHAN TURLEY**

Mr. TURLEY. Thank you, Mr. Chairman. Mr. Chairman and members of the Judiciary Committee, my name is Jonathan Turley and I am a law professor at George Washington University, where I hold the J.B. and Maurice Shapiro Chair for Public Interest Law. I sincerely appreciate the opportunity to speak with you today and to lead such a distinguished panel on an issue of great importance.

Of course, only Dante could come up with a more devilish bargain for an academic. You can speak at length on your most cherished subject so long as you can do it in 5 minutes. Mercifully, the committee has accepted a written statement, and I will only summarize those comments.

The CHAIRMAN. We will put all written statements in the record as though fully delivered.

Mr. TURLEY. Thank you, Mr. Chairman.

At the outset, I want to make clear that I come to this hearing with no prior involvement in this litigation or its parties. What draws me to the controversy is the process, not the products involved in these lawsuits. I believe that core principles underlying our government are being eroded through the pressures of political impulse and convenience.

As beneficiaries of a great constitutional legacy, left to us by men like James Madison, we have a duty to consider not only the political ends but the constitutional means to achieve contemporary goals. It falls to this body to protect that legacy when political passions threaten to overwhelm legal judgment.

We all inevitably bring some baggage to a hearing of this kind. Products like tobacco resonate with every citizen and legislator in a different way. For my part, I come to this hearing with something of an idiosyncratic academic perspective. I am an unabashed Madisonian. When Senator Schumer referred to the American way, I prefer the Madisonian way. In that sense, I tend to see political conflicts through the lens of Madisonian principles, divorced from their merits or ultimate outcome.

In the midst of this controversy, this view may seem an academic caprice for modern legislators. Certainly, while he grew tobacco for a living, Madison would have had little to say on the merits of this litigation, but he would have a lot to say on the way that we should resolve it. You see, in a Madisonian democracy it is more important how we resolve a question than what we resolve.

Our system is not immune from bad ideas or bad decisions, but Madison gave us a system that is truly idiot-proof so long as we stay within its simple rules. The only threat to a Madisonian system is when one branch attempts to act extra-constitutionally or to circumvent the tripartite process of government.

If there is a quintessential Madisonian moment, it is tobacco. Tobacco is a factional dispute. You have already seen the factions here today. There are fundamental questions about personal responsibility, corporate conduct, the government's role, taxation issues. It is precisely the moment that Madison had in mind. You see, he spent all of his life studying systems of government. He studied them not to see what they stood for but how they failed. He found that what forces governments to fail are factions, and that most governments often have poetic demonstrations of the things that bring us together, but he wanted to focus on the things that pushed us apart. He built a system not to inspire but to last. It is politics without romance. It is beautiful in its simplicity.

What happens in the Madisonian system is that we take our factional disputes and in the crucible of debate we reach a majority decision. Politics is like a prism; it creates factional views, and the Madisonian system brings those views together, a point of reference. Now, the greatest threat there is when you have one branch that wants to circumvent, not to submit things to a legislative process which is very, very costly and often irritating. That is what is happening with the tobacco litigation.

Rather than a Madisonian moment, we have a Madisonian nightmare. We have one of the most fundamentally fractioned issues that our country faces removed from the legislative branch and given to the judiciary. It is litigation with the best motives and the worst method. It is dangerous because it takes our system off its center of gravity. It invites the things that Madison wanted to prevent.

Regardless of how you feel about the motives of this litigation—and I may agree with people on the other side—I ask you to think of the covenant that we made when we formed this Nation. We come from different places. We have different backgrounds, but the one thing that we have together is that common covenant to submit our disputes to the democratic process. That is what makes us unique as a people. We are not unique because of the problems we face; we are unique in how we solve them.

And so I ask you to pause and look seriously at what the cost of a system will be when we shift matters that divide us to the one branch which we are supposed to prevent from making decisions for the majority. I appreciate the opportunity to speak today because the tobacco litigation threatens, unfortunately, to remove us from our most central roots. It is an impulsive act. It is one that I understand, but it falls to this body on some occasions to resist temptation and to level a system that had the greatest possible foundations and beginnings.

Thank you, Senator.

The CHAIRMAN. Thank you, Professor Turley.

[The prepared statement of Mr. Turley follows:]

## PREPARED STATEMENT OF JONATHAN TURLEY

Thank you, Mr. Chairman: Mr. Chairman, members of the Judiciary Committee, my name is Jonathan Turley. I am a professor at George Washington University Law School where I hold the J.B. and Maurice C. Shapiro Chair for Public Interest Law. I sincerely appreciate the opportunity to speak with you today about the recent government lawsuit and the mass tort actions against the tobacco industry and other domestic industries.<sup>1</sup> Of course, only Dante could construct a more devilish bargain for an academic: you can speak at length on your most cherished subject \* \* \* so long as you can do it in five minutes. Mercifully, the Committee has accepted a longer statement for the record and my oral testimony today will only summarize those written remarks.

## I. INTRODUCTION

At the outset, I want to make clear that I come to this hearing with no prior involvement with this litigation. Specifically, I have never accepted money from any of these industries or served in a consultative capacity to any of these companies. What draws me to the controversy is the process, not the products, involved in the lawsuits. I believe that core principles underlying our government are being eroded under the pressures of political impulse and convenience. As the beneficiaries of a great constitutional legacy left by men like James Madison, we have a duty to consider not only the political ends but the constitutional means used to pursue contemporary goals. It falls to this body to protect that legacy when the political passions overwhelm legal judgment.

We all inevitably bring some baggage to a hearing of this kind. Products like tobacco and guns resonate with every citizen and legislator in a different way. These are products that have attained powerful symbolic value that unleash passions on every side of the debate. All of the witnesses today, like the public at large, will see the issues surrounding these lawsuits through a lens of personal experience or perspective. For my part, I come to this hearing with something of an idiosyncratic academic perspective. I am an unabashed Madisonian.<sup>2</sup> In that sense, I tend to see political conflicts through a lens of Madisonian principles divorced from their merits or ultimate outcome. I have spent most of my academic career studying, writing, and teaching in the area of Madisonian theory and the legislative process. I have written roughly two dozen academic works and over 70 articles on constitutional and legal issues.<sup>3</sup> Much of this work incorporates or relies on the principles of James Madison who was the central architect of our governmental structure.<sup>4</sup> In addition to my academic work and litigation in the constitutional area, I have also taught torts and product liability for over a decade.

In the midst of the current controversy, I realize that the views of a Framers, even James Madison, may appear to be something of an academic caprice for modern leg-

<sup>1</sup>Most of my comments today will be directed at the federal tobacco lawsuit but the same concerns extend to other governmental suits such as those against the gun manufacturers. Moreover, I will address the significance of the recent mass tort litigation toward the end of these remarks.

<sup>2</sup>Madisonian scholars are a diverse group with many different views of Madison's theories and positions. While there are common denominators among the historians, law professor and political scientists, it would be arrogant to claim any particular view as the "genuine Madisonian" perspective. It is impossible to list all of the academics who have written on this subject. Some of these works, however, are included in citations to this testimony.

<sup>3</sup>In legal commentary pieces, I have been critical of the federal lawsuit and the current system for handling mass torts actions, particularly mass tort tobacco cases. See, e.g., Jonathan Turley, *The New Profiteers of the Tobacco War*, *The Wall Street Journal*, September 20, 1999; Jonathan Turley, *Reforming the Great American Litigation Lottery*, *The Chicago Tribune*, November 1, 1999, at A11.

<sup>4</sup>These academic works touch on various aspects of the Madisonian democracy or the legislative process. See, e.g., *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 *Duke Law Journal* 1 (1999); *Through a Looking Glass Darkly: National Security and Statutory Interpretation*, 53 *Southern Methodist University Law Review* (1999) a (Symposium); *The "Executive Function" Theory, the Hamilton Affair and Other Constitutional Mythologies*, 77 *North Carolina Law Review* 1791 (1999); *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 *George Washington University Law Review* 735 (1999) (Symposium); *Dualistic Values in the Age of International Legisprudence*, 44 *Hastings Law Journal* 145-275 (1992); *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 *Northwestern University Law Review*, 598-664 (1990); *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 *Boston University Law Review* 339-364 (1990); see also *Reflections on Murder, Misdemeanors, and Madison*, 28 *Hofstra Law Review* (2000) (Symposium); *Dynamic Originalism and the Posnerian Paradigm*, 93 *Northwestern University Law Review* (1999); *"From Pillar to Post": The Impeachment and Indictment of Sitting Presidents*, (forthcoming).

isolators. Certainly, while he grew tobacco for a living at Montpelier, Madison's writings offer little indication on how he would have felt about the merits of the claims against the tobacco companies. The Framers had no true comparison to contemporary litigation. Certainly, the concept of a mass tort or an action like the federal lawsuit would have been quite foreign to Madison and his cohorts. Madison, however, has much to say about how we, as a people, should resolve this and any political controversy. In a Madisonian democracy, it is more important how we resolve questions than what we resolve. In our system, we are not immune from bad decisions but our process protects the integrity of the system and gives it a direction. As Alexis de Tocqueville noted in his masterful work *Democracy in America*, Americans are constantly in motion. De Tocqueville was astonished that we appeared to be always veering in different directions. Yet, he noted that we somehow still managed to get from point A to point B before any other government. It is the integrity of our political system that allows this hyperkinetic energy to be released without seriously damaging our country. To be blunt, Madison gave us a system that is truly idiot-proof so long as we stay within its simple rules. The only threat to a Madisonian system is when one branch attempts to act extra-constitutionally or to circumvent the tripartite process of governance. It is this problem, what I refer to as the problem of "circumvention," that will occupy the majority of my remarks today. While I will suggest an alternative process for dealing with mass tort litigation, I would like to focus on the process by which this controversy should be resolved regardless of its merits.

## II. THE MADISON MOMENT AND ROLE OF THE LEGISLATIVE PROCESS IN RESOLVING FACTIONAL DISPUTES

If there is a quintessential Madisonian moment,<sup>5</sup> it is the contemporary debate over tobacco. Tobacco is a factional dispute involving fundamental questions of personal responsibility versus corporate conduct. It involves complex questions of the actual costs of this product on the federal and state governments. It raises questions of the government's own culpability in the subsidization and taxation of an industry that is now targeted for damages. It involves questions concerning the future of this industry and the priority of any federal payment vis-à-vis the state settlements and private mass tort verdicts. It is a debate that has been joined by a vast array of different interest groups and organizations representing medical, legal, financial, and political interests. It is precisely the moment that Madison had in mind when he crafted our system.

### A. Factional Politics and the Tripartite System

Before addressing the specific questions raised by the federal tobacco litigation, a brief review of the foundations and principles of the Madisonian democracy may be useful.<sup>6</sup> It is important to be clear as to what is meant by the Madisonian principles before reaching conclusions as to how the federal lawsuit could pose a threat to those principles.

While it has evolved since its conception by James Madison and other Framers, the tripartite system continues to reflect the genius and character of Madison.<sup>7</sup> Madison spent much of his life studying systems of government.<sup>8</sup> When the time

<sup>5</sup>This is not a reference to Jack Rakove's fine work which uses this term. Jack N. Rakove, *The Madisonian Moment*, 55 *University of Chicago Law Review* 473 (1988). While I respect Rakove's work immensely, we have different views of aspects of Madison's theories.

<sup>6</sup>This brief overview is a reduction of longer treatments that can be found in *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 *Duke Law Journal* 1 (1999); *Through a Looking Glass Darkly: National Security and Statutory Interpretation*, 53 *Southern Methodist University Law Review* (1999) (Symposium); *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 *George Washington University Law Review* 735 (1999) (Symposium).

<sup>7</sup>Madison himself steadfastly declined the common label as the author of the Constitution or father of the American constitutional system. Madison was personally quite modest and actively sought to share credit with his colleagues in the enterprise. See LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THAT FOUNDING OF THE FEDERAL REPUBLIC* 1 (1996). Certainly, other Framers played significant roles in crafting aspects of the government. However, while Madison may have viewed such distinction as vainglorious, his vision of the tripartite system was the most cogent and dominant of his time. For a collection of Madison's writings, see JACK N. RAKOVE, *MADISON: WRITINGS* (1999). For background on Madison, see IRVING BRANT, *THE LIFE OF JAMES MADISON* (1970).

<sup>8</sup>Madison was voracious in his appetite for books on government and particularly confederacies. This appetite was so great that, when Jefferson went to Paris in July 1784, Madison dogged Jefferson to send books on government. Jefferson would comb stores in Europe for his friend and ultimately sent back dozens of such works, including the thirty-seven volumes collection *Encyclopedie methodique*. See generally WILLIAM LEE MILLER, *THE BUSINESS OF*

came for a design of a new governmental structure after the failure of the Articles of Confederation, Madison had achieved an almost unrivaled knowledge and appreciation of the various governmental antecedents. Madison was particularly interested in the ancient systems such as the Achean confederacy of Greece and the Helvetic confederacy of Switzerland.<sup>9</sup> Madison was most interested in the causes for failure in democratic systems.<sup>10</sup> In the course of his studies, he came to conclude that one of the chief causes of system failure was the corrosive influence of factions. This problem was exacerbated by the failure of prior systems to recognize the inevitability of factions and to effectively channel the pressures produced by such divisions.<sup>11</sup> Madison noted that these earlier models tended to be based on documents espousing the common values and collective goals of a nation. They often bordered on the poetic in their articulation of the aspirational values of government. They also tended to fail as factional pressures grew beneath the surface and exploded into the streets of Paris or Athens. The Athenian model of direct democracy was rejected by Madison precisely because it “admits of no cure for the mischiefs of faction.”<sup>12</sup>

The Madisonian system can be aptly called government without romance. Like Madison himself, the system is remarkably understated and unpretentious. Where other systems built structures around a view of the common values of a people, Madison designed a system to deal with the things that divided us. Madison left the vanities of other systems behind in favor of a starkly pragmatic system of government. It was a system primarily designed not to inspire, but to last. Since its creation, the Madisonian system has withstood pressures that would have easily crushed many other systems. It has lasted because it was based on an ultimate expression of realism in the matching of a government structure to the demands of a pluralistic society. Madison was faced with the most pluralistic nation on Earth with the promise of religious, economic, political, and racial factions.<sup>13</sup> Madison concluded that “the causes of faction cannot be removed and that relief is only to be sought in the means of controlling its adverse.”<sup>14</sup>

The bicameral legislative model was central to Madison’s vision in dealing with factional pressures. Madison recognized that factions and divisions within a nation can, if left unresolved, fester into open conflict or “convulse the society.”<sup>15</sup> Madison saw the natural inclination of citizens to divide on issues of importance in a democratic system since “[t]he latent causes of faction are \* \* \* sown in the nature of man.”<sup>16</sup> Madison wanted to create a system that would force such divisions into the open where they could be transformed into majoritarian compromises.<sup>17</sup> The bicameral system was a result of this deliberative democratic concept. The key was to deal with the inevitable formation of factions in a free government while not sup-

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MAY NEXT: JAMES MADISON AND THE FOUNDING 15 (1992); JACK N. RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC (1990); ROBERT MORGAN, JAMES MADISON ON THE CONSTITUTION AND THE BILL OF RIGHTS (1988); ADRIENNE KOCH, JEFFERSON AND MADISON: THE GREAT COLLABORATION (1950).

<sup>9</sup>See WILLIAM LEE MILLER, THE BUSINESS OF MAY NEXT: JAMES MADISON AND THE FOUNDING 15 (1992).

<sup>10</sup>Madison would so often speak on such antecedents in defending his model that Framers, like James Wilson, grew to loathe his historical presentations. See Miller, *supra*, at 18. As will be shown, however, there was method to this intellectual fascination.

<sup>11</sup>Madison defined factions broadly: “By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” THE FEDERALIST NO. 10, at 78. The Framers were well-aware of the presence of factions in the United States from their colonial experience. The colonies were riddled with often violent factional interests fueled by political and religious divisions. Nevertheless, as Madison strove to deal with factions, the delegates divided sharply between Federalists favoring representative procedures and Anti-Federalists favoring more direct democratic procedures. The Federalists believed that pure democratic systems were inherently unstable and that the solution to factional threats could be found in a representative system containing a separation of powers doctrine and a system of checks and balances.

<sup>12</sup>THE FEDERALIST NO. 10 at 81 (James Madison).

<sup>13</sup>While the United States presented greater chances for factionalism, Madison also noted that the unique characteristics and the size of the new nation could help reduce these dangers since “society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority \* \* \* The degree of security \* \* \* will depend on the number of interests and sects.” THE FEDERALIST NO. 51, at 324 (J. Madison).

<sup>14</sup>THE FEDERALIST NO. 10, at 80.

<sup>15</sup>THE FEDERALIST NO. 10 at 80 (James Madison) (Clinton Rossiter ed. 1961).

<sup>16</sup>*Id.* at 79.

<sup>17</sup>*Id.* at 80 (“The inference to which we are brought is that the causes of faction cannot be removed and that relief is only to be sought in the means of controlling its effects.”)

pressing liberty itself.<sup>18</sup> Under this system, factional interests and preferences were coaxed to the surface of a legislative process in which such interests could be realized in whole or in part only by majoritarian agreement. In order to secure such agreement, compromise would be required in both houses of Congress with an appeal to values or interests outside any particular narrow interest group.<sup>19</sup> Through the bicameral process, factional interests can evolve in the crucible of debate and deliberation into majoritarian resolutions. Certainly, this is the “deliberative ideal,”<sup>20</sup> albeit sometimes unrealized.<sup>21</sup>

*B. The Separation of Powers and the Circumvention of the Legislative Process*

Just as Madison was strikingly pragmatic about the tendencies of citizens to divide, he also had no delusions about the motivations of individuals in politics or the institutional tendencies of the three branches that they would lead. “If men were angels,” he stressed, “no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary.”<sup>22</sup> Throughout our history, there has never been a Congress that did not want to act like the president; a president who did not want to act like Congress; or judges who did not want to act like both. Madison preserved the balance of power by denying any branch the ability to govern alone.<sup>23</sup> In some ways, our system is held together by the simultaneous pressures of each of the branches, a type of inverse pressure that holds the three parts as one. Madison relied on the self-interest of each branch to maintain this level of institutional pressure, including acts of self-defense in the face of circumvention.<sup>24</sup> Madison believed that the solution for opportunistic elements in the political system was for “[a]mbition \* \* \* to counteract ambition.”<sup>25</sup>

The separation of powers was understood to be vital to this new model.<sup>26</sup> The problem of circumvention or usurpation would have to be checked to prevent a consolidation of power, for even a brief period, in any one branch. This belief in the separation of powers was heavily influenced by John Locke. While Locke referred to a separation of powers in two rather than three parts, he viewed the separation as essential to defeat the “great temptation to human frailty” when those with “the Power of making laws” are the same as those with “the power to execute them.”<sup>27</sup> Montesquieu emphasized the need to separate the power of government among various branches.<sup>28</sup>

<sup>18</sup>THE FEDERALIST NO. 10, at 78 (“Liberty is to faction what air is to fire, an ailment with-out which it instantly expires. But it could not be a less folly to abolish liberty, which is essen-tial to political life, because it nourishes faction than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.”). Madison sought to balance these two interests, noting that “[t]o secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government is, then the great object to which our inquiries are directed.” THE FED-ERALIST NO. 10, at 80 (J. Madison).

<sup>19</sup>Letter from Thomas Jefferson to Edward Rutledge (June 24, 1798), reprinted in 2 THE LIFE OF THOMAS JEFFERSON 24 (G. Tucker ed. 1873) (quoted in Stewart Jay, *Origins of Federal Common Law: Part One*, 133 University of Pennsylvania Law Review 1003, 1024 (1985)).

<sup>20</sup>*Id.* at 20.

<sup>21</sup>The public choice school has written extensively on the failures that can occur within the legislative process. For work discussing these theories, see generally Jonathan Turley, *Through a Looking Glass Darkly: National Security and Statutory Interpretation*, 53 Southern Methodist University Law Review (1999) (Symposium); *Dualistic Values in the Age of International Legisprudence*, 44 Hastings Law Journal 145–275 (1992); Jonathan Turley, “When in Rome”: *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 Northwestern University Law Review, 598–664 (1990); Jonathan Turley, *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 Boston University Law Review 339–364 (1990).

<sup>22</sup>THE FEDERALIST NO. 51, at 322.

<sup>23</sup>The concept of separation of powers predates American jurisprudence and had grown in suf-ficient popularity to be a familiar political theory to the Framers. For an excellent treatment of the history behind the separation of powers doctrine, see Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 Cornell L. Rev. 393 (1996).

<sup>24</sup>THE FEDERALIST NO. 51, at 349 (Madison) (“Unless these departments be so far con-nected and blended, as to give each a constitutional controul over the others, the degree of sepa-ration which the maxim requires as essential to a free government, can never in practice, be duly maintained.”)

<sup>25</sup>THE FEDERALIST NO. 10, at 344 (Madison).

<sup>26</sup>James Madison stressed that the essence of good government required that “the legislative, executive and judiciary departments ought to be separate and distinct.” THE FEDERALIST NO. 47, at 331 (Madison).

<sup>27</sup>JOHN LOCKE, TWO TREATISES ON GOVERNMENT (Peter Laslett 1988) at 364.

<sup>28</sup>BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS bk. XI, ch. 6, at 152 (Franz Neumann ed. & Thomas Nugent trans., 1949) (1748) (“There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those

Through the separation of powers and the system of checks and balances, Madison sought to achieve the difficult goal described in his Federalist No. 51: "In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself."<sup>29</sup> This goal required not only the separation of governmental powers among "departments"<sup>5</sup> but also a system of checks and balances:

[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others \* \* \* This policy of supplying, by opposite and rival interests, the defect of better motives might be traced through the whole system of human affairs, private as well as public.<sup>30</sup>

Our system is designed to compel the two political branches,<sup>31</sup> sometimes against the inclinations of their leaders, to deal with each other in an open and deliberative way. It is only by passing divisive issues through the legislative system that factional interests can be brought to the forefront and reconciled. Once either political branch circumvents the other branch in the process, the center of gravity for the Madisonian system is displaced with potentially dangerous consequences. It is the Judicial Branch that often preserves this balance.

Threats to the Madisonian system can come in a variety of different forms. The greatest temptation in the system is to avoid the inconveniences or costs of the political process in favor of an attempt at judicial intervention. The threat of circumvention is most profound when one of the two political branches attempts such an end-run around the legislative process, though individual suits can also challenge the integrity of the system by raising political questions with the courts.

The courts have been particularly vigilant in preventing unilateral action of one of the political branches to circumvent the other political branch. *United States v. Standard Oil Company of California*<sup>32</sup> reflects the adherence to this principle. In that case, the Executive Branch sought to recover tortious damages from Standard Oil after one of its trucks injured a serviceman. Advancing a common law claim for recovery for medical expenses and wages, the Executive Branch sought damages that were available to litigants in state court. The Supreme Court, however, ruled that such a theory raised separation of powers problems. The claim of the Executive Branch constituted a circumvention of the right of Congress to determine the circumstances under which the government could claim a cause of action.<sup>33</sup>

The tobacco litigation is the prototypical example of factional pressures and the need for "institutional settlement"<sup>34</sup> within the political system. The tobacco litigation by the federal government is ultimately based on a core of largely unresolved questions of policy. First, there is the question of the continued sale of tobacco as a product. While various leaders, like President Clinton, have denounced tobacco as a leading killer of Americans, there has been no general call from the White House or most congressional opponents to ban the product. There appears to be a consensus that citizens will be allowed to continue to use this product despite its addictive

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three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."). Montesquieu noted that checks must exist within a governmental system on the abuses of office since "constant experience shows us, that every man invested with power is apt to abuse it; he pushes on till he comes to the utmost limit." Montesquieu, U, at 200. Thus, a tripartite system allows "that by the very disposition of things power should be a check to power." *Id.*

<sup>29</sup>THE FEDERALIST NO. at 349 (Madison).

<sup>30</sup>*Id.*

<sup>31</sup>This term is used to refer to the Legislative and Executive Branches. Admittedly, it is a crude device that ignores obvious political aspects of judicial rulings. The reference, however, reflects the Madisonian view that any political role of the courts should be minimal in comparison to the central political functions of the other two branches.

<sup>32</sup>332 U.S. 301 (1947).

<sup>33</sup>The Court accepted that some historically recognized governmental claims do not require congressional action. The Court noted that "it has not been necessary for Congress to pass statutes imposing civil liability in those situations where it has been understood since the days of the common law that the sovereign is protected from tortious interference." *Id.* at 315 n.22. This includes such claims as trespass. *Id.*

<sup>34</sup>HENRY HART & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 4 (tent. ed. 1958) ("The principle of institutional settlement expresses the judgment that decisions which are the duly arrived at result of duly established procedures for making decisions of this kind ought to be accepted as binding on the whole society unless and until they are duly changed. The bicameral system forced communications in the interests of the parties and took conflicts from the streets into a legislative process

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and harmful characteristics. Yet, if this litigation is successful, there is a question of whether the industry would withstand the exposure to liability by the government as well as private actions like *Engle v. R.J. Reynolds*<sup>35</sup> and the massive payments as part of the state settlements. Likewise, there is the question of the future of the industry and the continued role of the government in promoting or discouraging the sale or use of the product. Some of the most direct impact of this litigation will tend to fall on consumers in the form of increased prices for tobacco, a distribution question for which Congress is uniquely qualified to answer. Second, there is the question of the responsibility of individual smokers for their injuries and the equity of pursuing the industry after years of federal governmental support and acquiescence. The public has strong views on issues of personal autonomy and responsibility that could significantly affect this debate. Third, there is the question of the right of the federal government to claim damages against any citizen or company. Citizens have a right to determine the conditions under which the federal government can seek additional funds or damages, including the moral or ethical basis for such recovery. Fourth, there is a factual question of whether the government has actually lost money on tobacco and, if so, to what extent. Finally, there is the cost-benefit determination of how a federal claim for tobacco money would affect other federal programs or the state settlements.

None of these questions belong in a federal court. They belong in a congressional committee room. Whether tobacco continues to be sold and the role of the federal government in such sales is ultimately a political, not a legal, question. No court is truly prepared or competent to explore the myriad of issues and calculations needed to determine the true cost or benefits of tobacco sales to the federal government. While courts do make difficult determinations on damages, such complex matters are generally left to congressional committees and agencies which have the resources and expertise to competently render a determination. There are few issues as volatile as tobacco or subject to more disagreement as to the underlying facts. Like gun and HMO liability, it is an area that produces only factionalized views without a single majoritarian resolution.

Politics works as a prism that spreads different views across a spectrum as it has in the tobacco controversy. The legislative process works to take this spectrum and produce a common focal point that is acceptable to the majority. Until tobacco is considered in the legislative process, the views contained in any federal filing are merely the single view of the Executive Branch and not the entire public for which it should speak. Moreover, these theories create uncertainty as to the relevant legal obligations in this area.<sup>36</sup> This produces gross inefficiencies within the market that should be able to rely on Congress as the forum for new policy and liability decisions. When the focus of governmental policy debates shifts from the Legislative Branch to the judicial branch, the stability and equity of the system is lost with a myriad of negative political and market consequences.

### III. THE MADISONIAN NIGHTMARE AND THE CIRCUMVENTION OF THE LEGISLATIVE PROCESS

The decision of the Clinton Administration to pursue a judicial remedy converted the quintessential Madisonian moment into a Madisonian nightmare. The passions evident in the debates over tobacco are precisely the reason this issue belongs in the Legislative, not the Judicial, Branch. It is in Congress that factional interests can be reconciled and, ideally, transformed into majoritarian views. The Madisonian nightmare is the removal of a highly factionalized dispute from the Legislative Branch to the Judicial Branch. As unelected governmental officers, judges can bring highly unrepresentative and unaccountable views into a matter of national importance. These filings invite federal courts to determine questions that divide the nation. It is an invitation for judicial activism. By seeking a judicial legislative act,

<sup>35</sup> Recently, a state court of appeals reversed its own panel decision in this case to allow for a single punitive award against the tobacco companies without individual trials. See *R.J. Reynolds Tobacco Co., et al. v. Engle, et al.*, 1999 Fla. App. Lexis 13055, 24 Fla. Law W. D. 2192 (September 17, 1999).

<sup>36</sup> As will be shown below, these theories are generally quite weak. However, the possibility of such massive liability is enough to produce uncertainty and force inefficient measures to hedge or protect against negative rulings against the industry. The federal filings could be easily viewed as a "settlement strategy" due to this fright factor. By even raising the possibility of a huge damage award, the federal government may hope to secure a settlement like those with the states. While this would be a highly improper use of litigation, it would only magnify the constitutional concerns discussed in this testimony.

a branch avoids the costs of some insular political fight at a prohibitive cost to the system.<sup>37</sup>

As noted earlier, Madison could not have anticipated the degree to which social or policy issues could be litigated in the court system. While he anticipated the danger of judicial activism, Madison assumed that Congress would be the dominant branch in such questions. The influence of litigation as an alternative to political action is, therefore, a largely unanticipated and exogenous factor in the Madisonian system.<sup>38</sup>

The federal law suit may fall into the category of an Executive Branch policy advanced with the best motives and the worst methods. Administration officials clearly feel strongly about the costs and dangers of this product. Yet, while many members of the Administration have had distinguished careers in public interest causes, their prior method of seeking judicial intervention is wholly inappropriate to their current status. Rather than fighting a resistant government, they are now the government. As part of the governmental structure, their effort to circumvent the political branch invites the very dangers that Madison sought to avoid. In using the courts as an alternative method for policy implementation, the Administration undermines the protections against tyranny of the minority and judicial activism. The smallest reliance on such means adds a corrosive element to the system that will only undermine its foundations in time.

The federal filing appears in part motivated by a judgment of the White House that Congress would not support an independent cause of action. The White House had already failed in its effort to secure funding for the lawsuit and, previously, Congress barred the federal government from claiming money that is part of the state settlements. It is certainly understandable why a political judgment would favor the circumvention of Congress in the hopes of reaching the same objectives through a federal court. However, the decision to advance creative statutory claims does little to change the effort to secure a judicial legislative act. Returning to *Standard Oil*, the Court rejected the use of creative analogies in that case to obscure the fact that what the government sought was an important change in policy—without congressional involvement.

For grounded though the argument is in analogies drawn from that field, the issue comes down in final consequence to a question of federal fiscal policy, coupled with considerations concerning the need for and the appropriateness of means to be used in executing the policy sought to be established. \* \* \* [These analogies to tort law are] advanced as the instrument for determining and establishing the federal fiscal and regulatory policies which the Government's executive arm thinks should prevail in a situation not covered by traditionally established liabilities.<sup>39</sup>

The Court returned to first principles in sending the Executive Branch to Congress, and through the Madisonian process, to achieve such objectives.

Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours. Congress, not this Court or the other federal courts, is the custodian of the national purse. By the same token it is the primary and most often the exclusive arbiter of federal fiscal affairs. And these comprehend \* \* \* securing the treasury or the government against financial losses however inflicted, including requiring reimbursement for injuries creating them as well as filling the treasury itself.<sup>40</sup>

The only difference between the current filing and the failed effort in *Standard Oil* is the pretense of a statutory basis. Yet, any statutory source could be commandeered to serve as the basis for a new liability system. The government was simply more straightforward in *Standard Oil*, in acknowledging that it sought to

<sup>37</sup>To his credit, Senator Jack Reed (D.R.I.) sought to make lead paint manufacturers liable to the federal government, Senator Reed submitted the matter to his colleagues for a decision of Congress. Regardless of the merits of such a bill, the recognition that an independent cause of action can only be given by Congress is central to the integrity of the tripartite system.

<sup>38</sup>This is not to say that it is always inappropriate to seek major social or legal changes through the courts. Some citizen groups like the Civil Rights groups of the 1960's found the federal courts to be the only forum open to the realization of principles of equality and desegregation. Through cases such as *Brown v. Board of Education*, 347 U.S. 483 (1954), the federal courts succeeded not only in changing legal standards but creating a dialogue over racial issues between the three branches. There is a great deal of difference, however, between marginalized groups seeking social justice in the courts and a branch of government seeking such judicial relief. When the Executive Branch seeks a judicial avenue for major policy changes, it is substituting a government by legislation with a government by litigation.

<sup>39</sup>*Id.* at 314.

<sup>40</sup>*Id.* at 314-15.

construct a new cause of action through analogies to common law doctrines. The courts must still determine if there is any congressional intent to create such a cause of action. Under the statutory sources in the federal filing, there is plainly no such intent.

Without debating the merits of each of the claims, it is important to note the extraordinary statutory interpretation theories that the Administration was required to maintain in order to avoid seeking an independent cause of action. One of the claims made by the government is that it can seek reimbursement under the Medical Care Recovery Act (MCRA).<sup>41</sup> MCRA was the belated response to the *Standard Oil* decision through which the Congress, fifteen years after the decision, gave the federal government a right to recoup the costs for medical care and treatment paid by the government. While the 1996 amendment specifically allowed the government to proceed independently against individual tortfeasors, it has never been used for Medicare reimbursement.<sup>42</sup> This limited statute was designed for a clear and limited purpose. The federal lawsuit would convert this limited statute into a massive Medicare recovery program without any debate as to the merits or efficiency of such a conversion.<sup>43</sup> Moreover, MCRA extends a right of recovery to the government only when an individual is harmed “under circumstances creating a tort liability upon some third person.”<sup>44</sup> Such “circumstances” are found in state tort laws, which differ dramatically in terms of the elements and defenses of tortious liability. The court would have to allow the government to litigate an unprecedented number of individual cases without reference to their underlying state issues. The question for any federal court concerned about the separation of powers is whether it should (1) manipulate the language of a statute clearly designed for a different purpose (2) in order to achieve a massive public policy objective that (3) was never submitted to Congress.

The government also seeks to use the Medicare Secondary Payer (MSP)<sup>45</sup> provisions to secure compensation. This theory frankly borders on the frivolous. MSP was created to allow the government to seek reimbursement for Medicare funds. This act was also amended to expand the government’s cause of action in 1984. However, the entire Act is designed to pursue *insurers* of tortfeasors, not the tortfeasors themselves. The court would have to find, among other things, that the tobacco companies constitute covered parties. In this sense, the self-insurance of the companies would have to be construed as a “primary plan,” a highly unlikely event. Moreover, that statute allows for recovery under the auspices of the Health Care Financing Authority (HCFA) only through satisfaction of certain claim filings requirements that are highly difficult to apply to tobacco companies. Finally, the MSP refers to the recovery of payments that should be paid “promptly.” Yet, there is no plausible argument why the tobacco companies should have expected to pay promptly costs that HCFA has never suggested should be paid. There is nothing in the statute or past practice to suggest to a tobacco company that it should pay anything at all, let alone on a prompt basis.

Under both MCRA and MSP, courts would not only have to ignore the original intent behind these statutes but resolve a host of problems in advancing the government’s case. These include statute of limitations problems. MCRA has a three-year limitation, which begins to run as soon as the government knew or should have known that it had a cause of action. MSP has a three-year limitation, though the operations of the regulations could practically reduce this to one-year due to a notice requirement.<sup>46</sup> Moreover, the court would have to aggregate the claims on questions of proximate causation; employ statistical methods of proof; bar individual defenses; and resolve different choice of law problems relating to the tort laws from each of

<sup>41</sup> 42 U.S.C. § 2651.

<sup>42</sup> Moreover, while an independent right is expressly mandated, the same sentence creating the cause of action also refers to the action as subrogated. This creates ambiguity on the question of whether a true independent right exists or whether the government must still stand in the shoes of the injured party. 42 U.S.C. § 2651(a) states:

the United States shall have a right to recover (independent of the rights of the injured or diseased person) from said third person \* \* \* the reasonable value of the care and treatment so furnished, to be furnished, paid for, or to be paid for and shall, as to this right be subrogated to any right or claim that the injured or diseased person \* \* \* has against such third person to the extent of the reasonable value of the case and treatment so furnished, to be furnished, paid for, or to be paid for.

<sup>43</sup> *But see United States v. Gera*, 279 F. Supp. 731 (W.D. Pa. 1968), *rev’d on other grounds*, 409 F.2d 117 (3d Cir. 1969) (finding independent right of action under MCRA); *see also United States v. Housing Authority of the City of Bremerton*, 415 F.2d 239, 243 (9th Cir. 1969).

<sup>44</sup> 42 U.S.C. § 2651(a).

<sup>45</sup> 42 U.S.C. § 1935(b)(2).

<sup>46</sup> 42 C.F.R. § 411.24(f)(2).

the states involved in the pool of injured parties.<sup>47</sup> Aggregation has never been used in a MCRA action against any defendant and there is no authorization under the Act for such an action. This is a great deal of water for a court to carry to maintain a cause of action on a question that the Executive Branch has refused to submit to Congress.

The strongest basis for recovery in the federal lawsuit is under the claim brought under the Racketeer Influenced Corrupt Organizations Act (RICO).<sup>48</sup> Congress has long known that such claims are routinely applied to areas far removed from the Act's origins in fighting organized crime. In fact, RICO contains an express invitation for liberal interpretation of its application.<sup>49</sup> The Supreme Court has accepted the language of the law as requiring federal court to "read broadly" the law due not only to "Congress' self-consciously expansive language and overall approach but also its express admonition \* \* \*"<sup>50</sup> This may allow the government to get beyond the threshold question of congressional purpose and intent. However, this still leaves the court with a host of subsidiary issues, including questions of how to prove the injuries. In *Homes v. Securities Investor Protection Corp.*,<sup>51</sup> the Supreme Court held that any RICO claims must show "some direct relation between the injury asserted and the injurious conduct alleged" to satisfy proximate causation. This requirement has led to dismissals in lower courts.<sup>52</sup> While distinguishable on some points, these cases share this fundamental and questionable element as well as difficult interpretive hurdles. While RICO has been shown to be susceptible to the wildest interpretations, the court must still face a series of insular statutory and proof issues.<sup>53</sup>

Inevitably, a federal court will have to deal with the question of circumvention and the question of judicial competence in this lawsuit. The circumvention of legislative process in this area has occurred in other litigation, which should only heighten judicial concerns.<sup>54</sup> Putting aside the response of the federal courts, however, there is a separate question as to the proper response of Congress to such circumvention. It is to that final question that I would now like to turn.

#### IV. THE INSTITUTIONAL ROLE OF CONGRESS IN THE FACE OF CIRCUMVENTION

As noted above, the maintenance of the balance between the branches is left to the self-interest of each branch to jealously guard its own constitutional domain. Madison's vision of government anticipated the branches being in a continual parry and thrust over institutional prerogatives. Ironically, the greatest threat is not an attempt at circumvention by one branch. Such attempts happen with fair regularity. Rather, the greatest danger is when one branch attempts such circumvention and the other branch does nothing in response. In this system, the failure of one branch to defend its constitutional territory produces a vacuum of authority that is itself destabilizing. The defense of the separation of powers is not left to the courts alone

<sup>47</sup>The issue of the displacement of state law is itself a question that Congress should address with the Executive Branch.

<sup>48</sup>18 U.S.C. § 1961.

<sup>49</sup>Pub. L. No. 91-452, § 904(a), 84 Stat. 992, 947 (1970) (mandating that the law "shall be liberally construed to effectuate its remedial purposes.").

<sup>50</sup>*Sedmina, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-98 (1985).

<sup>51</sup>503 U.S. 258, 268 (1992).

<sup>52</sup>*See, e.g., Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 172 F.3d 223 (2d Cir. 1999), withdrawn and superseded by 1999 U.S. App. Lexis 19576, 1999 WL 639865 (2d Cir. Aug. 18, 1999) (noting that [w]here a plaintiff complains of injuries that are wholly derivative of harm to a third party, plaintiff's injuries are generally deemed indirect and as a consequence too remote, as a matter of law, to support recovery."); *Steamfitters Local Union No. 420 v. Philip Morris et al.*, 171 F.3d 912 (3d Cir. 1999) (noting that "the tortured path that money must follow from the tobacco companies' alleged wrongdoing to the Fund's increased expenditures demonstrates that plaintiff's claims are precisely the type of indirect claims that the proximate cause requirement is intended to weed out."). However, recently Judge Jack Weinstein in the Eastern District of New York has approved a RICO action on behalf of self-insured ERISA trust funds and Blue Cross/Blue Shield. *See, e.g., Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 36 F. Supp. 2d 560, 579 (E.D.N.Y. 1999).

<sup>53</sup>In the interest of full disclosure, the author has also found civil RICO an irresistible vehicle for application in areas far removed from its origins. *See, e.g., Jonathan Turley, Laying Hands on Religious Racketeers: Applying Civil RICO to Fraudulent Religious Solicitation*, 29 William and Mary Law Review 441-500 (1988); Jonathan Turley, *The RICO Lottery and the Gains Multiplication Approach: An Alternative Measurement of Damages Under Civil RICO*, 33 Villanova Law Review, 239-79 (1988).

<sup>54</sup>Congress has also seen the Administration pursue tobacco through the Federal Drug Administration (FDA) in a case now pending before the Supreme Court. *Food and Drug Administration, et al. v. Brown & Williamson, et al.*, 119 S. Ct. 1495 (1999) (accepting petition for certiorari). In that case, the Fourth Circuit rejected the FDA effort to regulate tobacco as a circumvention of Congress. *Food and Drug Administration, et al. v. Brown & Williamson, et al.*, 153 F.3d 155 (1998).

but to each branch in the use of its constitutional powers in defense of its institutional interests.

Madison gave Congress a powerful institutional interest in deterring the circumvention of the legislative process through judicial filings by the Executive Branch. That interest can be defended in a variety of ways. The power of the purse given to Congress is not simply a check on specific programs requiring appropriations. Rather, Congress can use its appropriations authority to respond to circumvention in the general budget authorizations for the affected agencies. Appropriations are a signal of agreement between the two branches on the conduct and goals of the government. If a majority of Congress views the Executive Branch as pursuing extra-legislative means for policy, it is entirely legitimate to withhold public support for such unilateral behavior.<sup>55</sup> Likewise, Congress may use its oversight authority to demand answers to questions over the constitutionality or propriety of executive actions. Finally, Congress can directly legislate to bar legal theories by the Executive Branch or to create protections of targets pursued by the Executive Branch. Such measures are not only permitted but encouraged in such conflicts. Obviously, Congress can also overstep its bounds in the use of such authority. However, in the case of the federal tobacco lawsuit, a major policy question has been removed to the courts to avoid a vote of Congress. It is essential for this body to respond to such circumvention to reestablish the need for legislative debate and resolution.

The need for congressional action is magnified by two other developments in this area. First, the Administration has attempted to regulate tobacco under the Food and Drug Administration. In a case before the Supreme Court, an enormously important policy question will be answered without a decision of Congress. While the statutory arguments are closer in the *Brown and Williamson* case than the federal tobacco lawsuit, this case still represents a creative effort to avoid a question that belongs in the political not the judicial process. Second, and more importantly, the recent spate of mass tort actions in the tobacco area has recently created a new and compelling basis for federal intervention. While this is not the focus of this hearing, I would like to make a few brief comments about the latter phenomenon of mass tort litigation. As with the federal tobacco lawsuit, these class actions involve questions with truly national significance that are being decided outside the legislative process. While this is not a matter of circumvention, it is a matter of an interstate importance that is being left to the operations of individual state courts.

Mass tort represents a small subset of tort litigation. By mass tort, I am referring to legal actions that can encompass thousands or even millions of injured parties. My concern is primarily with a subset of this subset of product liability litigation. Recently, we have seen the emergence of mass tort actions seeking, in some cases, hundreds of billions of dollars in compensatory and punitive damages. Where past lawsuits focused on individual products, these suits over such things as tobacco, guns, and paint appear to target entire industries. Some of these lawsuits may be well-founded in their underlying claims but the national impact of these lawsuits demands a national process of adjudication.

Under the current system, a single state court can cripple or kill an industry. Moreover, litigants in mass tort actions today are participants in a contest that has far more in common with a lottery system than a legal system. There is no better example of the workings of this lottery system than proceedings that began yesterday in *Engle*. In the second phase of that tobacco case, a jury of six people will be asked to come up with a figure on punitive damages against the tobacco industry. Some projections suggest that the figure could go as high as \$300 billion.<sup>56</sup> What is extraordinary is that this single state court could demand most of the liquid capital of an industry. Such a verdict could ultimately prevent payments on the tobacco settlements to some states and, more importantly, leave other litigants with valid but valueless claims. All of this would be done without any political debate or public consensus. Whole industries may fall, not by a vote of Congress, but by massive blows delivered in mass torts law suits.

Mass torts cases present unique national issues in terms of the scope of the injuries and the pool of victims. However, in a type of tragedy of the commons problem, a single state can move to acquire the assets of a company or industry through gen-

<sup>55</sup> Some academics would likely balk at such use of appropriations as excessive and impinging on areas of Executive Branch authority. In my view, however, the power of the purse was given to Congress to force the Executive Branch into a continual dialogue with the two houses. Where the Executive Branch is avoiding such a dialogue in pursuit of judicial legislative acts, the purse can be drawn tighter to concentrate the collective mind of the Executive Branch.

<sup>56</sup> Jonathan Turley, *Reforming the Great American Litigation Lottery*, The Chicago Tribune, November 1, 1999, at A11.

erous class action rules and hostile appellate procedures. Each state has a perverse incentive to attempt to fully recover the maximum amount of damages for its citizens. Consider again the *Engle*, case. The tobacco industry is eager to appeal a series of decisions by the trial judge, Judge Robert Kaye, who has made some highly controversial rulings in this case. However, under Florida law, in order to appeal a final decision from Kaye, the companies would have to post a bond for the entire monetary judgment plus twenty percent interest. Such a bond could bankrupt the defendants. While the industry has promised billions to the states, these payments are spread across a number of years and tied to future sales. Even if the industry could post such a bond, the tobacco stocks would likely go into a free fall. Yet, if tobacco does not post a bond, they may be prevented from appealing and then get hit with the total bill for the punitive damages. This Catch-22 may face other industries, which find themselves subject to fifty different state laws and an incentive of each state to secure as much of the damages as possible.

This is what fuels the Litigation Lottery. If you are the first in line to demand punitive damages, you may receive awards in the billions. Later injured parties generally receive less as courts tend to reduce damages after an initial punitive award. They may receive nothing if the first award killed the company or the industry. None of this makes much sense, of course. There is no reason why one group of litigants in one state should receive the lion's share of damages to the deprivation of hundreds of thousands of other injured parties. Moreover, there is no reason why one state should be able to impose this result over other states when the problem and the victims are shared by the nation as a whole.

There is an alternative to the current mass tort system. While I have long opposed many tort reform proposals, I believe that it is time for federal intervention to deal with some mass tort actions. Congress can establish a national system for mass torts that would remove these cases from the state courts to the federal courts. This will prevent the ability of a state to gut an industry and would allow for consolidation of cases for a national resolution. Narrow criteria can be used to remove only those cases with truly national impact and the greatest interstate dimensions. These cases would be taken from a larger pool of litigation involving class actions in which punitive damages are sought. The removed cases would be class actions that are part of a product liability theory with injuries and anticipated cases distributed across the country. This would avoid the current danger in which each state has the ability to hit an industry with a massive or even fatal award to the deprivation of other states with similarly situated victims. It would reduce the race to the courthouse and the potential for windfall damages to the swiftest litigants or the most aggressive state process.<sup>57</sup> It would avoid the injustice of one state court forcing domestication of an award when other states have citizens with equal claims. Finally, it would add a degree of predictability and uniformity for the markets. The markets have experienced highly inefficient responses to the uncertainties of mass tort liability. Since any state law could potentially seize the assets of an industry in mass tort, the mere exposure of an industry results in expenditure of capital and resources in efforts to hedge or insure against such losses. Regardless of the ultimate liability of an industry like tobacco, the nation should create a system that affords greater structure and continuity to avoid such economic deadweight losses.

This federal process would also bring a greater degree of equity to the distribution of damages in mass tort actions. Since compensatory damages would be paid upon final judgment and appeal, the payout from punitive awards can be delayed by a brief period to allow for the consolidation of cases and to avoid premature exhaustion of the fund. Congress could then mandate that punitive damage awards be placed in a single pool to be divided more evenly among injured parties. Finally, Congress should create caps for legal fees. This is not an effort to radically slash attorney fees common to contingency litigation, which often serve as a necessary incentive to bring many worthy suits. Rather, the caps would only reduce the percentage that an attorney could take on punitive damages to prevent a repeat of the state tobacco scandals where attorneys are entitled to billions of dollars (a rate in some

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<sup>57</sup> Currently, one could anticipate a type of "race-to-the-bottom" in which states attempt to gain advantages for its citizens in mass tort claims. Mass tort litigation can pit states against each other in seeking to offer their own citizens the same access and potential recovery as the citizens of other states. If one state has a draconian bonding requirement for appeal or a liberal proximate cause standard, for example, another state could adopt similar rules to level the playing field.

cases of \$200,000 per hour). It would also avoid the spectacle of single firms or attorneys claiming literally billions of dollars in attorney fees.<sup>58</sup>

This is a general outline of only one approach to deal with mass torts. The merits of this proposal are less important than the need for a legislative response to the problem. While interstate issues are easiest to understand in the form of pollution or market barriers, it is now necessary to view some liability questions in interstate terms. The issues raised in cases like *Engle* produced highly factionalized debate that touches on the role of lawyers, the role of tort liability, the conditions for business enterprise, and the right of states to control tort judgments. It is a debate that does not belong in a state trial court. It is a debate that belongs here with the representatives of the entire populace and the involvement of both of the political branches.

#### V. CONCLUSION

In the law of product liability, there is a legal term called “foreseeable misuse.” This term refers to the doctrine that a manufacturer may still be liable for the misuse of a product if the misuse was foreseeable. Legislative circumvention is the constitutional counterpart to foreseeable misuse. Like any responsible product designer, James Madison anticipated such misuse and created a system to function in light of such conduct. The safety mechanism in the Madisonian design was a system of checks and balances in which circumvented branches could force correction and adherence to the original design. Such corrections or responses occur continually in the inevitable tension of a tripartite system. The mere presence of conflict, therefore, is not alarming. It is the possibility of acquiescence that is the danger to this system. Once one branch allows circumvention of its constitutional authority, the system becomes dangerously unstable.

This is not to say that the Republic will fall due to the filing of a federal tobacco lawsuit. To the contrary, the Madisonian democracy is a system that can take enormous abuse and still retain its integrity. However, the taste for legislative circumvention only increases with time. We have seen disturbing examples of recent circumvention and the negative effects of this trend should not be underestimated for the future. Our nation is one of the most pluralistic nations on Earth. We all come from different cultural, racial, and religious traditions. We share, however, one constitutional tradition. It is highly proceduralistic and pragmatic. It is magnificent in its simplicity. It requires little of us. The Madisonian democracy asks for only one thing, a type of covenant with its people. We must be willing to submit to the supremacy of a democratic process and the judgment of the majority. This judgment is found in the dialogue between the two houses of Congress and between the two political branches. The pressure of rivaling constituencies and institutional perspectives can transform factional politics into a national consensus. This is the Madisonian moment. What makes us unique as a people are not our problems but how we chose to solve them.

I would be happy to answer any questions that the Committee may have on my testimony.

The CHAIRMAN. Mr. Ryan, we will take your testimony.

#### STATEMENT OF DON RYAN

Mr. RYAN. Thank you, Senator Hatch. My name is Don Ryan. I am Executive Director of the Alliance to End Childhood Lead Poisoning. The Alliance is a national non-profit public interest organization. We work to protect children from lead poisoning through education, advocacy, and policy change. Our mission is prevention, avoiding children’s exposure to lead hazards in the first place.

I should note that the Alliance does not accept contributions from those with an economic stake in the issue, nor are we involved in any of the suits being brought against the lead paint industry by

<sup>58</sup> See, e.g., Marianne Lavelle & Angie Cannon, *The Reign of the Tort Kings*, U.S. News & World Report, November 1, 1999, at 36 (reporting that “[l]awyers representing the first three states that settled—Florida, Mississippi, and Texas—were awarded \$8.2 billion in legal fees); Daniel LeDuc, *Angelos, Md. Feud Over Tobacco Fee; \$4 Billion Payout to State Will Be on Hold as Lawyer Argues for 25 Percent*, The Washington Post, October 15, 1999, at B01 (reporting that lawyer Peter G. Angelos “has a three-year-old contract with Maryland to pay him 25 percent of the proceeds from the litigation, or about \$1 billion.”).

poisoned children, by owners of lead-burdened properties, or by the States.

I do need to make clear that I am not a legal scholar, nor am I prepared to comment generically about State lawsuits. My remarks this morning focus on the challenge of protecting children from lead poisoning and the potential that State lawsuits offer to advance prevention.

I believe the public interest is well served by State lawsuits against the manufacturers of lead-based paint. This morning, I want to make four points. Childhood lead poisoning remains a serious unsolved national problem. Current resources are inadequate to control lead hazards in children's homes. Fairness requires holding the manufacturers of lead-based paint accountable. Protecting children still at risk must be the central purpose of these lawsuits.

By its nature, childhood lead poisoning is an environmental disease. There is no medical cure. The only solution is to protect children from exposure to lead through source control. The scientific evidence about lead's adverse human health effect is overwhelming. Almost one million U.S. preschoolers have enough lead in their blood to harm their intelligence, learning, and behavior.

Most children are poisoned by lead hazards in their own homes. The major source of exposure is lead-based paint, present in nearly two-thirds of the entire U.S. housing stock. The foremost pathway of exposure is lead-contaminated dust which gets on children's hands and toys and into their mouths.

Lead paint poses an enormous challenge to this Nation. Preschool children, of course, suffer from lead poisoning, but many others suffer as well—landlords, insurance companies, lenders, homeowners, real estate agents, painters, remodelers, health care providers, and teachers in our schools.

Over the past several decades, all conceivable strategies have been explored—public education campaigns, universal blood lead screening, real estate disclosure, targeted subsidies, command and control regulations, and incentives for voluntary compliance. Despite all these efforts, the inescapable reality remains. Protecting children from lead poisoning requires substantial additional resources to control the hazards in their housing.

How did we come to have lead paint in 64 million homes and apartments? Why were we 50 years behind in regulating lead paint? I believe the answers are clear, because of the relentless promotion of lead-based paint by the manufacturers and their agent, the Lead Industries Association, despite their clear knowledge of the dangers.

The most chilling testimony comes from statements by industry leaders themselves and from LIA's own reports. This committee hearing is not the proper forum for judging the lead industry's actions. One important purpose of the Rhode Island lawsuit will be to reveal the factual evidence. I should note, however, that enough incriminating evidence has already been uncovered in prior suits that demonstrates that these charges are far from frivolous.

I believe the recent tobacco litigation and the settlements the States have made offer several lessons for States now contemplating suits against lead paint manufacturers. Simply punishing the companies for their misdeeds is not sufficient. The public interest

requires that relief and resources be devoted to remedying the problem at hand.

The Rhode Island suit meets this test by requiring the defendants to detect and abate lead hazards in housing. Lead screening and educational programs also support prevention. I would urge other States now planning such suits to devote the preponderance of relief to controlling lead hazards in the homes of children at highest risk.

In summary, I believe that fairness requires holding the Lead Industries Association and the lead paint manufacturers liable for their unscrupulous behavior in keeping lead in paint and for the cost of controlling the resulting hazards in our children's housing. I believe that Rhode Island's lead paint lawsuit directly serves the public interest. Indeed, such suits may be the only way to fill the gap in resources required to control lead hazards in the homes of children at highest risk.

Thank you.

The CHAIRMAN. Thank you very much, Mr. Ryan.

[The prepared statement of Mr. Ryan follows:]

PREPARED STATEMENT OF DON RYAN

Good morning, Mr. Chairman and Members of the Committee. My name is Don Ryan. I am executive director of the Alliance To End Childhood Lead Poisoning. I appreciate the invitation to testify before the Senate Judiciary Committee this morning.

The Alliance is a national, 501(c)(3), non-profit, public interest organization located in Washington, D.C. The Alliance has been working since 1990 to protect children from lead poisoning through education, advocacy, and policy change. The Alliance anchors a loose-knit coalition of more than 250 state and local grassroots groups committed to lead poisoning prevention.

The Alliance's goal is primary prevention, which means taking effective action to protect children before they are exposed to lead. We have been instrumental in shifting the national approach from waiting to react until after a child has been poisoned to ensuring that homes and apartments are safe from lead hazards in the first place. The Alliance was instrumental in Congress' enactment of the Residential Lead-Based Paint Hazard Reduction Act of 1992. This landmark law focused attention and resources on promptly and effectively controlling lead hazards in housing, especially lead-based paint and lead-contaminated dust hazards, which are by far the foremost cause of lead poisoning among U.S. children. With the goal of ensuring that all children's homes are lead-safe, the Alliance has worked over the past ten years to find cost-effective strategies for controlling lead hazards and has sought to develop and build consensus on maintenance and lead safety standards that are both workable and protective.

I will submit background information about the Alliance and our board of directors for the record. I should note that the Alliance does not accept donations from corporate and other interests with an economic stake in the issue, including: the lead and paint industries; the real estate and apartment industries; insurance companies; trial lawyers; lead hazard control contractors; or lead-safety product manufacturers. The Alliance has never initiated a lawsuit nor have we been involved in the suits now being filed against the lead-based paint manufacturers by state governments, by owners of lead-burdened properties, or on behalf of lead-poisoned children.

I should clarify at the outset that I am not a legal scholar and I am not prepared to comment generically about state suits to recover public health costs from those who have manufactured and marketed hazardous products. I would like to provide background information about childhood lead poisoning and its prevention, the challenges presented by lead-based paint in housing, the need for additional resources for source control, insights into how two-thirds of our housing came to contain lead-based paint, and reactions to the State of Rhode Island's suit against the manufacturers of lead-based paint.

I believe the public interest can be well served by state and local government lawsuits against the manufacturers of lead-based paint. First, lawsuits by state and

local governments offer a means to right a longstanding wrong by holding the lead-based paint manufacturers and the Lead Industries Association (LIA) accountable for their ill-gotten gains through unscrupulous and relentless promotion of a product whose dangers were clearly known. Second, these suits hold the potential to fill a critical gap in the resources required to control lead-based paint and dust hazards which threaten the intelligence, learning, and behavior of nearly one million preschool children. I want to make four points this morning:

- That childhood lead poisoning remains a serious and unsolved environmental, health, housing, and educational problem that demands concerted action;
- That substantial additional resources are required for source control strategies to protect children still at immediate risk for lead poisoning from lead hazards in their homes;
- That fairness requires holding the manufacturers of lead-based paint accountable, particularly in light of their efforts to obscure scientific evidence, mislead the public, and promote the sale of lead-based paint despite their clear knowledge of its dangers; and
- That the ultimate goal of protecting children at greatest risk for lead poisoning must guide the judgment of state attorneys general, judges and juries, and the defendants in these cases as well as legislative bodies that might themselves consider constructive solutions.

#### CHILDHOOD LEAD POISONING REMAINS A PRESSING NATIONAL PROBLEM

By its nature, childhood lead poisoning is an environmental disease. There is no medical prescription to cure lead poisoning. The only solution is protecting children from continued exposure to lead hazards through source control.

Young children are most sensitive to lead's toxic effects because their brains and nervous systems are still developing. Even at very low levels, lead exposure in childhood causes reduced intelligence and attention span, learning difficulties, and behavioral problems. The scientific evidence about lead's adverse human health effects is beyond dispute, as summarized by the National Academy of Science's objective and authoritative 1993 report, *Measuring Lead in Infants, Children and Other Sensitive Populations*.

Ironically, lead poisoning among U.S. children is at once a stunning environmental and public health success story and a pressing and persistent problem that eclipses virtually all other environmental health threats. The past three decades have seen dramatic decreases both in average blood lead levels in the U.S. population and in the number of children with elevated blood lead levels. These public health gains are positive proof that regulating environmental exposures to toxic substances directly benefits human health.

Nevertheless, lead poisoning still affects almost one million preschoolers in the U.S. despite controls on point source emissions and bans on lead in new paint, gasoline, food cans and plumbing supplies. The latest national health data available (NHANES III) estimate that 890,000 children aged 1–5 have blood lead levels 10 ug/dL or above, the current "level of concern." (A number of recent studies have observed adverse neurological effects at even lower levels.) The risk of lead poisoning is disproportionate across population subgroups: children from low-income families are eight times more likely to have elevated blood lead levels than children from upper income families; African-American children are at five times higher risk than White children.

#### THE CHALLENGE POSED BY LEAD PAINT IN HOUSING AND THE NEED FOR EXPANDED SOURCE CONTROL

Most children with elevated blood lead levels are poisoned by exposure to lead hazards in their own homes. The major *source* of their exposure is lead-based paint, estimated by the Department of Housing and Urban Development's 1990 Report to Congress to be present in 64 million homes and apartments, nearly two-thirds of the entire U.S. housing stock. Intact lead-based paint rarely poses an immediate hazard, although children can be highly poisoned by chewing protruding surfaces coated with intact lead-based paint. The foremost *pathway* of exposure in children is ingesting lead-contaminated dust, which typically is produced by lead-based paint that is deteriorating or disturbed by repainting or remodeling. Toxic lead dust settles on floors and other surfaces and gets on children's hands and toys and then into their mouths.

Lead-based paint in two-thirds of all U.S. housing presents an enormous challenge to the nation. Preschool children, of course, are directly affected. But lead-based paint in housing poses a complex public policy dilemma and imposes multiple burdens on many industries and interests. To name a few: rental property owners fear

lead poisoning tort suits by tenants; insurance companies seek to refuse liability coverage wherever possible; lenders are nervous about properties with lead-based paint; affordable housing providers face the increased costs imposed by lead-based paint; real estate agents take pains to get disclosure forms signed; homeowners fear that lead-based paint will reduce equity in their homes; painters and remodelers need special training in lead safety; health care providers dread parents' questions about lead poisoning (there is no medical "silver bullet"); the Medicaid system struggles mightily to screen children at highest risk; public health agencies scramble to give poisoned children follow-up care; and our public schools must teach children unable to concentrate and unready to learn.

Over the past few decades, various federal, state and local agencies and private sector interests have searched for solutions to childhood lead poisoning through a multitude of strategies: from screening and treating lead-poisoned children to educating parents and caregivers; from certifying specialized lead contractors to empowering community-based organizations; from training apartment maintenance supervisors in lead safety to educating painters and remodelers in how to avoid creating lead dust hazards; from categorical grants targeted to highest risk housing to lead safety regulations that govern all federal housing assistance programs; from incentives for voluntary compliance to targeted code enforcement; from reliance on market forces to command and control state laws. Despite the contributions of these various strategies, lead poisoning remains an unfortunate reality for almost one million preschool children. While the Alliance will continue to pursue all promising strategies, including public education and market-based solutions, the inescapable reality is that committing substantial additional resources to source control is the only way to prevent childhood lead poisoning. Without additional resources for controlling lead-based paint and lead-contaminated dust hazards in housing, future generations of children are destined to continue to be poisoned by lead hazards in their homes.

THE MANUFACTURERS OF LEAD-BASED PAINT SHOULD BE HELD ACCOUNTABLE  
FOR THEIR MISDEEDS

One group has been conspicuously absent from efforts to protect children from lead poisoning: those who are directly responsible for putting the lead in paint that is now present in nearly two-thirds of all U.S. housing. Suits by states such as Rhode Island serve the public interest by forcing the lead-based paint manufacturers and their agent, the Lead Industries Association, to be held accountable for improperly manufacturing and marketing lead-based paint and by rightfully forcing these companies to help defray the costs of source control to protect children from lead hazards in their homes. The unscrupulousness of these companies' and LIA's activities to cover up the dangers of lead-based paint and promote its sale for decades after the dangers were clearly understood underscore the fairness of such suits by state governments.

People's first reactions to the Rhode Island case seem to vary based on their presumptions about the lead-based paint industry's culpability or innocence. Those who view the manufacturers of lead-based paint as benign argue that it is unfair to hold past acts to the standards of current knowledge. I am convinced that an objective evaluation of the historical record will reveal that the dangers of lead-based paint have been well known since at least the turn of the century and that the lead-based paint manufacturers and the LIA, with clear knowledge of these dangers, undertook a callous, calculated, decades-long campaign to manufacture and market lead-based paint. Statements by industry leaders and LIA's own reports offer the most chilling testimony about the industry's success in obscuring the scientific evidence, misdirecting scientific inquiry, suppressing publication of damning studies, and delaying government legislation and regulation of dispersive uses of lead.

This Committee hearing is not the proper forum for judging the actions of the lead industry. One benefit of the Rhode Island suit is to ensure that this historical record is carefully examined and that LIA's and the lead-based paint manufacturers' actions are fairly judged. I should note, however, that litigation against the lead-based paint manufacturers over the past decade has already uncovered sufficiently incriminating evidence of wrongdoing to preclude dismissing out-of-hand the charge that these suits are frivolous.

STATE SUITS AGAINST LEAD-BASED PAINT MANUFACTURERS MUST INSTRUMENTALLY  
ADVANCE PREVENTION

As an advocate for children's health, I want to emphasize that the ultimate effectiveness of suits against the lead-based paint manufacturers is the extent to which resources are actually devoted to controlling lead hazards in the homes of children

at highest risk. The recent tobacco litigation and settlements offer many lessons for state suits against the manufacturers of lead-based paint. Most importantly, the public interest requires more than simply punishing companies for their culpability; the relief sought and the proceeds of such cases should remedy the problem at hand rather than balancing state budgets or funding unrelated activities.

In this regard, the Rhode Island suit deserves note because the relief it seeks from the lead-based paint manufacturers will instrumentally advance prevention. The lion's share of the relief sought will ensure source control by requiring the defendants to detect and abate lead hazards in Rhode Island's housing and neighborhoods. In addition, the case seeks funding for ongoing blood lead screening and educational programs. The Alliance believes that, in addition to giving parents practical information about what they can do to help protect their children, educational strategies must encompass training of property owners, community groups, painters, and remodelers in lead-safe work practices and certification of expert lead safety consultants and abatement contractors in order to advance prevention effectively.

I would urge any and all states now developing suits against the manufacturers of lead-based paint to focus relief on source control to protect children at immediate risk. It is not sufficient simply to transfer funds from the companies responsible to state governments, even though that does serve to punish their misdeeds. The vast preponderance of the relief sought and the proceeds derived from such suits must be devoted to cleaning up lead hazards in the homes of children at highest risk for lead poisoning. These same principles of prevention and public health protection should guide any legislative action.

I have outlined the dimensions of the still unsolved problem of childhood lead poisoning, the challenges presented by lead-based paint in housing, the necessity for additional resources to control lead hazards in the homes of children at highest risk, and the appropriateness of holding liable the manufacturers of lead-based paint and the Lead Industries Association. I believe that Rhode Island's lawsuit against the manufacturers of lead-based paint directly serves the public interest by holding the responsible companies accountable and by filling the critical gap in resources needed for prevention through source control. Indeed, I believe that such suits may be the only way to secure the resources that are required to control lead-based paint and lead-contaminated dust hazards in housing to protect the almost one million children now affected by lead poisoning as well as future generations of children who will occupy these homes and apartments.

The CHAIRMAN. Mr. Myers, we will turn to you.

#### **STATEMENT OF MATTHEW L. MYERS**

Mr. MYERS. Good morning, Mr. Chairman. It is a pleasure to be back before this committee and I want to thank you for the opportunity to testify today.

It is our opinion that these lawsuits, particularly the tobacco lawsuits, have been an effective and powerful mechanism for holding the tobacco companies accountable, for changing the behavior of the tobacco companies in ways that are likely to promote the public health, and for at least partially transferring the cost of treating tobacco-caused disease from the American taxpayer to the tobacco companies themselves.

The issue is not, as some have said, whether the Surgeon General was fooled or whether the Surgeon General knew that tobacco caused disease. It is whether the tobacco companies succeeded in using their 40-year campaign of deceit and deception to confuse young people deciding whether to start and adults deciding whether to stop, and, as between the tobacco companies and the American taxpayer, who should pay.

We only have to go back to 1994 when the State of Mississippi became the first State to file suit against the major tobacco manufacturers and look at that complaint. Mississippi sought to hold the tobacco industry accountable for decades of wrongdoing. They sought to seek reimbursement for the taxpayers' cost in treating tobacco-caused disease, and using traditional consumer protection

concepts to force the tobacco industry to make changes in order to drive down the incidence of tobacco-caused disease in the future. Mississippi did not seek to enact new laws. It relied on existing laws, and when its complaint was challenged in the courts, it held solid ground.

Now, eventually, almost all of the States followed suit, and the judicial decisions that were rendered in those cases were a mixed bag. But it is fair to say that a substantial number of them, at least in preliminary rulings, had courts make findings to demonstrate that they were solidly based on the law.

It is important to try to put these cases in context, and you know the context as well as I; as a matter of fact, you know it better than I. At the time the State of Mississippi first sued, tobacco companies continued to deny that their products caused lung cancer or other serious diseases, including before this very committee. They continued to deny that the nicotine in their products was addictive. They continued to deny that they researched children or marketed in ways that were attractive to children, and they continued to deny that they had any ability to actually reduce the harms caused by these products.

These lawsuits, in the finest tradition of what litigation can accomplish, have opened the flood gates, and that is why it is our opinion that these cases reflect a proper use of the judicial process and a real sensitivity to the different roles of the three branches of government. Both the State and the Federal lawsuits are based on straightforward legal principles that a person or corporation should be held legally responsible when he, she, or it engages in conduct that causes harm to others.

State legislatures and Congress have enacted laws that embody this principle. What the State attorneys general have done and what I believe the Department of Justice has done is seek to use those laws, to enforce those laws, in ways to seek proper redress. In bringing these suits, neither the State nor the Federal Government as a general rule enacted new laws.

Now, I want to make a specific comment. We don't support cases that are not solidly based in the law. I don't know anybody who does. What we do support is a strict application of the current laws to accomplish the mutual goal, and I believe that that is what has been done in these cases.

As we go back and look quickly, we can recite the positive gains that have come from the tobacco cases—the disclosure of tobacco industry documents that has forever changed the debate, for the first time creating a sense of accountability for the tobacco industry that never before existed; forcing the tobacco industry to make changes that you and I in our discussions have said are actually better done in litigation, elimination of billboards, elimination of brand name advertising in clothing, curtailment of sponsorship. Things that would have been difficult for this body to do have been accomplished through these ways.

They have done some other traditional consumer protection things, and that is forcing the tobacco companies to fund a foundation to do public education. When I was at the FTC, we called it corrective advertising. It is exactly what the court should be doing, what the Attorney General should have been doing.

In conclusion, I think there are three points I would like to make, and I know my time is up. One is I think these cases represent a thoughtful, careful enforcement of the laws. To the extent they are frivolous, I trust the courts to make that distinction. Two, they have done a great deal of good. And, three, as you know, we support the enactment of comprehensive legislation. I don't see them as either/or. I think we need to do both. We would like to work with you to enact meaningful, comprehensive legislation so that the courts can do their job, Congress can do its job. We need to do both.

I want to thank you for the opportunity to be here today.

The CHAIRMAN. Thank you, Mr. Myers.

[The prepared statement of Mr. Myers follows:]

PREPARED STATEMENT OF MATTHEW L. MYERS

Good morning Mr. Chairman and members of the Committee. My name is Matthew Myers. I am the Executive Vice President and General Counsel of the National Center for Tobacco-Free Kids, a national organization created to protect kids from tobacco by raising awareness that tobacco use is a pediatric disease, by changing public policies concerning tobacco, by altering the environment in which tobacco use and tobacco policy decisions are made, and by actively countering the tobacco industry and its special interests. The National Center is a membership organization with over 125 members, including many of this nation's major public health organizations and other groups concerned about the health and welfare of our nation's children.

Mr. Chairman, I appreciate the opportunity to testify today regarding whether government lawsuits against industries like the tobacco industry are in the public interest and whether they run counter to the proper separation of powers among the legislative, executive and judicial branches of government. I want to emphasize that my organization's expertise is limited to tobacco and to the role lawsuits play in helping to prevent the death toll from tobacco.

In 1994 the state of Mississippi became the first state to file suit against the major tobacco manufacturers. Mississippi sought to hold the tobacco industry accountable for decades of wrongdoing, to obtain reimbursement for the taxpayers of the state of Mississippi for the state's expenditures to treat tobacco-caused disease, and to force the tobacco industry to make changes in order to drive down the incidence of tobacco-caused disease in the future. Eventually, almost all states followed Mississippi's lead. Most recently, the United States Department of Justice has decided to enforce federal statutes against fraud and other wrongdoing by the tobacco companies. It is seeking reimbursement for a variety of health care expenses incurred by federal taxpayers to treat tobacco-caused disease as a result of decades of wrongdoing by the tobacco industry.

It is our opinion that these lawsuits have been an effective and powerful mechanism for holding the tobacco companies accountable, for changing the behavior of the tobacco companies in ways that are likely to promote the public health and for partially transferring the cost of treating tobacco-caused disease from the American taxpayer to the tobacco companies. The issue is not whether the states or the federal government knew that smoking caused disease. The issue is whether the tobacco companies succeeded in using its campaign of deceit and deception to confuse children to start, and adults not to quit, and who should pay for the impact of the industry's wrongdoing—the tobacco companies or the American taxpayer.

It is important to put these tobacco-related cases in context. At the time the state of Mississippi first sued, tobacco executives continued to deny that their products caused lung cancer or other serious disease, that the nicotine in their products was addictive, and that they marketed their products to children. In fact, the behavior of the tobacco companies on these critical issues had changed little over the previous decades and neither government, nor the private sector had yet succeeded in piercing the tobacco industry's wall of silence.

The United States Centers for Disease Control and Prevention has estimated more than 10 million Americans have died from tobacco use since the issuance of the landmark Surgeon General's report in 1964. How many of those lives could have been saved had the tobacco industry told the truth or lived up to its promises not to market its products in a manner to make them more attractive to children? It has also been estimated that annual health care expenditures in the United States directly related to smoking exceed 85 billion dollars, that tobacco-related Medicaid

expenditures exceed 16 billion dollars annually and the Federal Government pays more than 20 billion dollars a year as a result of non-Medicaid, tobacco-related, health care costs. How much of these costs could have been averted had the tobacco industry behaved responsibly?

Millions of lives could have been saved and billions of dollars could have been more productively spent if the tobacco industry had not engaged in a concerted cover up of the truth and a campaign designed to mislead the American public. While it is true that the tobacco industry did not succeed in deceiving the Surgeon General, it is equally true that its conscious effort to “sow seeds of doubt” in the minds of the American public, along with its aggressive marketing efforts, had an impact on young people deciding whether to smoke and on smokers deciding whether to quit. Unfortunately, all taxpayers ended up paying.

It is also our opinion that these cases reflect a proper use of the judicial process and a sensitivity to the different roles of the three branches of government. Both the state and federal lawsuits are based upon the straightforward legal principle that a person or corporation should be held legally responsible when he, she or it engages in conduct that harms others. State legislatures and Congress have enacted laws that embody this principle. It is the role of State Attorneys General to enforce those state laws, and it is the role of the Department of Justice to enforce the laws passed by this Congress in order to hold wrongdoers accountable. In bringing these suits, neither the state nor federal Attorneys General enacted a new law; rather they applied existing laws to the conduct of the tobacco industry and reached a legal conclusion that the industry’s conduct gave rise to civil liability. Ultimately the courts will determine the validity of this legal conclusion, but we are persuaded that the lawsuits correctly apply current law and represent an appropriate exercise of executive authority.

What has been the effect of these tobacco cases? They have played a vitally important role. The following is not intended to be an all-inclusive list.

First, these lawsuits forced the tobacco industry to disclose millions of pages of documents it had long kept secret. It put on public record for the first time what the tobacco industry knew and when they knew it. By doing so, it destroyed the tobacco industry’s ability to continue to confuse the American public about whether there was any scientific controversy about the health effects of its products or the addictive impact of nicotine. It also blew apart the tobacco industry’s claim that it never studied the smoking behavior of children and that it was uninterested in trying to attract children. These disclosures have forever changed the public debate about tobacco and the tobacco industry.

Second, these cases for the first time held the tobacco industry accountable for its wrongdoing. The payments the tobacco industry is now being forced to make to the states represent only a fraction of the value of the harm the tobacco industry has caused, but for the first time they bring some sense of justice to this issue. The federal government’s claims are no less meritorious and may even be more so in light of the decision by Congress to recognize an independent right of recovery for the government under the Federal Medical Care Recovery Act (MARA).

But should the federal government be allowed to file a suit separate from the suits filed by the states? The answer is yes. The state suits sought recovery in part for Medicaid costs; the federal government’s claims are for Medicare and other non-Medicaid federal programs. In addition, we have argued that a portion of the state settlement should have been returned to the federal government because current law requires states to reimburse the federal government when they recover from third parties. Many members of Congress countered that the federal government should file its own suit if it wanted to recover. Those who made that argument should not now criticize the Department of Justice for taking action that Congress essentially invited.

Third, some states are using these funds to attack the tobacco problem. It is too early to know whether the states will maximize this opportunity to reduce the long-term death toll from tobacco. Of the 29 states which have made at least a preliminary decision about how to use the first payments which they will receive, 8 have made commitments to use enough of the funds to mount a truly comprehensive tobacco prevention program, 10 have made more modest commitments, and five put funds into a trust fund for which expenditures for tobacco prevention and cessation can, but need not be made. In addition, the state of Mississippi has launched an aggressive two-year pilot project with funds from the tobacco settlement and Florida used its initial payment for the most successful one-year tobacco prevention program to date.

Fourth, in the finest tradition of the enforcement of consumer protection laws, the States Attorneys General demanded and received meaningful concessions in how the tobacco industry does business that were directly related to the tobacco industry’s

wrongdoing. As the result of the state settlement, there are no more tobacco billboards. Clothes and other non-tobacco items no longer will be distributed with tobacco product brand names. Brand name sponsorships will be somewhat curtailed, among other actions. These measures are a step in the right direction and are appropriate actions to take in the settlement of a public lawsuit.

Fifth, the state settlement agreement also requires the tobacco industry to fund the American Legacy Foundation. This foundation will conduct a major public education campaign to counter and undo some of the harm that has been caused by years of massive tobacco industry advertising. This, too, is a classic consumer protection remedy. If the American Legacy Foundation carries out its task effectively, it will become a powerful force for helping to reduce tobacco use.

Sixth, no one should underestimate the overall impact that these cases have had on the tobacco industry. They now know that if they engage in future wrongdoing, they may be held accountable for their actions. Thus, for the first time the tobacco industry will not be allowed to behave as if it is immune from the laws that apply to other industries and other citizens.

Every year tobacco kills over 420,000 Americans. It is a product that is unique in many respects. It is the only product, which kills when used exactly as intended. It is addictive. Virtually all-new users are children. The tobacco industry's behavior also distinguishes it from responsible industries. We now know that for decades the tobacco industry had known that its products were a cause of disease, but hid from the American public what it knew. We also now know that for decades the tobacco industry realized that the nicotine in its products was addictive, but also hid that truth from the American public. We know that the tobacco industry studied children and the behavior of children very carefully and understood full well that virtually all-new users of its deadly products were kids. Finally, we now realize that the tobacco industry has long known how to reduce the harm from its products, but because it was not being held accountable for its behavior, it chose to continue business as usual.

Our support for these law enforcement actions is consistent with our call for strong, comprehensive, national legislation. Both seek to hold the tobacco industry accountable when it engages in serious wrongdoing. Both are needed. The lawsuits are not a substitute for legislation. The state and federal Attorneys General have correctly relied on existing laws to hold the tobacco industry accountable for its wrongdoing and, in the process, have triggered important improvements in public health.

The CHAIRMAN. Mr. Schwartz.

#### **STATEMENT OF VICTOR E. SCHWARTZ**

Mr. SCHWARTZ. Thank you, Mr. Chairman, for inviting me here today. I am testifying today on behalf of the American Tort Reform Association, which is a broad-based coalition of non-profits, businesses, who are interested in our justice system. But my remarks are my own, and they are called by points that you have made, Mr. Chairman, and zeroed in on.

There is a new trend, and the trend of these lawsuits—and I will discuss some of them in a moment—intrudes on separation of powers, reflects unsound public policy, and raises questions about equal justice under law. As you enlightened us earlier, the examples that were put forth by Senator Durbin of antitrust suits, civil rights suits, or under the Constitution all had some basis in law. But the lawsuits that we are talking about today are unchartered ventures where judges make the law with no principles, other than their own feelings about unpopular defendants.

I put it this way: is it tort law or is it outlaw? If you don't like somebody, do you change the law because you don't like them? Now, a few years ago, that occurred in asbestos litigation. A few of our courts said basic principles of law go out the window; we are going to say there should be absolute liability because asbestos companies did very bad things.

But then cases came up involving other things like escalators, and then they said, well, maybe what we said there about products isn't really what we meant because escalators in Louisiana, when those principles that were established in asbestos were applied to escalators, shut down.

When the principles of law that were brought up against unpopular defendants were listed against popular defendants, the courts moved back. Now, will that occur with the current situation? Take tobacco. For 240 years, a basic principle is that if I am hurt, the primary right to sue is mine. Nobody should, and nobody does, have a greater right to sue than I do. That is true of every American who is hurt.

But by some magic, a few lower courts, no court of highest jurisdiction, came up with something that my godchild could come up, although he is 6 years old and creative. They called it the quasi-sovereign doctrine. Just like he finds things in rooms, they found it in a room. It had no basis in law whatsoever, but it gave States greater power to sue than somebody who was hurt. So the State wasn't bothered about choice of smokers. The State wasn't bothered about proving harm. The State wasn't bothered about whether the State could tell who did what.

Now, if you apply those principles to other industries—and I give an example in my testimony—sure, people who make lead paint should worry. Sure, the attorney general of Rhode Island is going to be head-on with the latex industry. The automobile industry makes cars that go fast. If you ignore the driver who is driving that car and you forget about his conduct, it is a big cost to our society. But people would be uncomfortable if those types of lawsuits had begun with automobiles. They are more comfortable when things are brought against unpopular defendants.

With gun laws, and I won't go into detail, the same new creation is there. One theory is negligent distribution. Well, if you adopt that, people who make beer in Milwaukee have to worry about people who may be drinking beer in New York. The principles of law have changed because we don't like the defendant.

One of the theories is that guns should be liable because they operate as guns. Well, that means we are holding companies liable even though their product doesn't have a defect in it. There are kitchen knives that are very large and very frightening. One was used in a famous case out in California.

To us, what should the concern be? Is it tort law or outlaw? The principles of Senator McConnell's bill help address this. The principles of basic law address this that we have a system of laws that is based on principles, not who the defendant is.

In closing, I will mention one other concern, and that is that where you have very wealthy, very fine plaintiffs lawyers bonding with the State, you have two people who have completely different interests. The State has certain interests. The sworn allegiance of attorneys general, Mr. Sessions, is to the Constitution. But those who practice personal injury law in your State who are very good people have other motives underlying them. This body produced the laws for unpopular defendants. It says "Equal Justice Under Law" on the top of the Supreme Court. I think it should, and that

is why your hearing today puts a light on a subject that needs more attention.

Thank you.

The CHAIRMAN. Thank you, Professor Schwartz. We appreciate it. [The prepared statement of Mr. Schwartz follows:]

PREPARED STATEMENT OF VICTOR E. SCHWARTZ

THE NEW TREND OF REGULATION AND TAXATION THROUGH LITIGATION: WHY IT REPRESENTS UNSOUND PUBLIC POLICY

Mr. Chairman, thank you for your kind invitation to allow me to share some thoughts before the Committee about the new judicial trend of regulation and taxation through litigation. This trend intrudes on the separation of powers, reflects unsound public policy, and raises concerns that the bedrock principle of "equal justice under the law" might be set aside when the defendant is unpopular.

I am testifying today on behalf of the American Tort Reform Association ("ATRA"). ATRA is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms who have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. ATRA was founded in 1986; it is based in Washington, D.C.

*Regulation and Taxation Through Litigation*

Former Secretary of Labor Robert Reich concisely characterized the new trend of governments bringing their powerful resources to bear against lawful, private industries when he observed, "The era of big government may be over, but the era of regulation through litigation has just begun."<sup>1</sup> The new judge-made path toward regulation and taxation through litigation has been blazed by unpopular defendants—the people who make tobacco, guns, or lead paint. On the horizon, reports have suggested that the next round of targets could include HMO's, manufacturers of latex products, automobiles, chemicals, alcoholic beverages, and pharmaceuticals, the gaming industry, "Hollywood" and the entertainment industry, internet providers, and even the dairy and fast food industries.

Public officials and personal injury lawyers who have brought these lawsuits, and judges who support them, argue that since the Congress and state legislatures have not acted, judges must do so. Some regulation through litigation advocates suggest that executive branch regulators are captured by industry and will not act in the public interest, and that the only way to achieve certain public policy goals is through litigation.

Litigation may provide the opportunity for some to achieve their personal agenda of reform, because some judges who see themselves as public policymakers are willing to bend the law. Although the judiciary should be, in the words of the late Alexander Bickel, the "least dangerous branch," a few judges see it as the most activist branch. There are problems with this perspective.

One of the problems is that many judges are unelected; this is certainly true with respect to the entire federal judiciary. And, even in those states where judges are elected, judges face little public light or scrutiny. Therefore, judges who embrace "regulation through litigation" are not subject to the checks and balances of the more open arenas of public policy that you face as Members of Congress.

I will briefly share with you how Robert Reich's observation has played out so far and where it may go in the future. I suggest that this new, uncharted path poses serious dangers for our society. When the cheers fade for the state attorneys general tobacco victories, the public may realize that a new form of government has been unleashed and has the real potential to regulate them and tax them in ways that they neither require nor want.

*Tort Law Or Outlaw?*

Tort law principles should apply in the same way to all defendants. This does not always occur in practice. Sometimes courts have bent tort law rules to ensure findings of liability against unpopular defendants.

For example, in a 1982 case called *Beshada v. Johns-Manville Products Corp.*,<sup>2</sup> the Supreme Court of New Jersey overturned more than two centuries of tort law and imposed absolute liability on a manufacturer of an asbestos-containing product.

<sup>1</sup> Robert B. Reich, *Regulation is out, Litigation is in*, USA Today, Feb. 11, 1999, at A15.

<sup>2</sup> 447 A.2d 539 (N.J. 1982).

The court broadly stated that manufacturers of products that caused serious harm should not be able to defend themselves on the ground that they neither knew nor could have known about the risks that might be caused by their products.

The Supreme Court of Louisiana reached the same conclusion in a case called *Halphen v. Johns-Manville Sales Corp.*<sup>3</sup> The court determined that asbestos products were unreasonably dangerous *per se*, in effect, of no social benefit. The court chose to ignore the fact that regardless of the risks asbestos may have created, it was the only insulation material available during World War II to ensure that Allied ships could stay warm inside. And, it was fireproof—an important fact when you are a thousand miles out at sea.

While principles in those cases were broadly stated, the New Jersey and Louisiana supreme court decisions were based on the judges' views that manufacturers of asbestos-containing products had engaged in heinous conduct. The companies had produced a product that had caused serious injuries and, in some cases, death. According to the plaintiffs' allegations, the manufacturers knew about the risks, but did not warn the public.

While the plaintiffs had made the central allegation that the defendants had known about the health risks associated with asbestos, the New Jersey and Louisiana courts eliminated the requirement that the plaintiffs prove that fact. By eliminating the need to prove that the defendants knew or should have known about the health risks of their products, the Supreme Courts of New Jersey and Louisiana anticipated that asbestos manufacturers would settle their cases and not litigate.

When the *Beshada* principle of law arose again, however, in a case against the manufacturer of a pharmaceutical product, the Supreme Court of New Jersey stated that absolute liability would *not* apply because the product at issue was a medical product.<sup>4</sup> The court opined that the nature of the product justified a different result.

The distinction drawn by the New Jersey Supreme Court between asbestos and a medical product was not based on neutral principles of law, but on how the justices on that court felt about the particular defendants—people who made products that contained asbestos were tort law “outlaws”; people who manufactured pharmaceuticals were not.

A similar process occurred in Louisiana. Once the principle of absolute liability set forth in *Halphen* was unleashed in Louisiana, lower courts applied it to non-outlaw defendants. One example: escalator manufacturers. As a consequence, escalators in the state were shut down. When the case involving escalators reached the Supreme Court of Louisiana, the court confined the *Halphen* principle to manufacturers of asbestos-containing products.<sup>5</sup> The court believed that society could proceed without asbestos, but not without escalators.

In effect, these courts said that manufacturers of asbestos-containing products were outlaws and were not entitled to the same legal principles that applied to others.<sup>6</sup> A key public policy question that Congress should consider is whether our Nation should have neutral tort law or outlaw tort law.

#### *Tobacco Law—Good-bye Subrogation, Hello “Quasi-Sovereign” Doctrine*

The “tort law or outlaw” issue arose with respect to the state attorneys general tobacco cases. Will the principles established by a few courts against those who make tobacco products be confined to tobacco or spread to other manufacturers? Some background concerning long-standing tort principles sheds light on the answer to that question.

A fundamental principle of tort law is that an injured person's claim is greater than or at least equal to any claims by others for indirect economic harms that may flow from that injury. For example, if a worker is injured in the workplace as a result of a defective tool, his claim is the primary claim. No one else has a greater right to sue for the worker's injuries than the worker himself. If the worker's employer suffers economic losses as a result of the employee's injury (*e.g.*, the employer has to pay workers compensation and medical expenses on the employee's behalf, suffers loss of profits while the employee is out of work, or has to hire a substitute worker), the employer's claim is secondary to that of the injured party. Through a legal process called subrogation, the employer can join in the employee's tort claim against the manufacturer of the tool or put a lien on the employee's recovery, but

<sup>3</sup> 484 So. 2d 110 (La. 1986).

<sup>4</sup> See *Feldman v. Lederle Labs*, 479 A.2d 374 (N.J. 1984).

<sup>5</sup> See *Brown v. Sears, Roebuck and Co.*, 514 So. 2d 439 (La. 1987).

<sup>6</sup> *Halphen* and *Beshada* were overruled by legislation so as to require proof of defect. See N.J. Rev. Stat. § 2A:58C-3(3) (1987); La. Rev. Stat. Ann. § 9:2800.56(1) (1991). Another case, *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143 (Md. 1985) (holding handgun manufacturer strictly liable for injury resulting from properly functioning “Saturday Night Special”), was subsequently overruled by legislation. See Md. Ann. Code art. 27, § 36-I(h) (West Supp. 1990).

the employer does *not* have a separate, independent claim or a greater claim than that of the injured worker.

Apart from the process of subrogation, the same result is reached through a traditional tort principle called the “remoteness doctrine.” The remoteness doctrine prohibits people who may incur an indirect economic loss from bringing a claim against a person who may have caused a physical injury. For example, if a negligent driver injures a person and the accident ties up a highway, the injured person may have a claim, but those who suffer lost economic opportunities because of traffic delays do not. The remoteness doctrine is based on twin public policies of avoiding duplicate recoveries and preventing an avalanche of claims.<sup>7</sup>

Despite these fundamental aspects of tort law that have been respected for more than 200 years, a few lower state courts in the state attorneys general tobacco cases held that a state government could have greater legal rights than those of the individual smokers. In effect, the state could recover the cost and injuries allegedly sustained by a smoker, even though the smoker’s case would fail. A smoker’s case could fail, for example, because the person was clearly aware of the risk of smoking and made a conscious choice to smoke. Or a smoker’s case might fail because the person did not establish that his or her particular illness was caused by smoking. Under established tort principles, the smoker could not prove this causal connection by statistics alone.

In one state’s lawsuit against the tobacco companies, however, a trial court created a new principle, the “quasi-sovereign” doctrine, which granted the state “super plaintiff” status.<sup>8</sup> First, the “quasi-sovereign” doctrine, in effect, eliminated applicable neutral defenses such as assumption of risk and contributory negligence. Second, it allowed states to subvert traditional principles of causation by allowing causation to be established through a general statistical correlation between the activity of smoking and public health care expenditures. Third, it bypassed established rules for allocating liability by allowing the super-plaintiff State to provide liability by generalized market share statistics. It did not have to show that a particular citizen was injured because he or she smoked a particular defendant’s product.

It remains to be seen whether the “quasi-sovereign super plaintiff” decision represents neutral tort law or outlaw tort law. The implications of either result will have profound effects on our society. If “super plaintiff” decisions become neutral tort law and are applied to other defendants, many industries could be at risk of new and unprecedented liability exposures.

For example, a very prominent plaintiffs’ lawyer friend has shared with me his view that automobiles that go 90 miles per hour or more create a known risk that has no social justification. He fully appreciates that a person who drove a car above 90 miles per hour and was hurt would have his claim barred because of his own negligence or because he assumed the risk of injury. On the other hand, this sage plaintiffs’ attorney observed that a claim by the state to recover Medicaid costs incurred in treating the driver’s injuries might not be barred if the “quasi-sovereign” doctrine applied. For example, the driver’s fault could be ignored. This plaintiffs’ lawyer believes that state funds have incurred substantial Medicaid costs because of people who drive at excessive speeds. He believes that statistics can show that “speed kills.” He also claims to have evidence that automobiles sold in certain foreign countries have computer chips which prevent the automobiles from going faster than the speed limit. He claims that U.S.-made automobiles should have these computer chips.

If the “quasi-sovereign” doctrine is limited in its application to unpopular defendants such as the tobacco industry, however, this plaintiffs’ lawyer’s theory would probably fall. The law would be different only because judges believe that we need automobiles, not tobacco.

Mr. Chairman, the legislation you have sponsored with Senator McConnell, S. 1269, the Litigation Fairness Act, would address this issue and preserve the rights of individuals who may be injured. As the Litigation Fairness Act makes clear, an injured person’s right to sue should be primary. Government should not have a greater right to sue than a citizen who has been hurt when that injury is at the heart of the government’s claim.

#### *Gun Law—Changing Law, Once Again, Against An Unpopular Defendant*

The new cases filed by some cities against firearms manufacturers present the same issue of neutral tort law or outlaw tort law. The cities have proceeded on at

<sup>7</sup>See Victor E. Schwartz, *The Remoteness Doctrine: A Rational Limit on Tort Law*,—Cornell J. Law & Public Pol’y—(forthcoming Fall 1999) (providing history and public policy behind the remoteness doctrine).

<sup>8</sup>*Texas v. American Tobacco Co.*, 14 F. Supp. 2d 965 (E.D. Tex. 1997).

least two rather novel theories. First, some of the city suits are predicated on a theory called “negligent distribution.” These suits allege that the gun manufacturers knew or should have known that their products, lawfully sold in one state, would find their way into other states, where they could be used in criminal activity.

Recently, a Federal District Judge in the Eastern District of New York ignored basic principles of tort law and allowed a jury to consider this novel new theory of liability of negligent distribution.<sup>9</sup> The theory allows a jury to impose liability on various gun manufacturers. While the state or city was not the plaintiff in that case, its core principle would be helpful to governments that base their suits on negligent distribution claims.

*Hello “Negligent” Distribution, Good-bye Cars and Beer*

Fundamental tort law principles create a duty on the part of a person not to entrust another with a dangerous object. If I give my car to a drunk driver, and he causes an accident, I am subject to liability. That is the law of negligent entrustment. The same would be true if a gun seller knowingly sells a firearm to a “strawman” fronting for a felon or a bartender sold a bottle of vodka to a customer who was clearly inebriated.

For over 200 years, negligent entrustment has been based on face-to-face contact. There has been no tort of “negligent distribution,” where liability is asserted against a manufacturer that neither saw nor knew the party that intentionally and wrongfully misused its product.

If negligent distribution principles, such as the one embraced by the New York Federal District Judge, were adopted and neutrally applied, a number of industries could be substantially at risk. For example, manufacturers of alcoholic beverages could face crushing and unfair liability exposure. To date, they have had no duty to stand guard over where their products are going or decide whether their products should be used in areas where they might be over-consumed by the local populace. The precedent that may be established in the gun cases, however, could create such a duty. Similarly, automobile manufacturers could have a duty to determine whether any dealer or car rental agency sold or leased vehicles to any person who might drive while intoxicated. Gasoline companies and matchmakers do not currently have a duty to determine whether the purchasers of their products might be arsonists.

In short, once a new duty regarding manufacturer’s negligent distribution is created, and one is held responsible for the criminal acts of a person that one never knew nor saw in person, liability implications are limitless, unless judges decide forever that “we only meant guns, because we do not like guns; no one else need be concerned.”

*Defectless Products—Let’s Invent A Perfect Kitchen Knife*

A second theory used in gun cases is that firearms are “defective” because they do not feature adequate safety devices to protect third parties against criminal misuse of the product. Product liability principles since their inception have focused on protecting the product user. These principles also may protect bystanders if the product fails to perform in a safe manner—for example, if a wheel falls off a car and injures the driver and a pedestrian.

The concept of “defect” does not support the idea, pushed in the cities’ firearms cases, that a protective device must be included to protect third parties from the *intentional wrongful acts* of the person who uses the product. If the legal definition of “defect” were to be extended to that point, there could be far-reaching implications for manufacturers of products that are intended to serve a legitimate purpose, but could cause significant harm if intentionally misused—for example, matches, kerosene, or even knives.

The manufacturers of kitchen knives—especially long, sharp and potentially dangerous ones like those that have been used in well-publicized criminal cases—could have a potential duty to ensure that those knives are kept locked up and used only for their lawfully intended purpose (*i.e.*, cutting food, not people). Again, we will have to see whether courts will adopt this radical new definition of “defect.” Will we have neutral tort law or outlaw justice?

We are fortunate that, to date, at least some courts have respected existing principles of law and have not twisted them in order to regulate the firearms industry.<sup>10</sup>

*Government Should Not Be “Pushing The Envelope” On Tort Law*

Governments should not be part of the push to extend tort law far beyond its 200-year-old moorings. Governments also should stand for principles of equal justice

<sup>9</sup> *Hamilton v. Accu-Tek*, 1999 WL 557261 (E.D.N.Y. June 3, 1999).

<sup>10</sup> See *City of Cincinnati v. Beretta U.S.A. Corp.*, No. A9902369 (Ct. Cm. Pl. Oct. 27, 1999).

under law and not try to create or extend existing legal principles for the purpose of attacking unpopular defendants. Government officials should appreciate that the legal theories created to fight unpopular industries could soon be applied to more popular industries. That is occurring now.

The latest extension is in Rhode Island with respect to the manufacturers of lead paint. At least one attorney general has suggested considering suits against manufacturers of latex. Publicly, however, most state officials have followed the example of the Attorney General of the United States. When Senator McConnell asked Attorney General Reno about the Federal Government's lawsuit against the tobacco companies to recover Medicare costs and whether she would consider suing producers of high fat foods, alcohol, firearms or automobiles in the future, she stated that she was "not aware of any other industry" with the characteristics of tobacco. It has been stated by many attorneys general that tobacco is the only product that causes disease when it is used as intended.

But, as people who suffer from heart disease can attest, high fat foods *used as intended* can contribute to serious illness, including arteriosclerosis. This is particularly true with young males. Medical data show that at least 25 percent already have incipient arteriosclerosis, a disease that seriously reduces the probability of a long and healthy life. If a court were to stretch existing legal principles in order to allow the Federal Government to sue tobacco companies for alleged Medicare costs, there is nothing to prevent future attorneys general from deciding to extend this new principle to manufacturers of products other than tobacco.

#### *Separation Of Personal Injury Lawyers And State*

Apart from and, to some extent, linked with the creation of "outlaw tort law" against unpopular defendants is the new and unprecedented partnership between governments and private contingency fee personal injury lawyers. Personal injury lawyers are enterprising professionals and have helped many seriously injured people. Nevertheless, this attorney general-personal injury lawyer linkage creates at least four fundamental public policy problems.

First, government and private contingency fee personal injury lawyers are guided by different goals and principles. Attorneys general take oaths to the Constitution of the United States; that document is their guiding light and their interest is the public interest. The guiding light of private contingency fee personal injury lawyers, by contrast, is profit. To quote the old Seinfeld show, "not that there's anything wrong with that," but it is clear that the goals of contingency fee personal injury lawyers and the goals of government are not the same. If personal injury lawyers run the show, the result may not be in the public interest.

Second, as has been amply demonstrated in the Texas tobacco lawsuit, there is a strong potential for fraud and abuse when public officials make private fee arrangements with contingency fee personal injury lawyers. In almost every other context, government contracts are made in the public light and are priced through a competitive bidding process.

That is a proper way to resolve public contracting opportunities. Public contracting should achieve the very best values for taxpayers. That goal is achieved by conducting the bidding process in the open. When public officials make agreements in private about contingency fees, however, potential abuses can include a wink and a nod about political contributions, or a wink and a nod about future employment at a private contingency fee law firm.

Third, assuming such agreements are negotiated on the "up and up," private multi-million or billion dollar agreements between contingency fee personal injury lawyers and attorneys general may not result in the selection of the best person at the best cost. Contingency fees do not have to be automatically 33 percent or 25 percent of the total recovery. It is in the public interest to have the amount of the fee based on neutral criteria. For example, the probability of a successful outcome, whether work already has been performed by others to achieve the goals of the litigation, and the amount of time actually spent on the case. Marketplace open bargaining should be the norm—not backroom deals in the dark.

Fourth, governments and contingency fee personal injury lawyers have shown the strong potential for fee disputes that can result from "backroom deals." Such disputes have occurred in a number of states. The potential for such fee disputes would be reduced if the agreements were made in public.

The American Legislative Exchange Council (ALEC), a group of over 3,000 state legislators, has developed a proposal to address these problems. ALEC's, model bill, "The Private Attorney Retention Sunshine Act," was recently enacted in Texas and North Dakota. The Act would clarify how and under what terms state governments may enter into contingency fee contracts with private lawyers. Here is what the ALEC model bill would do.

First, the filing of a contingency fee contract would have to be approved by a Legislative Budget Board if the state's anticipated recovery was likely to be more than \$100,000 and adequate funds had not been budgeted to prosecute the case. Second, the contracting attorney or law firm would have to keep complete time and expense records. Expenses would have to be reasonable, proper, necessary, and actually incurred. In most cases, the time and expense records would be subject to public disclosure. Third, hourly rates would be capped at \$1,000 an hour. Attorney fees could not exceed 35 percent of the total recovery, and the "risk" and "difficulty" multipliers could not exceed four times the base rate without prior approval by the legislature. All litigation and settlement funds recovered by the state would become the property of the state. Fourth, the payment of fees and expenses would have to be specifically approved by a governing body. Finally, no state or local officer could waive the requirements imposed by the legislature.

For over ten years, I had the privilege to represent plaintiffs and it was a very satisfying portion of my professional life. But, I know from that experience and the experience of others that a plaintiff's counsel has a goal and, in part, an instinct to both push tort law principles as far as they will go, and to create new principles when the old ones do not reach far enough to permit a recovery. That is a legitimate private goal, not a public goal.

A few years ago, legal experts stated almost universally that plaintiffs' lawyers would never sue the firearms industry because gun manufacturers do not have "deep pockets" like those of the tobacco industry. Experience has shown otherwise. This is true, in part because the balance between the plaintiffs' lawyer and the defense changes when the government is the contingency lawyer's sponsor and partner. For that reason, the pursuit and extension of new changes in law have no end. The contingency fee lawyer would not wish to confine the principles to one or two industries; he or she wants liberal tort law rules applied to everyone from whom a monetary recovery is possible. The future will demonstrate the truth of this statement. For example, the lead paint industry already is now exposed to new style lawsuits. As has been suggested, at least one attorney general has strongly suggested that the latex industry be next on the list for the state official contingency fee personal injury partnership.

#### *Intrusion On The Separation Of Powers Principle*

When Robert Reich wrote that "the era of big government may be over, but the era of regulation through litigation has just begun," his examples of this new trend were state suits against unpopular defendants—tobacco and guns. Robert Reich said that the public policy goals of these and future lawsuits could not be achieved through the normal political process of enactment of legislation or through well-considered regulatory proposals. He analogized the new effort to the United States Supreme Court's civil rights decisions under the Constitution of the United States.

Mr. Reich's perception of a new and major trend in tort law is perceptive and valid, but his analogy to the civil rights movement is misplaced. Equal protection under the law were words that were guideposts for the Supreme Court in civil rights cases. Tobacco, gun, and other new-style lawsuits, by contrast, operate in an almost completely open-ended, uncharted world. The words of the Constitution of the United States do not frame the picture as they did for civil rights. There is virtually no limit to what courts can do in creating new tort law and now they are demonstrating that fact.

When courts create totally new causes of action and nullify long-established precedent they go beyond their appropriate governmental role and act as legislators. Apart from the fact that such lawmaking initiative trespasses on the vital separation of powers between the judicial and legislative branches of government, bad public policy can result. This is why.

First, judge-made law is retroactive. If the Congress made law in the same way, it would be an unconstitutional *ex post facto* law. Second, judges do not have the information that legislatures gather through the hearing process. That process helps legislative lawmakers appreciate the full public policy implications of their decisions. While two lawyers before an appellate court presenting their points of view are a source of good information, they are not a substitute for the legislative or regulatory fact-gathering process. Third, lawyers in court argue and focus on narrow rules of law, not major changes in public policy. If lawyers were allowed to focus on public issues far beyond the instant case they are arguing, courts would abandon the fundamental principle that judges must only resolve actual cases and controversies. Consideration of issues that go beyond a particular case or controversy is properly the job of legislatures.

Those that have advocated that courts should make law where legislatures have refused to do so ought to think about the full implications of their new approach.

If the courts become the forum in which to remedy failures in the legislative arena, what would happen if tort reformers who are unable to persuade legislatures take their case before judges who are empathetic to reform efforts? Would it be appropriate to have judges place caps on punitive damages? Would it be appropriate to have judges create statutes of repose and limit the liability of a manufacturer to a fixed number of years? I do not think so. Those are decisions for legislatures, not courts.

*Conclusion*

The greatest argument of Robert Reich is that legislatures simply will not act on things that he and those who share his values believe are appropriate for legislative action. But it touches upon a bedrock principle of our Government to give up on the legislature because you cannot get your way. It has been shown that legislatures are politically responsive to the wishes of the general public. As Senator Everett Dirksen of Illinois once said, "When they feel the heat, they will see the light." Legislators do act when the public consistently wants them to do so. Moreover, if legislators are not responsive to the public, voters have a direct remedy at the polls. The judiciary, on the other hand, is the least politically accountable branch of government.

As state or the federal government tries to regulate or tax unpopular defendants through litigation, Members of this Committee should ask themselves whether we will have neutral tort law or outlaw tort law justice. If new and unprecedented judicial lawmaking is applied only against unpopular defendants, the principle of "equal justice under law" that is set forth on the top of an august building near here, the Supreme Court of the United States, will be nullified. We will have an outlaw tort law system. On the other hand, if courts adopt and broadly apply these new principles of tort law, judges could begin to regulate the marketplace and tax the public, deciding what products and services are to be available, how they are to be marketed, and at what price. No doubt, the implications of these lawsuits for our society are frightening; they undercut the very basic principles of our democratic form of government.

The CHAIRMAN. General Keys, we will turn to you.

**STATEMENT OF WILLIAM M. KEYS**

Mr. KEYS. Mr. Chairman, I would like to thank you and members of the committee for inviting me to speak here today, and I am grateful for the opportunity to discuss with you the effect that the multitude of trial attorney-sponsored and politically-backed anti-firearm group lawsuits have had and could continue to have on Colt.

Colt is a company with a time-honored place in American history, and today is engaged in an important and legitimate business. Colt today remains one of the few U.S.-owned suppliers of vital military equipment and firearms. We have supplied weapons to our armed forces in every conflict for the past 100 years. In fact, our present product line consists of over 70 percent government and law enforcement weapons, and our handgun manufacturing has now been reduced to two models.

I would like to state up front that we consider ourselves to be a very responsible gun manufacturer who is clearly concerned with gun safety in all areas and against any illegal use of firearms. Nevertheless, Colt and other legitimate gun makers currently face unfounded lawsuits from approximately 30 cities and counties and other entities in predominantly local and State courts across the country.

We have been burdened with an unusual number of discovery requests seeking every document in our possession. In our defense, waves of lawyers have descended on Colt and other manufacturers, scouring every aspect of our business in order to respond to these requests.

The fact of the matter is that the sale of firearms by companies like Colt is lawful. Congress has properly recognized that firearms serve an important, legitimate, and necessary purpose, including military, law enforcement, sporting, collector and self-defense uses. Does this mean that firearms like any other manufactured product doesn't get misused? Of course not. But Congress and other political entities have responded to the misuse of firearms by criminals and others by passing an extraordinary array of laws and regulations.

Additionally, manufacturers like Colt are continually seeking to educate firearm users regarding the risks, proper use, and safe storage of firearms. In fact, death from accidental or criminal misuse of firearms is now and has been at historical lows, raising serious questions about the motives of the trial lawyers and others behind these lawsuits.

Evidence suggests that the best method of achieving even further reductions in firearms misuse is to increase the enforcement of existing laws, which number approximately 40,000 in this country, and to provide additional staffing of law enforcement bodies like the Bureau of Alcohol, Tobacco, and Firearms.

Instead, local governments, who already have the power and authority to regulate the very issues against which they now complain, have brought these lawsuits. Each of these cities can seek through legislation to require guns sold within those cities to have any design feature they would like, as well as control of distribution requirements. They can even ban sales on firearms if they so choose.

Mr. Chairman, we feel litigation should not be used to replace the will of the people and those laws enacted by the legislature. In fact, the first judge to consider these issues fully, Judge Ruehlman, in Cincinnati, agreed only a legislature has the power to engage in this type of regulation which is being sought.

It appears the hidden agenda of the backers of this litigation is to put us out of business. And despite the lack of merit in these lawsuits, they may succeed even before we have the opportunity to obtain complete vindication in these many lawsuits in courtrooms around the country. The legal fees that the industry has and will incur to defend against these lawsuits have and will be astronomical. Sources of investment in our legitimate businesses are being discouraged and driven away. This is a very serious concern to us. Insurance providers threaten not to renew policies, and the manpower and time requirements of our executives and employees required to defend Colt in this litigation seriously disrupt our daily business operations.

In short, municipal firearms litigation threatens the very existence of legitimate businesses like Colt, and in the case of Colt a business clearly important to the national defense. We are only one of two suppliers of the M16 rifle and the sole supplier of the M4 carbine to the U.S. military, as well as our allies. We are continually working with the military to develop new products to protect our armed forces. We believe, in fact, that we remain a major U.S. military supplier because of our ability to provide the highest quality products at a reasonable cost. It is less expensive for the U.S.

Government to buy from a commercial business supplier than it is to maintain a supplier who supplies only to the military.

Another aspect of our business that is jeopardized by the plaintiffs trial attorney is the development of the personalized handgun. Colt has long been a company known for its ingenuity and skill. Since Colt's rebirth in the mid-1990's, we have placed great emphasis on the development of high-tech safety options, including the so-called "smart gun." As many of you know from previous press accounts, we began working on this project several years ago.

In summary, Mr. Chairman, I would state that we consider ourselves to be a responsible gun manufacturer. For the future of Colt, we would like to assure our position as the premier manufacturer of small arms to our military and our allies. We are uneasy and troubled by the fact that we and other companies in the future may be driven out of business by a wave of lawsuits even if the courts find out that the plaintiff's case has no merit.

Mr. Chairman, myself and every other member of the Colt family is horrified when children take the lives of other children, and other law-abiding citizens suffer death as a result of gunshot wounds. But passing new laws and putting our company out of business is not the solution to solving this social problem. Rather, the best method of achieving even further reductions is to increase the enforcement of existing laws and provide additional funding for law enforcement bodies like the Bureau of Alcohol, Tobacco, and Firearms, and to continue development of safety programs like the "smart gun."

Thank you.

The CHAIRMAN. Thank you, General. We appreciate it.

[The prepared statement of Mr. Keys follows:]

PREPARED STATEMENT OF LT. GEN. WILLIAM M. KEYS, USMC (RET.)

Thank you Mr. Chairman and Members of the Committee for inviting me here to speak. I am grateful for the opportunity to discuss with you the affect the multitude of trial attorney sponsored and politically backed anti-firearm groups lawsuits have had and could continue to have on Colt. Colt is a company with a time honored place in American history and today is engaged in an important legitimate business. Colt today, remains as one of the few U.S. military suppliers of vital military equipment and firearms. We have supplied military weapons to our armed forces in every conflict for over 100 plus years. In fact, our present product line consists of over 70 percent government and law enforcement weapons and our hand gun manufacturing has now been reduced to only two models. I would also like to state up front that we consider ourselves a responsible weapons manufacturer who is clearly concerned with gun safety in all respects and against any illegal use of firearms.

Nevertheless, Colt and other legitimate gunmakers currently today, face unfounded lawsuits from approximately 30 cities and counties and other entities in predominantly local state courts around the country. In connection with these lawsuits, Colt has been served with extraordinarily expansive and burdensome discovery requests seeking virtually every document in Colt's possession related to the design, manufacture and marketing of firearms—military and otherwise. In our defense, waves of lawyers have descended on Colt and other legitimate gun manufacturers, scouring every corner and aspect of our business in an effort to respond to these unreasonable requests. Indeed, the trial lawyers and anti-gun groups, who crafted and are behind these ill-conceived lawsuits, seek only to cripple, maim and, if possible, destroy legitimate businesses like Colt. And one would believe increase their personal gain in the process. In a *U.S. News* report dated November 1, 1999, about the litigation, Lester Brickman, a legal ethicist at the Benjamin N. Cardozo School of Law in New York properly pointed out that: "They [the plaintiffs' trial lawyers] \* \* \* have invented a formula where they get megabucks \* \* \* for being a superlegislature and creating policy to their liking without regard to the right of the electorate to make the ultimate decisions about public policy."

The fact of the matter is that the sale of firearms by companies like Colt is lawful. Aside from its Constitutional foundation, it has long been the will and considered judgment of the United States Congress that the manufacture and sale of firearms should be permitted. Congress properly has recognized that firearms serve important, legitimate and necessary purposes, including military, law enforcement, sporting, collector and self-defense uses.

Does this mean that firearms, like any other manufactured products, don't get misused? Of course not. But, Congress and other political entities have responded to the issue of firearm misuse by criminals and others by passing an extraordinary array of laws and regulations. Additionally manufacturers, like Colt, also have continually sought to decrease the likelihood of misuse by seeking to educate firearm users regarding the risks, proper use and safe storage of firearms. In fact, death from accidental or criminal misuse of firearms is now and has been at historic lows, raising serious questions about the motives of the trial lawyers and others behind these lawsuits. Moreover, the evidence suggests that the best method of achieving even further reductions in firearms' misuse is to increase the enforcement of existing laws which number approximately 40,000 in this country and provide additional funding and staffing of law enforcement bodies, like the Bureau of Alcohol Tobacco and Firearms.

In sharp contrast to the considered judgment and actions of Congress, however, the backers of the Municipal Firearms Litigation are now attempting to circumvent the Legislature and turn to the courts to have them declare unlawful that which Congress has determined should be lawful and to prevent law abiding citizens—and, perhaps, even the military—from obtaining U.S. manufacturers products. Instead local governments who already have the power and authority to regulate the very issues against which now they complain have brought these lawsuits. Each of these cities can seek, through legislation; to require guns sold within those cities to have any design feature they would like as well as control the distribution requirements. They can even ban sales on firearms if they would like. Mr. Chairman, litigation should not be used to replace the will of the people and the Legislature with respect to these issues of public policy. In fact, the first judge to consider these issues fully, Judge Ruehlman in Cincinnati, Ohio agreed by only the legislature has the power to engage in the type of regulation which is being sought by the City here.

It appears that the hidden agenda of the backers of this litigation is to put us out of business and, despite the lack of merit in these lawsuits, they may succeed even before we have the opportunity to obtain complete vindication in all these many lawsuits in courtrooms around the country. The legal fees that the industry has and will incur to defend against these lawsuits have been and will be astronomical. Sources of investment in our legitimate business are being discouraged and driven away. Insurance providers threaten not to renew policies. The manpower and time commitments of our executives and employees required to defend Colt in the litigation seriously disrupt our business operations.

In short, the Municipal Firearms Litigation threatens the very existence of legitimate businesses like Colt and, in the case of Colt, a business clearly important to the national defense. While Colt's Manufacturing is one of the oldest manufacturers in the world, it also is one of the few remaining U.S. suppliers of military weapons. Our company's historical relationship with the U.S. Armed Forces remains today one of the focal points of our business. We are one of the two suppliers of the M16 rifle and the sole supplier of the M4 carbine to the United States military, as well as, many of our allies. In fact, we are continually working with the military to develop new products to protect our armed forces and bring them the highest technology available. We believe, in fact, that we remain a major U.S. military supplier because of our ability to provide the highest quality products at a reasonable cost.

One of the reasons we are able to do this is because of the efficiencies we achieve as a result of our commercial business which consists of our Match Target rifle, our classic handguns and our law enforcement sales. In fact, the Army conducted a study in 1994 and has produced several documents thereafter, which recommend maintaining Colt as the sole supplier to the military because of our successful commercial business. It is less expensive for the U.S. government to buy from a commercial business supplier than it is to maintain a supplier who supplies only the military.

The Municipal Firearms Litigation will not only have a negative affect on our ability to supply the military at a more reasonable cost, but if it forces us out of business, it also will leave the military without an experienced base to turn to during a time of crisis. In the opinion, of the Department of Defense, it would take two to five years and significant government investment to return any of today's weapon systems to their current level of operational reliability should we loose this present capability.

Another aspect of our business that is jeopardized by the plaintiffs' trial attorneys is the development of the personalized handgun. Colt has been a company long known for its ingenuity and skill. Since Colt's re-birth in the mid 1990's, Colt has placed great emphasis on the development of high tech safety options, including the so-called "Smart Gun." As many of you know from the numerous press accounts of our project, we began working on this program several years ago. In 1998, we received a grant for \$500,000 from the National Institute of Justice to further this process. Colt has also invested a significant amount of its own funds into this program.

In comparison, the army currently which is developing a new firearm with electronics on board and, despite their cost overruns, the project received over \$15 million for research and development this year, a significant amount more than the funding we received from the Department of Justice. Viewed from that perspective, the \$500,000 the government has awarded us clearly is only a small part of an investment to move this program to a commercially viable product. Nevertheless, because of our concern for safety, our company is committed to its development. Unfortunately, the very municipalities, which are suing us who, believe we are not interested enough in safety are the ones who may prevent us from completing this project. The heavy financial burdens of the Municipal Firearms Litigation clearly will continue to impede our progress and possibly jeopardize its very existence.

In summary, Mr. Chairman, I again state we consider ourselves to be a responsible gun manufacturer. And for the future Colt, now New Colt Holding Company, is intent on ensuring its position as the premier manufacturer of small arms to our military and allies throughout the world and most particularly, we seek to be the supplier of choice to our military. In the furthering interests of gun safety we will continue to develop the Smart Gun to the extent possible in the current costly legal environment and to work with any organizations both public and private who have a legitimate interest in gun safety. We have a new management team who together, will with our labor force share the vision for a successful future. Our union, which is approximately 70 percent of our workforce, has remained loyal because of their workmanship and pride in our product through our recent complicated period of readjustment.

We are uneasy and troubled by the fact that we and other companies in the future may be driven out of business by a wave of lawsuits, even if the courts eventually find out that the plaintiff's cases have no merit. We feel Tort law should not be used to achieve a narrow political goal that can not be achieved through legislative means.

Mr. Chairman, myself and every member of the Colt family is horrified when children take the lives of other children or other law-abiding citizens suffer death as the result of gun shot wounds but passing new laws and putting our company out of business is not the solution to solving this social problem. Rather, the best method of achieving even further reductions in firearms' misuse is to increase the enforcement of existing laws and provide additional funding and staffing of law enforcement bodies, like BATF and continue development of programs like the "Smart Gun".

Thank you very much for allowing me this opportunity.

The CHAIRMAN. Mr. Josten, we will turn to you now.

#### **STATEMENT OF R. BRUCE JOSTEN**

Mr. JOSTEN. Mr. Chairman, members of this committee, I am Bruce Josten, Executive Vice President of the U.S. Chamber of Commerce. I appreciate the opportunity to testify today before the committee and request that my full statement be entered into the record.

Government-sponsored litigation is a topic that has recently been thrust again into the public spotlight. Following President Clinton's directive in this year's State of the Union Address, Attorney General Janet Reno filed the Department of Justice's lawsuit against tobacco manufacturers.

Government-sponsored litigation is also appearing in a growing list of industries. Numerous lawsuits have been filed by local jurisdictions against the firearms industry, as we just heard. Rhode Island has filed a lawsuit against the manufacturers of lead paint,

and other jurisdictions are expected to file shortly. Some in the plaintiffs bar have been vocal in announcing additional targets for litigation—alcoholic beverages, pharmaceutical products, and even auto manufacturers, to name but a few.

The effects of these lawsuits are far-reaching and they pose serious threats to American business, their employees, their shareholders, as well as the communities they operate in and the economy at large. We need prompt action by Congress to stop governments from abusing their power to tax legitimate businesses through litigation or, where the rule of law is against them, to strip certain fundamental legal rights from the companies they are suing.

Why are governments abusing their power to litigate against legal industries and legitimate activities? We believe the answer is three-fold. First is the potential for massive settlement awards, such as the success of the States in recovering over \$240 billion from tobacco manufacturers.

The second is the relative ease with which governments have been able to partner with some trial lawyers willing to finance and initiate these suits. The services of these trial lawyers are frequently secured under contingency contracts and they are willing to take these cases because of the possibility of a massive jackpot at the end of the litigation. For example, the 5 firms that represented Texas are attempting to share a \$3.3 billion award from an arbitration panel, though Texas is challenging that fee.

The third reason is the ability to make policy decisions through litigation. Exploiting their alliance with a mere handful of like-minded government officials, some of the members of the plaintiffs bar are today in a unique position to bypass legislatures, if not usurp their authority, and determine public policy through the courts. As former Labor Secretary Robert Reich asserted, “The era of big government may be over, but the era of regulation through litigation is in.” The Chamber believes that these policy decisions should be left right where they belong, in legislatures.

The incentives for unfair government-sponsored litigation are clear, but how is this process actually carried out? First, a particularly legal, albeit unpopular industry is targeted. Next, a campaign to vilify that industry occurs. Third, lawsuits are filed in multiple jurisdictions. Finally, in some instances we are also beginning to see a particularly troubling trend. Some governments, at the request of their trial lawyer allies, have taken the extraordinary step of enacting legislation targeted at these legal industries to, in effect, guarantee victory in the courts.

In the Florida tobacco litigation, for example, this political phenomenon resulted in the enactment of the Medicaid Third-Party Liability Act which played an enormous role in forcing settlements by tobacco manufacturers. This unprecedented legislation stripped the defendant companies of their legal defenses. In Maryland, a similar outcome was achieved when the State’s general assembly enacted legislation almost identical to Florida’s. Maryland has become embroiled in a dispute with its outside attorney, Peter Angelos, who is claiming that the State agreed to pay him 25 percent of the settlement.

Maryland’s State Senate President Thomas V. “Mike” Miller, Jr.’s response to Mr. Angelos’ claim was, “Mr. Angelos agreed to ac-

cept 12.5 percent if, and only if we, the State of Maryland, agreed to change tort law, which was no small feat. We changed centuries of precedent to ensure a win in this case.” This example highlights how governments have, in fact, become super-plaintiffs by removing legal defenses and other fundamental rights from legal industries that they are suing.

We need prompt action. The list of businesses targeted for this type of litigation grows longer each day. One way to combat the unfair government-sponsored litigation is, in fact, for Congress to pass S. 1269, the Litigation Fairness Act. This simple yet effective legislation sponsored by you, Mr. Chairman, and Mitch McConnell and other members of this committee would do much to stop some of the more abusive parts of this new trend.

I believe it is important to say first what this legislation does not do. It does not bar any lawsuits by governments against private defendants. It does not place any caps on recoveries that may be obtained, nor does it limit any attorney fees. What it does do is ensure a level playing field where the government cannot make itself a super-plaintiff at the expense of defendant companies.

Unfair government-sponsored litigation has the potential to bankrupt entire segments of the American economy. Congress and State governments must take action to stop this abusive practice. Passage of the Litigation Fairness Act would preserve the authority of Congress to set national policy and maintain the principles of accountability. The Chamber and the Nation’s business community endorse this legislation and will work to help secure its enactment.

Thank you, Mr. Chairman, for the opportunity to testify.

The CHAIRMAN. Thank you so much, Mr. Josten.

[The prepared statement of Mr. Josten follows:]

#### PREPARED STATEMENT OF R. BRUCE JOSTEN

##### INTRODUCTION

Good morning, I am Bruce Josten, Executive Vice President of the United States Chamber of Commerce with responsibility for the U.S. Chamber’s Institute for Legal Reform and the National Chamber Litigation Center. The U.S. Chamber is the world’s largest business federation, representing more than 3 million businesses and professional organizations of every size, in every business sector, and in every region of the country. The central mission of the Chamber is to represent the interests of its members before Congress, the Administration, the independent agencies of the federal government, and the courts. The mission of the Institute for Legal Reform is to reform the nation’s justice system to make it more predictable, fairer and more efficient while maintaining access to our courts for legitimate lawsuits.

On behalf of the U.S. Chamber of Commerce, I appreciate the opportunity to testify before the Committee. Government-sponsored litigation is a topic that has been thrust into the public spotlight. Following President Clinton’s directive in this year’s State of the Union Address, Attorney General Janet Reno filed the Department of Justice’s lawsuit against tobacco manufacturers. But unfair government-sponsored litigation is also appearing in a growing list of industries. For example, numerous lawsuits have been filed by local jurisdictions against the firearms industry and Rhode Island has announced its intent to bring a lawsuit against the manufacturers of lead paint. Other jurisdictions are expected to file their own lawsuits as well.

Some in the plaintiffs’ bar have been vocal in announcing additional targets for litigation: alcoholic beverages, pharmaceutical products and auto manufacturers to name a few. The effects of these lawsuits are far-reaching and pose serious threats to American businesses and their employees, as well as the economy at large. We need prompt action by Congress to stop governments from abusing their power to tax legitimate businesses through litigation, or to strip certain fundamental legal rights from the companies they are suing.

## PROBLEM OF GOVERNMENT-SPONSORED LITIGATION

So why are governments abusing their power to litigate against legal industries and legitimate activities? The answer is threefold. Some believe it is the potential for massive damage and settlement awards, an alliance between some government officials and outside trial lawyers seeking huge contingency fee awards, and the ability to obtain policy objectives that may otherwise be impossible to achieve.

Clearly, the first factor is the success of the States in recovering over \$240 billion from tobacco manufacturers. The state tobacco settlement will result in States receiving pay-outs in the billions of dollars over the next 25 years; monies which will likely be spent on projects not connected to alleviating tobacco-related health costs. Further, the Justice Department's suit seeking equally as large amounts can be construed as tacit approval by the federal government of legal actions, which serve as primary sources of additional revenue.

The second factor leading to unfair government-sponsored litigation is the relative ease with which governments have been able to partner with some trial lawyers willing to finance and initiate these suits. The services of these trial lawyers are frequently secured under contingency contracts that do not require any immediate outlay of cash, and allow the government to avoid the financial risks associated with initiating speculative litigation of this type. The outside trial lawyers are willing to take these cases because of the possibility of a massive payout at the end of the litigation.

For example, in Mississippi, one law firm has been awarded \$304 million for its involvement in that State's tobacco lawsuit (the total fee awarded to all lawyers who represented Mississippi was \$1.4 billion). The five firms that represented Texas are attempting to share a \$3.3 billion award from an arbitration panel, though Texas is challenging their fee. The single law firm that represented Minnesota was awarded \$440 million over two years. In addition to the sheer amount of legal fees involved, these contracts have been the source of other controversies. For instance, allegations arising out of Texas' contract to the five law firms are currently under investigation by Texas' attorney general and the FBI. This partnership of trial lawyers and government officials has led to unprecedented political clout by the plaintiffs' bar.

The third factor leading to these lawsuits is the ability to make policy decisions through litigation. Exploiting their alliance with a mere handful of like-minded government officials, some members of the plaintiffs' bar are in a unique position to bypass legislatures and determine public policy through the courts. For instance, the firearms industry is relatively small when compared to other targets of these lawsuits and cannot possibly pay the huge damages that are sought in these types of cases. Many believe that these particular suits seem to be more about achieving policy goals that could not be obtained through other means (such as the legislature). As former Labor Secretary Robert Reich described in an editorial earlier this year, "the era of big government may be over, but the era of regulation through litigation is in." The Chamber, however, believes that these decisions should be left where they rightfully belong—in the legislative bodies.

## HOW THIS PHENOMENON WORKS

The process through which unfair government-sponsored litigation develops into cash bonanzas is a predictable one. First, a particular legal, albeit unpopular, industry is targeted. The firearms manufacturing industry is a good example. Despite their own failure to reduce handgun violence in the nation's urban centers, mayors in cities such as New Orleans and Boston have expressed interest in lawsuits targeted at manufacturers. In New Orleans, the city itself released more than 7,000 guns confiscated from lawbreakers back onto the streets without many of the safeguards they demand from gun manufacturers. In Boston, 3,000 handguns were resold, with no conditions attached, even though that city has endorsed a theory which would hold vendors liable for displaying so-called "willful blindness" to what happens to guns after they have been sold.

Nevertheless, after targeting the industry, some trial lawyers and public officials become emboldened to pursue litigation. As was the case when New Orleans Mayor Marc Morial announced his city's lawsuit, numerous states and localities, sensing a potential for some financial gain and the ability to achieve a policy objective they could not otherwise achieve, jumped on the bandwagon.

Finally, in some instances we are also beginning to see a particularly troubling trend. Having become ideologically invested in the notion of holding the industry accountable for alleged wrongdoing some governments, at the request of their outside trial lawyer allies, have taken the extraordinary step of enacting legislation targeted at these legal industries to, in effect, guarantee victory in the courts.

For example, in the Florida tobacco litigation, this political phenomenon resulted in the enactment of the Medicaid Third-Party Liability Act. Not only did this measure strip defendant companies of the traditional common law tort defenses that have been essential to ensuring fairness in the American civil justice system for over two hundred years, it also relieved the State of its obligation to identify injured parties on whose behalf it claimed to be suing. Although this statute later had significant portions repealed by the legislature, and others invalidated by the Florida Supreme Court, it played an enormous role in forcing settlements by tobacco manufacturers on terms which were disproportionately in the government's favor.

In Maryland, a similar outcome was achieved when the State's General Assembly enacted legislation that contained provisions almost identical to Florida's. Like the Florida statute, it permitted the state to seek compensation for sums paid for smoking-related illnesses without identifying victims, or producing them in court. Also like the Florida statute, the Maryland law abrogated centuries old common law tort defenses such as assumption of risk, thus prohibiting tobacco makers from making the claim that smokers may have caused their own illnesses by choosing to smoke. This new statute was not to be tested in court, however, since Maryland joined in the national settlement.

Subsequently, Maryland has become embroiled in a dispute with its outside attorney, Peter Angelos, who is claiming that the state agreed to pay him 25 percent of the settlement amount under his contingency contract. If the contract is upheld, he stands to gain \$1 billion. To bolster his argument that Mr. Angelos is only entitled to a mere 12.5 percent, Maryland State Senate President Thomas V. Miller, Jr. made an astonishing assertion. "Mr. Angelos, in my opinion agreed to accept 12.5 percent if and only if we [i.e., the State of Maryland] agreed to change tort law, which was no small feat. *We changed centuries of precedent to ensure a win in this case.*"

This example highlights how governments have become "super-plaintiffs" by removing legal defenses and other fundamental rights from the legal industries they are suing.

#### FAR REACHING NEGATIVE EFFECTS

Defenders of government-sponsored lawsuits and the liberal use of contingency fees to initiate them claim that our system of justice dictates that plaintiffs with fewer resources be given an opportunity to have their lawsuits against wealthy corporate defendants heard. They would also say that in these lawsuits the government stands in the place of those individuals injured by allegedly defective products, assuming the risks of litigation that the victims are not themselves equipped to assume. But does that accurately characterize what these government-sponsored actions are about?

In the Florida, Maryland, Vermont and Mississippi tobacco lawsuits, the state governments did not merely "stand in the place" of the parties who were alleged to have been injured by defective products. Rather, through the manipulation of their legislative and judicial processes, these jurisdictions altered procedural rules and substantive laws to ensure legal victory, exercising rights that even the alleged victims would not have had. The end result was not surprising.

The chilling effects of potential lawsuits on the economy have been widely documented. According to the Public Policy Institute, tort costs in 1996 were estimated at over \$163 billion. This amounts to a "tort tax" of \$2,400 annually for a family of four. Government-sponsored lawsuits, bolstered by laws that tilt the playing field in the favor of the government will only serve to heighten this effect. Congress should act now to ensure that the civil justice system is not further corrupted. Inaction at this crucial stage will result in additional harm to American business and our nation's ability to compete on a global level.

#### WHY NO BUSINESS IS SAFE

We need prompt action. The list of businesses targeted for litigation grows longer each day. For example, last month, Rhode Island's Attorney General expressed his interest in pursuing the manufacturers of latex products for compensation for allergies caused by their rubber products. Even fast food establishments are beginning to experience the initial negative campaign that often precedes and accompanies these types of lawsuits.

A 1997 RAND study on punitive damages reports that "most business decision makers focus on the worst-case scenario and will go to great lengths to avoid exposing their companies to large financial losses and potential bankruptcy." This means that even in cases in which defendants have little or no genuine liability, companies are forced—by the threat of large punitive awards—to reach a settlement. Pro-

ponents of government-sponsored lawsuits capitalize on this willingness to settle and are in effect, taxing businesses through litigation. The American business community is in dire need of a comprehensive measure which will ensure basic fairness of process when they are under attack from government officials seeking to raise revenue and trial lawyers hoping to increase their personal fortunes.

#### SOLUTION

A direct means of solving this problem of unfair government-sponsored litigation is for Congress to pass S. 1269, "The Litigation Fairness Act." This simple, yet effective legislation sponsored by you, Mr. Chairman, and Senator Mitch McConnell and other members of the Committee, would do much to stop some of the more abusive aspects of this new trend.

I believe it is important to state clearly what this legislation does not do. It does not bar suits by governments against private defendants; it does not place "caps" on recoveries that may be obtained; nor does it limit attorneys' fees.

What this legislation would do is ensure a level playing field where the government cannot make itself a super-plaintiff at the expense of defendant companies. This would mean that in many of these lawsuits, governments could not unfairly stack the deck against defendant companies by depriving them of their legal defenses.

If enacted, this legislation would ensure that if a covered government entity files suit to recover funds expended by that entity on behalf of a third-party, such as a Medicare or Medicaid patient, it would only be entitled to the same rights as an individual suing that defendant. In essence, this would mean that in many of these lawsuits, governments could not unfairly stack the deck against a defendant industry. A defendant in such a suit would have the same defenses as those available if an individual had sued that defendant. These include access to affirmative defenses such as assumption of risk and comparative negligence. In addition, it would prevent the government from being able to aggregate dissimilar claims, use broad statistical evidence to prove causation, and determine damages based on market share.

The Litigation Fairness Act would apply to any industry sued by a covered governmental entity (including the U.S. Department of Justice) under the legal theories just discussed. It is not about protecting any single unpopular industry. Instead, this balanced and equitable legislation would ensure that the customers, employees and shareholders of all defendants sued by a government entity in these types of lawsuits will be treated fairly by the judicial system and not have the rules changed to their detriment in the middle of litigation.

#### CONCLUSION

Unfair government-sponsored litigation has the potential to bankrupt entire segments of the American economy. Congress and state governments must take action to stop this abusive practice. Passage of the Litigation Fairness Act would preserve the authority of Congress to set national policy and maintains the principle of accountability. The U.S. Chamber and the nation's business community endorse this critically needed legislation and we will work to help secure its enactment into law.

Mr. Chairman, thank you for the opportunity to testify today. I would be happy to respond to any questions the members of the Committee may have.

The CHAIRMAN. Let me just ask you, Professor Turley, can you expand on your testimony as to what Congress can do to resolve the policy and constitutional problems arising out of these policy-driven governmental lawsuits? How can Congress protect its prerogatives under the Constitution?

Mr. TURLEY. Thank you, Mr. Chairman. The funny thing is that Madison actually envisioned the problem that we are having today; he envisioned it all too well. Throughout our history, there has not been a Congress that didn't want to act as President, there has not been a President that didn't want to act like Congress, and there haven't been judges that didn't want to act like both.

Madison saw that as a very likely thing, so he gave to the branches the ability of self-defense. It is a unique aspect of the tripartite system because it is held together by sort of inverse pressure. He expected the branches to defend their constitutional terri-

tory. He anticipated it. The greatest danger is not when one branch tries to usurp the powers of another branch. It is when there is not an act of self-defense, and that is what we have with the tobacco litigation.

Madison gave a great number of possible responses to Congress. They included most importantly the power of the purse. Nothing concentrates the executive mind as much as pulling the strings on the purse. On top of that, it gave Congress oversight responsibility and the ability to legislate directly. But the most important thing is that there is a misconception that it is the courts that protect the separation of powers. Madison expected that Congress would be at the forefront of protecting its own power, as the President is at the forefront of protecting the executive's power.

But there is an enormous vacuum which forms when Congress acts by acquiescence and allows this type of circumvention to occur. And once again, it doesn't matter what the subject is and it doesn't matter where you come out on this. It is dangerous to a system which depends upon all the branches being vigorous and jealous of their own authority.

The CHAIRMAN. Thank you.

Mr. Myers, let me just ask you one. I understand that there was a September 24, 1999, press release by the Physicians Committee for Responsible Medicine urging the Justice Department to go after the so-called, "big meat." In the press release, the president of this organization states, "An estimated 1.3 million Americans die of cancer, heart disease, and other diet-related causes each year. It's time we looked at holding the meat producers and fast-food outlets legally accountable."

Now, you have said on a number of occasions that tobacco raises unique issues that justify a Federal lawsuit, but apparently others don't see how tobacco is so unique in terms of health care issues. Doesn't this press release justify our serious concern about the dangerous precedent the Department of Justice is setting with this tobacco lawsuit?

Mr. MYERS. Obviously, I can't comment on a press release.

The CHAIRMAN. Sure, you can.

Mr. MYERS. But let me give you an answer because you and I agree it is vitally important that the Department of Justice's suit be solidly founded in the law. Now, in this case the Federal Government has cited a number of different claims. They have at least as much merit as the claims that the States did, and in critical respects.

You have emphasized the importance of reliance on statute. Well, in 1996 Congress amended the Medical Care Recovery Act to make clear that the U.S. Government had an independent cause of action when a third party causes an injury for which the Federal Government pays the bill. What the key difference is that the Department of Justice in the tobacco case is relying on solid statutory grounds, rights and authorities that Congress gave it, in moving forward. That is exactly the type of division of responsibility that I would think you would want.

Now, if the Department of Justice wanders off and we begin to look at different types of things where it is not solidly based, well, two things. One is the courts will slap them down. I have no doubt

about that. I have witnessed that enough, and it will happen quickly in cases that are truly frivolous. I have faith in the courts, as I know you do.

Second, if they really move off the area where there is a solid statutory basis, well, then Congress should intervene, but I don't believe that has happened with the tobacco case here. Now, anybody can issue a press release and advocate that the Department sue anybody. You and I have engaged in debates, not between us, but listened to debates for years where the tobacco companies said, if you impose regulation on us, then it is not only going to be meat, but it is going to be—and then we have a laundry list down.

The good fortune is that we have public officials who have sound judgment, and I trust them to be able to divide the line between a product which, when used as exactly as intended, kills; to divide the line with an industry who, based on the documents that you have helped to bring out, now make clear that they engaged in a concerted conspiracy to lie to the American public. There is a distinction there that we can rationally draw, and I trust the Department of Justice and the courts to do it, and for you to understand when that line has been crossed.

Mr. SCHWARTZ. Senator Hatch, may I speak to that?

The CHAIRMAN. Sure.

Mr. SCHWARTZ. At the end, Matt used the same rhetoric and I was glad he did, the mantra that was used to distinguish the tobacco suits over and over and over again. The distinction was that tobacco was the only product used as intended that can harm you. But you talked about food products. I have arteriosclerosis. If I eat hamburger, if I eat cheese with pizza, it can kill. At the age of 21, 25 percent of men already have arteriosclerosis.

The marketing of food products with fat is used as intended. People don't throw french fries; they eat them. So the distinction is one without a difference. It just happens to be that it is unpopular probably right now to go after fast food, and it is popular right now to go after tobacco.

Mr. MYERS. Senator Hatch, could I just have one quick response because I think it is very important? The tobacco industry's behavior itself ought to distinguish it from responsible industries in this country. From documents that are in the congressional record, we know that 40 years ago they sat down together and conspired to engage in a campaign to deceive the American public about what they knew about their product, about how addictive their product was, about their interest in children. Now, I would hope that we don't have other industries that have engaged in that type of behavior, and I would certainly hope that we don't design our laws to protect industries that do.

The CHAIRMAN. Mr. Turley, do you have any comment?

Mr. TURLEY. Well, you know, what is interesting about this exchange is I expect that James Madison is smiling. The question is where does this belong? At the beginning, Senator Durbin made a passionate and I think compelling argument for his side, but he also said what are they afraid of? Why are they afraid of presenting this to a jury of American citizens?

Well, the question can also be asked, what are some afraid of submitting this to the representatives of those citizens? That is

what the Constitution presupposes. What you are hearing is a wonderful debate by two wonderful advocates, and they belong here and this body should make a resolution as to what has the most power. But if we are going to return to a system of government by litigation as opposed to government by legislation, then our Constitution becomes something of a noble lie.

You know, that is the violation of the covenant that we made not just with the Framers but with each other. And so I think it is a great debate. It is in the right place. The question is, is this body going to assume responsibility to decide that debate.

The CHAIRMAN. Let me go back to you, Mr. Schwartz, for a minute, and then if I can just ask two more questions, I am going to turn the rest of the time over to the distinguished Senator from Alabama.

Let me turn your attention, Mr. Schwartz, to the government lawsuit against the tobacco companies, particularly the RICO count. My understanding is that, in general, the law will not allow third parties such as the government and health care and pension plan suits to sue for damages that grow out of harm to individual smokers who are covered by the plans or whose medical care is paid for by the government.

Such lawsuits are termed, as I understand it, derivative lawsuits and are considered too remote because the third parties cannot establish that the alleged harms were proximally caused by the defendants. Is that right or wrong?

Mr. SCHWARTZ. It is right. I will submit to the record—I have just completed an article on the remoteness doctrine in the *Cornell Journal of Law*.

The CHAIRMAN. We would like to have that, but to many—

Mr. SCHWARTZ. It is remote. Indirect economic harm under RICO and under the common law is deemed too remote. That is a core doctrine of law, it is hornbook law. It isn't some type of thing to debate. The theories used under the RICO count are brand new. Asking to disgorge profits because there has not been full disclosure in advertising could apply to any industry just about in the United States.

The CHAIRMAN. Well, to many this tort concept is very confusing. Let me just ask the following related question. Why shouldn't the United States be able to sue the tobacco companies for recoupment of medical costs which it has shelled out? Aren't the Federal Government and the States and localities who bring such lawsuits being harmed?

Mr. SCHWARTZ. I think that their right to sue is not questioned. Some of the earlier remarks by the Senators were really addressing a different issue as to whether the government can sue. The question is what is the government's right when they do sue, and is their right greater than the individual who is hurt. Law for 240 years did not somehow make the government a super-plaintiff. If you do that, you change the whole fabric of American law.

An example that anyone here would know is in the workplace, a worker is injured. That causes an employer harm; he has got to pay workers compensation. And you know businesses. That can be plenty of money. It can be \$100,000 with one case. But the employer's right to sue is not better or greater than the worker. He stands

in the shoes of the worker with all the defenses that would be applicable to him.

What is new about these cases is it is making the State a super-plaintiff, getting the money before the injured person can. And things have changed in tobacco litigation. Individuals are winning some cases. With the government getting greater rights to sue, with any industry, assets can be exhausted by government lawsuits with greater power than individuals before people who are hurt. So the answer to your question is, sure, they can sue, but by what right does greater power devolve on the government?

If you want to do that, that is fine. Senator Reed earlier brought up a bill. You should debate that bill, and debate it right. I found Mr. Schumer's point that we have a peculiar way of electing people, that somehow that makes this forum inappropriate—well, he got elected and so did other people. This is the forum with the bright lights and this is the forum where the cameras are on. When one is in a court and you have a court do this, a court is dark. There is one other person at the podium. They do not hear the full implications of what is going on.

So if a court decides that a State should have greater power than an individual, it is doing so without the informational base to make that decision. If you want to do that with the Reed bill, do it. If you want to do it against tobacco, but do it, but it should be done with the lights on, not with the lights out.

Mr. TURLEY. Mr. Chairman, could I add one thing to something Victor said?

The CHAIRMAN. Yes.

Mr. TURLEY. We have disagreements between us on some tort issues, but we agreed on this one. The Supreme Court laid out the test for the Federal Government in claiming a right to sue in a case called *Standard Oil*, which I know you are familiar with. In *Standard Oil*, the Court rejected creative arguments, in this case arguments by analogy to tort common law. The Court said that mere creativity in trying to come up with a reason to sue is not enough, that the executive branch must go to Congress and get the right to sue.

And the only difference between the tobacco litigation and *Standard Oil* is the pretense of a statutory basis. But any statute can be commandeered to create a pretense. The statutes used in the tobacco litigation, I don't think anyone argues, have no evidence of congressional intent that they are to be essentially a parallel system to Medicare. So we see a collision here with a doctrine established by the judicial branch to try to keep the executive branch as part of that dialogic process, that Madisonian process. And so it is a little curious to look at these theories.

Mr. MYERS. Senator Hatch, I can't cite quite the same way that my two learned colleagues can, but I think it is very important. One is that the Federal Medical Care Recovery Act was designed in such a way to overcome the problems in the *Standard Oil* case, and effectively does so.

Second, I believe the Department of Justice suit here, the use of RICO, takes into full account the Supreme Court's decisions that relate to the extent to which there must be a proximate cause be-

tween the injury of the government, not a derivative injury, the injury of the government, and the purpose for which it sues.

And, third, it is important to understand in this case that the RICO claim is an equitable claim in this particular case, so it took into account many of these problems. Now, we are not going to resolve the legal issues here today. I understand that, but I think it is important to understand that the Department of Justice's suit was carefully done based upon an existing law, not breaking new ground, not even being creative in its use of the law. We all may disagree with it, and I think the appropriate place to resolve that is in the courts and I think that is where they will.

The CHAIRMAN. Well, let me just ask one other question of you, Mr. Schwartz, and that is cannot the government plaintiffs in these suits sue under a theory of subrogation? Is there any statute that grants the United States subrogation rights in its suits against the tobacco companies?

Mr. SCHWARTZ. I think under the MCRA statute, they can make an argument clearly that they have the rights that an injured person has. I have never seen in MCRA anything there—and I don't want to have a debate on the issue—that gives the government greater substantive rights than a smoker or a drinker or somebody exposed to lead paint. It is just not there.

So they could bring a subrogation claim, if they wished, on behalf of those smokers just the way every employer in America, when it has to recoup for injuries to workers, are permitted subrogation claims. And no employer in the history of the United States has gone into court to assert some type of super power that would be greater than the individual who was injured in the workplace. We differ, Matt. This is new, and subrogation is the remedy that is appropriate.

The CHAIRMAN. Well, let me just ask you, General, one question. I recognize you as a true hero. You are one of the few recipients of the Navy Cross. You have led people into battle. You have done a lot of things. You commanded the 2nd Marine Division in Operation Desert Storm during the Gulf War and you are a true American hero. You are now an executive officer of a major gun manufacturer.

I believe you testified that there are over 44,000 firearm control regulations on the books and that Colt abides by all of these pertinent to its operations. Now, you say that Colt is a good citizen and has been developing the so-called computerized "smart gun," which may reduce firearm accidents and crimes using firearms because only the owner of the firearm is able to use it. Yet, Colt is being sued for negligence.

When I went to law school, negligence was in part defined as a breach of a duty of care or an unreasonable behavior by the defendant. Now, unless somebody has changed that, that is still the law. Would you answer the charge that Colt has been negligent? Has it sold or distributed its products in such an unreasonably risky manner that lives have been lost and crimes have been committed?

Mr. KEYS. We don't agree with that, Senator. We agreed that, in fact, we are not negligent. We have obeyed every law. We don't distribute to anybody who does not have a Federal firearm license.

Clearly, the laws on the books, if administered correctly, have shown that it reduces crime in every area.

The CHAIRMAN. Well, let me put this another way. Has Colt directly harmed the city plaintiffs in such a way as to warrant a lawsuit?

Mr. KEYS. In our opinion, no. We are willing to work with the cities in any way we can to make a safer product. We will work in any way, but we don't feel that we are negligent.

The CHAIRMAN. What does Colt do when it finds out that one of its products has been used in the commission of a crime?

Mr. KEYS. Well, we are not a law enforcement agency, but we would go out and work with the Federal agency that is seeking to investigate the crime. We would provide any serial numbers that they asked us to. We would work with them in any way possible to ensure—

The CHAIRMAN. You would fully cooperate, in other words?

Mr. KEYS. Yes, absolutely.

The CHAIRMAN. Now, one of the points that you made was that you have not only been a good corporate citizen, but you have supplied arms for our military in almost every war.

Mr. KEYS. Yes, sir, we have, and we are very proud of that.

The CHAIRMAN. And you have done it in a low-cost, modern, efficient, and technically astute way.

Mr. KEYS. Yes, sir.

The CHAIRMAN. What would be the economic impact on Colt and other firearms companies if these—well, let's just limit it to Colt—if these lawsuits by the municipalities prevail?

Mr. KEYS. If these lawsuits were to put Colt out of business, then, in fact, it would take 2 to 5 years to reestablish the manufacturing base for the small arms of this country and to our armed forces, and it would cost considerably more.

The CHAIRMAN. Well, as the leader of a company that is manufacturing firearms for the military and other purposes, what should we in the government do to stem this tide of unwarranted crime?

Mr. KEYS. Well, we would hope, sir, that you would pass legislation that would preclude companies like us who are not negligent and are trying to just make a product that satisfies the law from being sued in this instance. We feel that we have adhered to every regulation that is now on the books.

The CHAIRMAN. I understand that settlement talks have been held between the gun manufacturers and the municipalities. Can you comment on that?

Mr. KEYS. Well, we have worked with them. We have not agreed on anything. There are some things I think we could do, but we have not reached a consensus on any of them yet.

The CHAIRMAN. One last question to you, Mr. Josten. You said in your testimony that no business is safe from these types of governmental-inspired lawsuits. Could you amplify on that? What businesses do you think may be next?

Mr. JOSTEN. Well, 2 years ago, sir, I began asking that very question myself. Who is next? And subsequent to that time, the firearms industry clearly is one. The lead paint industry has become another. The trial lawyers in a March article in the *New York Times* suggested many others, including the health care industry.

There are other reports from other trial lawyers mentioning the entertainment industry. Victor Schwartz has pointed out the automobile industry has been mentioned. The fast food industry has been mentioned by others.

The CHAIRMAN. You seem to be saying no industry is immune if this kind of legal theory prevails.

Mr. JOSTEN. What we are concerned about, Mr. Chairman, is the distortion of law, the changing of law in midstream, as I tried to highlight in my testimony, which clearly stacks the deck in behalf of government-sponsored litigation to go after legal industries. And clearly, with some of the creative theories that we are seeing employed and that have been discussed here on this panel today, in our opinion, no CEO, no company should feel secure today as this begins to take root in our society.

The CHAIRMAN. Well, thank you.

Senator Sessions, I wonder if you would come up here and take over the hearing. I am going to have to leave, but you can finish off the questions.

Mr. MYERS. Senator Hatch, could I just make one comment before you leave?

The CHAIRMAN. Sure.

Mr. MYERS. I think one of the most important points that should come out of today's hearing is that we not do this as a juxtaposition that there is either an opportunity for government lawsuits to hold industries accountable or for Congress to act.

As I said in our testimony and what I would hope that we could do is find a way to work with Congress to solve legitimate public health problems, particularly in tobacco, and to recognize the proper role of the courts, and carefully define both. I don't see that they have to be in opposition as we move forward in this process, and I don't think we should see that there are government lawsuits just because Congress didn't act and that Congress should act to curtail lawsuits and not solve these other problems.

The CHAIRMAN. As we can see, there are legitimate issues here, very serious issues here. There are issues involving not only the future of law and application of law in this society, but whether or not our separation of powers is going to be maintained in a reasonably decent way.

I think you have all been very interesting. This has been a very interesting panel. It is a very interesting set of issues. I am a great believer that sometimes, through litigation, you can solve problems, but on the other hand there have to be limits to everything and we have to have the laws be reasonable in ways that work, not just ways that benefit one side or the other. So this has been a very interesting hearing, and we will continue to consider these issues as much as we can.

I am sorry that I have kept you so long, Senator Sessions, but I will turn the rest over to Senator Sessions. Thank you all for being here. You have been wonderful witnesses.

Senator SESSIONS [PRESIDING]. Thank you, Mr. Chairman, for your leadership and concern and scholarship concerning the rule of law.

I do really think it is important for us to recognize, as some of you have suggested, that we have got to preserve, fight for, and de-

fend the rule of law. This changing of procedural rules, and so forth, blithely this way and that way have tremendous consequences. When we start changing 200-plus years of established precedent that jeopardizes entire industries, when the Congress of the United States or State legislatures haven't chosen to act—and not choosing to act is an act—then I think we have got some serious problems.

We have lawsuits in America today deciding about air bags in some county in some State somewhere that will probably bind the entire automobile industry. That would be better done, in my opinion, in full hearings, in the light of day, in the Congress of the United States by people who can be voted out of office if they don't do their duty.

With the matter of gun manufacturing, to me that is breathtaking in its concept. Historically, if I have a gun and I aim it at somebody and it blows up and knocks out my eye, I can sue the gun manufacturer because it didn't perform. But if I aim it at somebody and it shoots as it is supposed to, you don't sue the gun manufacturer. You sue the person who aimed it if he aimed it in the wrong direction. I mean, that is fundamental law. That is what America is all about. This idea that mayors can gather together and sue a gun manufacturer because the guns do what they are created to do, and they are legal, protected by the Constitution, in my view, is stunning.

Let me just ask you, General Keys, when you distribute a Colt handgun, you indicated they go to licensed gun dealers.

Mr. KEYS. Yes, sir.

Senator SESSIONS. Who licensed those dealers?

Mr. KEYS. The Bureau of Alcohol, Tobacco, and Firearms. It is a Federal bureau.

Senator SESSIONS. The Federal Government licensed these people who distribute the firearms?

Mr. KEYS. Yes, sir.

Senator SESSIONS. And they tell them who and what and how to distribute them, is that right?

Mr. KEYS. Absolutely.

Senator SESSIONS. Then how in the world can somebody think that Colt is responsible for maldistribution, when the Federal Government passes the laws and creates the agencies to supervise the laws to do it? To me, that is stunning.

Mr. Josten, you mentioned changing the law. In Florida, as you are aware, one of the better lawyers in Florida was interviewed by John Stosel on "20/20" and he asked about the tobacco lawsuit there that made the attorneys \$3 billion in legal fees, over \$3 billion. And they asked him about the change in the Medicare law and Mr. Stosel said, well, we did it by changing the law.

And Stosel said to Mr. Levin, well, did the legislature understand what they were doing? Oh, no, they never would have done it; it was a technical thing. Then he asked Mr. Levin, did it make a difference in the lawsuits, and he answered, oh, God, yes, it was a slam dunk.

So I guess what I am saying is I guess you could blame that on the legislature, couldn't you, Mr. Myers? They passed the law without knowing what was in it, but isn't there potential abuse here?

Mr. MYERS. You can't have it both ways, sir. You can't both want to say the court shouldn't do it and the legislature shouldn't do it. There are some important questions, though, that are raised as well, and I can only speak to tobacco, and that is whether the law is used to address corporations that engage in wholesale wrongdoing. I would hope that we wouldn't disagree that that is an appropriate use of the law.

And in the tobacco case, we have concrete evidence that they have engaged in precisely that type of activity, to the injury of your kids and my kids. That is something that I would hope that our law enforcement officers would be aggressive in attacking.

Senator SESSIONS. Well, what do you think about the gun manufacturers, Mr. Josten? I want to ask Mr. Keys; I know how he feels about it. Do you think that approach jeopardizes—you have indicated it does—can you give me any concrete examples of how it may jeopardize other industries, and do you agree with my analysis on that?

Mr. JOSTEN. I completely agree with your analysis. With respect to the firearms industry, as I believe has been well reported, they are nowhere near the size and financial stature of the tobacco industry. And the bets are, as we see jurisdictional lawsuits filed across the country in multiple locations, that that will essentially bring them to financial settlement as a way to avoid bankruptcy.

What we are watching take place is a prostitution, it seems to me, of everything that this country stands for. You can't have governments, as you just cited, in Florida be duped into changing a law in midstream on the bet of financial rewards at the end of the stream. And what we are seeing in Florida now, I think, is a very challenge to what that legislature did. But what it did do, as you pointed out, is forced settlements. It forced huge sums of money to be put on the table as a way to get out from under what was beginning to occur.

The President earlier this year waved his finger at the entertainment industry which I cited earlier. I think the trial lawyers are being—and I almost hate to say it this way—entrepreneurially creative, sir, in how they are approaching this. It is not a far stretch for me—and I am not a lawyer, I am not a legal scholar—to imagine a creative lawsuit against that industry in the name of our children's health.

I mean, you can keep going on and on and on as you destroy over 200 years of principles of the rule of law which have evolved on solid standing on this country, with defenses and legal rights for both plaintiffs and defendants. To see governments jump in, change that in midstream, and literally seize the assets of legal industries—Senator McConnell himself testified earlier he was pleased that it had become difficult to raise taxes. This seems to be a free way to get your hands on bags of tax dollars without having to go through a difficult process under the light of day.

Senator Schumer earlier spoke of his favoring long-held principles of law. So do I. The American business community is probably the single biggest user of lawyers and the courts of law in this country. We rely on the rules of the game. To have them changed in midstream is certainly repugnant. To watch your authority usurped as an elected official to determine the next law and regula-

tion bothers me immensely. Not unlike Mr. Schumer, I too every day am not necessarily pleased with the actions of this chamber or the one on the other side. There are days I am frequently discouraged, but I wouldn't change it.

Mr. TURLEY. Senator, could I note one thing?

Senator SESSIONS. Yes.

Mr. TURLEY. I come to the same conclusion, obviously, as some of the witnesses. I don't think we can blame trial lawyers, frankly. An "eat what you kill" lawyer is operating according to his training, and sometimes they do a lot of good. The people that are blamed are the people in this body for not acting when they see an interstate national issue.

I think that the difference is that we have always had tort law, but in the past products liability cases have focused on a product, not on an industry. The thing that has changed is that whole industries are being sued. In places like Florida, in the *Engel* case, you could actually have an industry hit with as much as \$300 billion worth of punitive damages and unable to put up a performance bond in order to appeal that decision.

So what you have for the first time, I think, is you have a true interstate issue of each of these States adopting mass tort actions that threaten industries. And now, because of these actions, this body has, in my view, the right and the interest to act. And you can legislate on mass tort to remove from class actions on the State level those things that have a national footprint, where there are victims across the country.

Recently, I did an article called "The Litigation Lottery," and that is how this system works. It is a perverse system. It means that if you are first to nail an industry with punitive damages, you could get \$300 billion worth of damages, and then all the other victims in all the other States simply lose because they were not as swift or their State was not as aggressive. Now, that is not good for anyone. It is enormously inefficient.

And so what we have is we have to start thinking of interstate problems as including liability issues. There comes a time when this Congress, in fairness, has to create a Federal process to remove certain cases, not all tort cases, into the system where they could be dealt with by fairness, not by fate as to who wins and who collects.

Senator SESSIONS. I appreciate your saying that. As a federalist, I know you believe in the rights of States to have certain different standards than other States would have. But when things are essentially interstate in nature, such as airbags that are in every county in America, would you agree that that would be an appropriate kind of litigation, a class action case that would be appropriately brought in Federal court?

Mr. TURLEY. Absolutely. Otherwise, you have enormous inefficiencies not just in terms of law, but also the markets. Right now, you have a market which must take preventive action. Dead-weight losses occur. When the market has to respond to 50 different systems, like speed traps, if they get nailed in one of the States, they could gut the industry. What the market then has to do is engage in inefficient preventative efforts. In some cases, that means stocks

go right through the floor. But that is not how the system is supposed to work.

This body has to step in, not in the interest of any industry, but in the interest of creating an efficient and fair process. If it is a national problem, it needs a national solution.

Senator SESSIONS. Well, it is certainly consistent with the Commerce Clause. I mean, this is not a lawsuit over a fight in a local community. You are talking about a lawsuit that affects every automobile or every smoker in America, or every breather of asbestos in virtually every State and community in America. And those things would be appropriate, I think, even those of us who believe in States' rights, to be handled in Federal court, where you have the Supreme Court making the final ruling because it affects the entire United States.

Mr. TURLEY. That is right. In fact, in my testimony I make a proposal in terms of mass tort legislation. It is a modest one in the sense of comparison to other programs, but it is not hard. I mean, we can define those types of cases with this type of national footprint. It is not hard to do that.

I don't understand why there is a question in terms of fairness. Right now, there is nothing fair, nothing logical about the system. I have opposed a lot of tort reform. I believe in tort litigation, but you can't defend the system anymore. I don't know of any merits to a system where you hit a jackpot in Florida and then victims in 49 States are left. And not only that, but once you hit the jackpot in Florida, you can domesticate the judgment and force other States to collect that \$300 billion while your own citizens are left whistling in the wind.

Mr. MYERS. Senator Sessions, we have moved off government-sponsored lawsuits, which I think is important to understand. And before we do just what many of the people on this panel have accused the courts of doing, which is willy-nilly blowing out 200 years of State tort law, we should be very cautious in doing so.

I think one of the concerns I have heard is in one voice I am hearing the applicability of the rule of law. You know, over 45 States sued tobacco companies; only 3 changed the law. The others all relied on the existing State laws. I think we need to be very careful that what we do is not simply say we don't like the outcome, it is tilted one way or the other, because a mechanism has been created to deal with corporations and industries that engage in the type of behavior that most American businesses, I hope, don't engage in. So I think we need to go very, very carefully here so that we don't tilt the law against those people who are recovering so that the balance is proper and careful.

And as it relates to government lawsuits, I think we need to recognize that they have done a great deal of good. We need to ferret out those that have not, but fortunately those that have been brought so far have done an enormous amount of public health good for this Nation.

Senator SESSIONS. Well, I appreciate your position on that. I would just simply say, as Mr. Turley suggests, that it has been and is and remains the burden of the legislative branch to observe the legal system because judges are enforcing the laws we pass for the most part. And if things are out of control, such as in asbestos

where you have almost every company in bankruptcy, or a large number of them in reorganization, and only 40 percent of the money they paid out getting to the victims, then we need to be prepared to ask ourselves can't we legislate something to make it better.

Professor Schwartz, there has been a phrase used, "public policy lawsuit." It strikes me that is a misnomer in itself. It strikes me that a lawsuit, according to all traditions of American law, is an action against two parties or multiple parties over whether or not there is a case of action and damages. It is not a matter of public policy. Public policy is set by the legislative branches. Is that right?

Mr. SCHWARTZ. Well, you went right to the heart of what this hearing, as I understood it from Senator Hatch, is all about. Tort law deals with people who may be injured, individuals, and they go into court and they are compensated for harms, whether it is a smoker or somebody who has driven an automobile or is hurt by a lawn mower. That has been around for a long time.

Robert Reich says we need a new paradigm where courts make public policy, frankly, because you won't, and that is the issue. Is there enough public light on what Congress does and State legislatures do for you to maintain your current role as an equal branch of government, the branch that makes the law? Or have you so abdicated your powers that now courts have to take over?

Now, if the answer is the courts should take over, here is a question to ask people who have that view. Think of laws that you have proposed, sir, or other of your colleagues on your side of the aisle. Should courts enact those laws because Congress doesn't? I worked for a number of years for certain tort reforms that didn't pass here; a statute of repose, for example, for a number of years. It failed, but should courts then decide, if the judges are of the right temperament, that a manufacturer should only be liable for so many years?

If you turn this principle around to ideas and concepts that people who espouse it don't have, you really have the litmus test about where they are. Is it only to be courts as regulators when they are enforcing ideas that are in their political spectrum? That is the problem with courts making public policy, and those are the questions that need to be addressed to Mr. Reich and his colleagues who say courts now should be making public policy because you won't.

Senator SESSIONS. I think you really went to the core of that problem and I agree with you there. Mr. Myers indicated that if the product is used as intended, it kills. I think there are a lot, as you indicated, of other products that do have the capacity to kill if used as intended, and people make choices everyday.

Mr. MYERS. But what prompted these lawsuits was the fact that evidence came public that this industry lied about what it knew, hid the truth about what it knew about addiction, marketed in ways that violated the law, and had the capability of producing a product that killed many fewer people and chose not to do so and hid all of those things. And that is the proper role for a court. It is not a public policy decision. It is an enforcement of the laws, just as if somebody else broke the consumer protection laws, we would ask them to move in. And if corrective advertising was a way to

overcome that problem, we would ask them to do that. In a very critical respect, at least the tobacco cases are not designed to make public policy; they are designed to enforce the public policy.

Mr. SCHWARTZ. I mean, why wouldn't the smoker cases be enough, Matt? I mean, you have followed them and you felt a few years ago—

Mr. MYERS. Actually, Victor, as you know, I have never filed a tobacco lawsuit.

Mr. SCHWARTZ. No; followed them. You have followed this as much as anybody in America.

Mr. MYERS. You know, the government has—

Senator SESSIONS. I think the question Mr. Schwartz is asking is why does the government have to do it? If the person is wronged, why can't the individual be successful?

Mr. MYERS. In this case, we have government programs where we pay for health care costs. We have as taxpayers direct financial interest, and it is those interests that we were protecting. We also as governments—States have different laws on it, but most States have strong consumer protection laws where we give the government a responsibility to come in and enforce wholesale violations of the law. We don't leave it necessarily to an individual to combat a whole industry.

You know, the battle was more lopsided when it was this poor person sitting and having to face five tobacco companies with hordes of lawyers. And the tobacco industry documents say that one of their strategies was simply to out-spend them so that they could never get into the courthouse. But the government has a distinct interest here and I think it is an important one to protect, and I think we should have a very serious discussion about how we draw the line.

Senator SESSIONS. Well, it seems to me the individual has the right; he has traditional tort law. The government has the power to pass legislation, fundamentally.

With regard to tobacco, Mr. Turley, the attorneys general of the United States, utilizing their contracted employees, the plaintiff lawyers who made billions, not millions, hundreds and millions and billions of dollars—they enter into agreements that involve health matters, advertising, free speech questions, and have the people sign on to these things. And one of them, including the judge, were elected to set health policy. Is that correct?

Mr. TURLEY. Well, that is correct.

Senator SESSIONS. Is that the problem we are dealing with?

Mr. TURLEY. Well, that is correct. I mean, you sort of look at today's debate and you say what is wrong with this picture? You have all these people debating this issue, where in a small courtroom in Florida the issue is being resolved by six people selected at random. And so you are left with this question of if this is so divisive, why isn't it here?

And I have got to disagree with Mr. Myers because I feel he is rearguing *Standard Oil*. This is not a question of the government's interest. There is a question of the government's right to sue. The government had an interest in *Standard Oil* and they ultimately were told to create MCRA. I strongly disagree with Mr. Myers about MCRA. MCRA was enacted to take care of a sergeant hit by

truck late one night. It was not created as a parallel system to Medicare.

Mr. Myers and I may agree in terms of where we should go on Medicare, but it doesn't matter what we agree on. It is what the representatives of the people agree. Listen, I have been out of step with Congress before. I don't always like—sometimes I won't even read the paper about what Congress does.

Senator SESSIONS. I don't either. [Laughter.]

Mr. TURLEY. So we are of like mind, but no one said the Madisonian process was pretty. Sometimes you avert your eyes, but it is the process. And so the problem with *Standard Oil* that it addressed is it is never a question of the government's interest. It is a question of the government's right, and that comes down to what Congress thought of with MCRA. MCRA has never been used to recover a dime in terms of Medicare. It has never been used to aggregate interests the way that the Federal claim will require aggregation of interest.

It is essentially a court which will have to carry a great deal of water for the executive branch to avoid it doing what James Madison asked that it does, to engage in a dialogue with the legislature and come up with a majoritarian decision, a decision of the people, not a decision of President Clinton, not a decision of the people in the executive branch.

What is sort of interesting is a lot of my friends in the administration come from public interest backgrounds and they often go to court against a resistant government, and that is fine. But they are now part of the government, they are a branch of the government. It is OK for those of us who go and we try to litigate civil rights or we try to litigate environmental issues as private citizens, trying to interpret statutes.

But when you are part of the government, your responsibility changes, and it is not an easier road at all. And I am afraid that the Federal tobacco litigation has a lot about it that seems intemperate. It is an impulse, but it is the wrong impulse.

Senator SESSIONS. Mr. Josten, I just want to ask you a question here. I want to ask you two questions. One is isn't there a qualitative difference when a private American company is sued by the attorney general of a State than when he is sued by a private attorney, and what kind of pressure is put on those companies when 15, 20, 25, 30 attorneys general sue them in 30 different States? What kind of stress and what kind of analysis does a company like that have to go through?

Mr. JOSTEN. I would say two things. The RAND Corporation study tells us that companies are risk avoiders. So when they begin to look at that activity, they immediately begin to rethink whether they are even going to make that product or put it out in the marketplace.

I find it interesting in General Keys' case that some of the lawsuits against him by city governments and some of the requests they are trying to suggest be made in terms of adjustments to his products none of them made when they wholesaled those products back to Federal firearms-licensed dealers. Nor did they take any responsibility for the ultimate end purchaser, who may—I don't know—have potentially used them in a felony.

Senator SESSIONS. I just want to add there is a traditional rule of law, and I have used it, that you can never foresee an illegal act, a criminal act. A person is never responsible for entrusting somebody with something on the theory that they may commit a crime. You should never expect them to commit a crime, so we have violated that little traditional rule.

Excuse me. I interrupted you.

Mr. JOSTEN. I think part of the analogy here that we see from the business side of the ledger is the trial bar, in concert with some attorneys general, not all, but with some, is very similar, ironically, to us to a union corporate campaign. Go after the company, vilify them publicly, demonize them and their purposes and their products. We are looking at the health care industry, in part, if you will, being tried in the court of public opinion on Wall Street, of all places, where we have trial lawyers actually openly talking about the need to drive down their price and the value of their shares to put pressure on the company to capitulate.

We are seeing some very strange and scary things take place in this country. We already, it seems to me, are the litigation capital of the entire world. We fortunately still seem to be the global leader in the world, and what we are doing in the rule of law is adding brick after brick after brick to a saddlebag on this horse called the American economy. And we are going to slow it down to the point that it is going to affect shareholders' pockets, it is going to start to affect his employees, it is going to affect the community that he is headquartered in.

And I am afraid that up until pain is felt by everybody and they begin to realize the old axiom that there is no free lunch here, only then will the public start to express its outrage openly in terms of what is taking place. Companies are being ripped off.

Senator SESSIONS. You are faced with 10 or 15 attorneys general suing you in States. You have got your stock prices dropping. Maybe others may join. You are getting bad press around, as the media tends to favor the good citizen lawsuit. It does put extraordinary pressure that could cause a company, would you agree, to pay more than they ought to pay? They could say, well, we are going to litigate this for 3 or 4 years. Our stock is going to be depressed. We are going to get bad press. Let's just pay more than we think we ought to pay.

Mr. JOSTEN. I think the temptation is there to pay to get out from under. It is also interesting that some of the newer versions of legislation offered even sweep up in them the trade associations that represent some of these sectoral companies in lead paint, for example. That is an interesting twist to this game as well. It would seem to me if I were representing that industry trade association, I might be reluctant to come here today.

Mr. SCHWARTZ. Senator, I want to speak to your question.

Senator SESSIONS. Please speak up, if anybody does.

Mr. SCHWARTZ. There is a big difference when you walk in a courtroom and your buddy, a woman lawyer or a male lawyer, is over there representing somebody. And you walk in and the plaintiff's lawyer is walking arm in arm with an attorney general. Maybe you have got to be there to really see the difference. This

is assuming that the rules of law were the same, not that the State had some special advantage.

Mr. Myers and I differ about——

Senator SESSIONS. I would just offer when I was a U.S. attorney for 12 years, I didn't say I am Jeff Sessions. I would say I am Jeff Sessions, for the United States of America. That is your client, and it does have a resonance, and for the State of Alabama, as attorney general. So I think there is a qualitative difference.

Mr. SCHWARTZ. Then you don't have just one attorney general that you are dealing with, or 2 or 20, because there can be 40 or 45.

Now, Mr. Myers and I often agree on legal principles, but we disagree on one here today that is very important. No State supreme court, including the Supreme Court of Florida when it looked at that law, said that the government has greater power than the individual. There were some lower courts that did. In my judgment, and in my testimony, I believe they weren't following the law.

A study was done at Cumberland Law School, in your State, sir, which was the most extensive study of legal principles in this area that has ever been done. And the professors who worked on it had nothing to do with the companies; they just looked at the law, and they said that, too. But the combination of lower courts changing the law, 45 or 40 attorneys general coming at you, the bonding between the plaintiffs lawyers and the attorneys general, caused a settlement.

Now, people may say that was a good settlement and it benefited the public, but I think we ought to look at how we got there, how the public got there, and I think there are concerns with that.

Senator SESSIONS. I think we had better finish. Mr. Myers, I think you have made some good points about what do you do with a company who acts fraudulently and deliberately misrepresents. I certainly bear no brief for the tobacco industry, but I am troubled by what happened in Florida or Maryland where they overturned 200 years of law. It seems to me that if things are as the evidence appears that the tobacco companies would have been liable in more traditional ways than some of the ways we are looking at.

I see you want to say something quickly and I will allow you to do that.

Mr. MYERS. Well, let me say something quickly as we end the hearing. It is sort of ironic that I am sitting here with the business leaders of America and I the only one who seems to have any faith in the State attorneys general of this Nation and the State courts of this Nation and the legislatures of this Nation. But that does seem to be the case because they are all unhappy with the result either in the application of current tort principles, or in some cases in legislatures deciding that tort principles aren't functioning properly and therefore need to be changed, or in the case that the State attorneys general have decided that they can perform their law enforcement function more effectively if they join together and look at big issues.

I still come back to a core principle, and we won't resolve it today. I think the Federal Government has solid legal grounds to move forward with its case and it ought to be tested in the courts. I think that there is a line between enforcement of the law and

making policy that is consistent with the Madisonian view, is consistent with our historical view. There may be places where it would cross it one way or the other, and you and I could probably debate that back and forth. I don't think the system is way out of whack.

I do think that as this Nation has become more integrated and problems have become more complex, as corporations have been more removed from their consumers and it has become harder to hold them accountable, that solving these problems has also become more complex.

We do need, in tobacco, comprehensive legislation to truly bring about fundamental change, and I regret that we missed the opportunity.

Senator SESSIONS. You believe that?

Mr. MYERS. Absolutely.

Senator SESSIONS. Apparently, not a majority of the Congress has agreed at this point on that.

Mr. MYERS. That is right.

Senator SESSIONS. They were elected, not you, to decide that.

Mr. MYERS. That is exactly right, and I am not suggesting that.

Senator SESSIONS. And may get unelected, but so far that is it.

Mr. MYERS. Well, that is the case, but I don't believe the need for comprehensive legislation means the courts ought to close their eyes to enforce the laws that currently exist. And I fear that at least the result of what is being proposed by many of the people on this panel today would be just that, and that would be a tragedy for the consumers of this Nation who depend on the State attorneys general and the courts to protect them.

Senator SESSIONS. Well, I would just share this thought with you. Alabama has been at the center of a lot of the debate over this issue, for a lot of different reasons. I have a daughter at Cumberland. I am glad you mentioned that fine law school.

I remember before I was elected attorney general—I will just share this story with you—a lawsuit was filed attacking the at-large election of the Alabama Supreme Court on the theory that it discriminated against minority candidates. The fact was that three African Americans had run for the supreme court, or two at that time, and all had won. We never had one lose a race. But at any rate, the lawsuit was filed and it challenged the way the supreme court was made up and it asked for various remedies.

The attorney general of the State of Alabama got with the plaintiff's lawyer in that case and agreed to a settlement, and the settlement consisted of adding two new judges to the supreme court and having them elected by a committee, even though the constitution of the State of Alabama said there would be nine justices and they were to be elected by the people.

A Federal judge approved that settlement, and so I am thinking you have got several plaintiffs' lawyers and the attorney general of Alabama agreeing to violate the constitution of the State of Alabama. And so when I became elected attorney general, the case was on appeal and I switched sides, and the Eleventh Circuit reversed that.

But I say that to say think about it. As you said, a little group of people—and that settlement is in many ways stronger than a

law passed by the State legislature. It is more difficult to change, especially if it is in Federal court. How big should a jail cell be? How much money should be spent on a mental health patient? So when these settlements occur, there is great power there, and there is a potential that we would be abdicating some of the great powers of a democracy if we allowed that to occur. So we need to think about what is happening.

I believe it is a major public policy issue for us. It is a recent trend that has taken on great momentum, and I think Senator Hatch and Senator McConnell and others are to be commended for confronting it, to having a panel like this, one of the best panels I have seen since I have been here, to discuss it. And perhaps we can figure a way to allow the great principles of litigation to proceed in America, but at the same time protect the separation of powers and the rule of the people.

The record will be open for one week for those who may want to submit additional questions.

Without further ado, we will be adjourned.

[Whereupon, at 1:41 p.m., the committee was adjourned.]

