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OFFICE OF THE VICE PRESIDENT
WASHINGTON

October 1, 1991

NOTE TO ANDY CARD
DAVE DEMAREST
ROGER PORTER
DORRANCE SMITH
TONY SNOW

FROM: BILL KRISTOL *Bk/kc*

Here's the Vice President's original speech on civil justice reform, as well as his remarks today at the American Business Conference. You might want occasionally to include a paragraph or two in the President's domestic agenda remarks.

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pass along
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OFFICE OF THE VICE PRESIDENT

Embargoed until delivered -- August 13, 1991 -- 10:35 a.m. EST

PREPARED REMARKS BY THE VICE PRESIDENT

ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION
ATLANTA, GEORGIA

The ABA is the largest voluntary professional association in the world. And you have many things to be proud of: from your early leadership in reforming and unifying American law, to your longstanding commitment to service through pro bono activities. Through his "Points of Light" program, the President has tried to reinvigorate the great American spirit of volunteerism. Many members of the ABA have been points of light since the day this organization was formed.

It is in the spirit of the early reformers in the ABA that I join you here today. Our goal, as was theirs, is to improve the administration of justice. Chief Justice Burger once termed this "a task never finished," and that is especially so in a country like ours. Madison's "vast and extended commercial Republic" is now more complex, diverse, and mobile than he could have ever imagined. But the ideals of the republic remain unchanged: the rights of the individual are fundamental in America. We take rights seriously.

So when we think about the command of our Constitution's Preamble, to "establish Justice," we have to start at the doors to the courthouse, and keep them open to every American. We owe them a system in which they can resolve their conflicts promptly, effectively, and fairly. And from the hundreds of county courts throughout America, to the Supreme Court in Washington, we also owe it to the people to maintain the independence and excellence of the third branch of government.

That is why we view it as so important that the Senate confirm President Bush's Supreme Court nominee, Judge Clarence Thomas. The ABA knows Judge Thomas. In fact, you've already considered his fitness to sit on the federal bench, and found him qualified just last year. And the Senate has confirmed him no less than four times for high positions in the federal government.

As you know, there's been a bit of opposition to Judge Thomas's confirmation from some interest groups. But in spite of this ideological opposition, I'm confident that my former colleagues in the Senate will consider this nomination fairly and on the merits. I think the great majority of senators will end up agreeing with the former national board chair of the NAACP,

Margaret Bush Wilson, who wrote last week that Judge Thomas's "record will speak for itself and will impress those willing to listen and look beyond misinformed rhetoric." Ladies and gentlemen, Judge Clarence Thomas is an outstanding nominee. He deserves to be confirmed, and I believe he will be.

Today I want to talk about our legal system's impact on the American economy, on our ability to compete. Through the 1990s, we're going to face many obstacles in the global marketplace. Some will come from the outside; we're still seeing unfair practices on the part of some trading partners -- subsidies, nontariff trade barriers, and the like. But there are other stumbling blocks that we can't make excuses for -- because they're our own fault. And that's the way I think we should look at litigation in America today. Our system of civil justice is, at times, a self-inflicted competitive disadvantage.

Every year in America, individuals and businesses spend more than 80 billion dollars on direct litigation costs and higher insurance premiums. When you include the indirect costs, it may add up to more than 300 billion.

This is just one part of the problem. Look at the sheer number of disputes now flowing through our judicial system. One of the most insightful studies of the system is aptly titled, The Litigation Explosion. In 1989 alone, more than 18 million civil suits were filed in this country -- one for every ten adults -- making us the most litigious society in the world. Once in court, many litigants face excessive delays -- some caused by overloaded court dockets, others by adversaries seeking tactical advantage. In addition, many of the costs confronting our citizens are enormous, and often wholly unnecessary. And in resolving conflicts, Americans don't have enough access to avenues other than the formal process of litigation.

Isn't our legal system in need of reform? Can't we improve the delivery of justice to American citizens? With these questions in mind, the President's Council on Competitiveness, which I chair, assembled a Working Group on Civil Justice Reform. I was pleased that the Solicitor General, Ken Starr, agreed to serve as chairman, and he and his colleagues have done a wonderful job. Their Report, which was endorsed unanimously by the Council, puts forward solid reform proposals in a number of areas. We have 50 recommendations in all; some ambitious, others more narrow. But each will help reduce cost and delay in the system, and make it easier for citizens to vindicate their legal rights.

Many of the Working Group's deliberations centered on the issue of Discovery under Rule 26. This reflects the view of many that, as one corporate counsel told us, "discovery is 80 percent of the problem." Anyone who has ever sued or been sued knows

that discovery too often becomes an instrument of delay and even harassment. Unnecessary document requests and depositions can disrupt or put on hold a company's entire research and development program, and the very idea of limits on discovery is outdated. I'm told of one judge who has said his policy is "just to have the parties exchange filing cabinets."

Worse yet, discovery can be a virtually cost-free weapon for the requesting party. That is what we want to change. The Council suggests the following reform. First, to require disclosure of some basic, core information on both sides. Then, to have the parties meet to formulate a discovery plan, with pre-set quantitative limits, approved by the court and changeable only with good cause. Discovery beyond the set limits is permissible -- but only so long as the requesting party pays his adversary's production costs. We serve no purpose by allowing the extreme waste and expense of marginal and abusive discovery under the federal rules. It is time that we bring it to an end.

It's also time to give people a greater right to choose among methods of resolving disputes. We believe the system should provide a "multidoor courthouse," where parties have options other than formal litigation. This idea builds on much of the ABA's important work on this subject. The Council's recommendation is that before the machinery of litigation kicks in, both sides sit down together -- with a mediator, or in a conference where they tell their stories to an experienced lawyer volunteering his or her time. The object would be to probe the issues carefully but informally, and to weigh the chances for concluding the matter as quickly as possible and without a trial. In line with this procedure, alternative dispute resolution would be made more widely available.

Now, this idea will, of course, empower people with disputes, and it'll help unclog the courts. But it will also help preserve relationships that might be destroyed by the stresses of a courtroom fight, and this is something we should all take very seriously. The great Judge Learned Hand once said that he dreaded a lawsuit "beyond almost anything short of sickness and death." A lot of Americans see things the same way. They find the system bewildering, a little intimidating, and frightfully expensive. That is why the Council advises that we do our best to give the American people a multidoor courthouse. After all, the system belongs to them, and it ought to respond to their needs.

On the question of financing litigation, there's been a lot of discussion on the relative merits of a "loser pays" rule. From our law school days, we know it goes by the name, the English Rule. But in fact, it's the rule in virtually every other western country.

The English Rule is grounded in fairness -- in the equitable principle that a party who suffers should be made whole. Where the Rule operates, the parties are encouraged to look more carefully at the merits of their cases. And there's no doubt that it weeds out a lot of frivolous claims and specious defenses.

On the other hand, to apply the rule too broadly could discourage some suits with true merit -- in civil rights and the environment, to name two areas. For that reason, we propose an experiment: to apply the English Rule in federal diversity cases where the plaintiff elects diversity.

There would be two important features to this experiment with the English Rule. First, the amount to be paid by the losing party would not exceed the amount he spent on his own case. This will keep the other side from loading up expenses to penalize the loser. Second, the rule won't be a guillotine; there will be an element of judicial discretion in its application.

Another item of great concern to the Council is punitive damages. These damages, of course, become an issue only after an injury is found and a compensatory sum is calculated. By definition, punitives aren't essential to compensation; in fact, some jurisdictions don't even have them. Most do, though, because for centuries they've been viewed, I think properly, as an effective punishment and deterrent for outrageous conduct.

The problem is that the method of assessing punitive damages has developed over the years without any real structure or limits. Even a casual observer knows that, in the last several decades, punitive damages have grown dramatically in both frequency and size. What began as a sanction only for the most reprehensible conduct has now become almost routine. In California, estimates are that one in every ten jury awards now includes punitive damages, in amounts averaging more than \$3 million. And as these awards become more common, so do the instances of their arbitrary, even freakish application.

Now, as Justice Blackmun wrote in the Pacific Mutual case, there are only modest due process limitations on punitive damages. So the tough issues of reform are left to the political branches. Here is the proposal agreed on by the Council. First, to restore the quasi-criminal nature of punitive damages, they should be awarded in a separate proceeding after the jury has determined liability, and only where there is some element of intent involved. Second, and most importantly, the trial judge would set punitive damages at an amount not to exceed the amount of the plaintiff's actual harm.

This reform will be good in every respect. For starters, it

will preserve the rights of plaintiffs to collect punitive damages in egregious cases, and continue to serve the goals of punishment and deterrence. But it will curtail the randomness of the system -- and restore some measure of certainty to commercial transactions. And, of course, it will leave unchanged the law of compensation.

I've covered for you only some of the high points of the Working Group's report. But the 50 recommendations touch quite a few other aspects of the administration of justice. For example:

- o Changing the rules on expert evidence. We recommend that expert testimony be admissible only as far as it relates to a community of opinion or scientific thought. We think it is time to reject the notion that "junk science" is truly relevant evidence. We're also recommending that contingency fees for experts be eliminated. An expert witness should not be an advocate.
- o Reforming summary judgment. Where it is appropriate to grant summary judgment, it should also be mandatory.
- o Instituting greater flexibility in judicial assignments - to ensure that we have the judges in the places we need them.

A word now about implementation. The Working Group was formed in response to a system we believe is in danger of spinning out of control. For that reason, the Group worked intensively these last eight months, and received input from state and federal judges, scholars, practitioners, and laymen of varying backgrounds. And for the same reason, we have a strong plan for action on the recommendations.

Some of the proposals envision formal legislation, and we will take that to the Congress. In the same vein, we'll be making contact with appropriate officials at the state level, and encouraging them to adopt reforms in their systems. In fact, I'll be presenting some of our recommendations later today to the National Conference of State Legislators. We'll also be communicating with relevant policy groups, and proposed changes in the federal rules will be taken through the proper channels.

And in the executive branch, we intend to take our own advice. The President will soon be issuing an executive order that will apply some of these proposals to the federal government when it engages in litigation. Specifically: to follow the recommendations on expert witnesses; to allow parties in disputes with the government to elect the English rule; and to require a policy-level review of discovery requests.

I'm personally optimistic -- and I know Judge Starr and his colleagues share this view -- that many if not all of the Council's ideas will be adopted. Our inspiration came from the American people: they've seen the problems, they've told us to act, and now they expect us to follow through.

After all, let's ask ourselves: Does America really need 70 percent of the world's lawyers? Is it healthy for our economy to have 18 million new lawsuits coursing through the system annually? Is it right that people with disputes come up against staggering expense and delay?

The answer is no. We are serious about challenging the status quo, and the proposals I've just outlined are offered to inspire dialogue, discussion, and action. Should we succeed, the American people will be the beneficiaries. And so, too, I suggest, will be the legal profession.

This is no time to be timid. If we believe in progress, we must not fear change. And on this bicentennial of the Bill of Rights, we should remind ourselves of the memorable words of Justice Robert Jackson: "Civil liberties had their origin, and must find their ultimate guaranty, in the faith of the people." Our job in government, and your job as leaders in the law, is to strengthen the faith of the people -- in the resolute protection of their rights, and in the effective delivery of justice.

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THE VICE PRESIDENT
OFFICE OF THE PRESS SECRETARY

Embargoed until delivered -- October 1, 1991 -- 2:20 p.m. EDT

EXCERPTS FROM PREPARED REMARKS BY THE VICE PRESIDENT
AMERICAN BUSINESS CONFERENCE
WASHINGTON, D.C.

I'm here today to enlist your help in our newest project: reform in the area of civil justice. In August I gave a speech on this subject to the American Bar Association in Atlanta. I thought it was time to address the legal system's impact on our economy, and on our ability to compete. And make no mistake: that impact is serious. One study found that foreign companies often have product liability insurance costs that are 50, 80, even 90 percent lower than their counterparts in the United States. We also know that liability concerns have caused dramatically higher prices for some everyday items, from stepladders to medicines -- and some beneficial products simply never reach the market at all.

Moreover, we're the most litigious society in the world. We have 70 percent of the world's lawyers. The legal system now costs Americans an estimated 300 billion dollars a year, and it has far too many openings for abuse and delay.

All these factors have obvious implications in an age of global markets, and there are things we can do to deal with them. We can work together to fight new legislation that, though well-intentioned, will only make the litigation explosion worse. We can institute system-wide policy reforms, starting with issues like product liability and medical malpractice, and we have sent legislation to Congress in both of these areas. And we can move ahead with the Council's 50 civil justice reform proposals, which I outlined to the A.B.A.

These proposals include:

- o Discovery reform: to eliminate the use of discovery for delay and harassment, by requiring the requesting party to pay the compliance costs of discovery beyond pre-set limits.
- o Empowering people by making the courthouse a place of real choice -- a "multi-door courthouse" -- where parties have greater access to options other than formal litigation, and where mandatory conferences reduce the number of cases that need to go to trial.
- o Adopting our experimental "fairness rule" in selected types of federal cases. The fairness rule is a simple, straightforward concept: the loser pays the winner's legal fees. The idea is to reduce the numbers of frivolous cases in the federal courts --

cases that have no business taking up the time and resources of the system. The fairness rule will work because it's a simple matter of incentives. People contemplating litigation may think more carefully about it if they are confronted with the notion of paying the other side's legal fees in a losing suit. This would go a long way toward reducing frivolous and nuisance lawsuits. Many would decide that it's better to settle, and many would decide not to file at all.

It is a matter of fair play that the American people should have some relief from lawsuits that harass and intimidate. Too often today, we tend to sue at the drop of a hat. Through this and other reform proposals, let us move toward a new American ethic: Make litigation the last resort, not the first.

o We also propose setting limits on punitive damages. Punitive damages are an effective punishment and deterrent for truly outrageous conduct. But the system has developed over centuries without any real structure or limits. Punitives can now be awarded in arbitrary, unpredictable, and disproportionately huge amounts. In California alone, estimates are that one in every ten jury awards now includes punitive damages, in amounts averaging more than \$3 million. What we want to do is to curtail the randomness in the system, and restore some measure of certainty to commercial transactions.

o Another part of our reforms is to changing the rules on expert evidence: first, to get rid of the kinds of "junk science" that have no business in the courtroom; second, to eliminate contingency fees for experts. It is simply wrong to give the expert witness in a case a stake in the outcome. *hired guns -*

The reforms we've proposed are sensible and well-considered. And I think the responses to our proposals are the best proof of that. Since my remarks to the A.B.A., I've received letters by the bushel from people across the spectrum: everyday workers, managers, academics, judges, entrepreneurs, doctors, and, yes, practicing lawyers. It won't surprise you that these letters have run at about a hundred to one in favor of our proposals. Huge numbers of Americans are saying, simply and directly: "we like these ideas. Now, please follow up!"

Well, we are. Here's what we are doing. We're working right now on federal legislation to implement some of the reforms, and we hope to submit it to the Congress within a few weeks. Among the items covered by the proposed legislation will be the fairness rule, the multidoor courthouse, and other provisions affecting federal courts. In addition, the President is planning to issue an Executive Order to apply some of the recommendations, when possible, to the federal government.

In areas like expert evidence and pretrial discovery, there

will need to be changes in the Federal Rules of Evidence and Civil Procedure. This will ultimately require action by the Supreme Court, after we go through a series of federal committees.

Now, it's just as important to move our reforms forward at the state level, because the states obviously have systems that parallel the federal system. So we're asking state attorneys general, district attorneys, and A.B.A. members around the country to help us implement the parts of the package that fall inside their areas of responsibility. And we're working on model state statutes that will give guidance to the governors and the state legislatures. I might add that I've already brought the civil justice reform issue personally to the National Conference of State Legislators.

The point is: We've gotten off to a good start, and I can tell you this: I am committed, and so is the administration, to a grass-roots campaign to finish the job. That's not to say it'll be easy -- I'm told there have already been fundraisers scheduled to stop us. But this is not a partisan issue, though some will try to make it one. Americans of all stripes -- Democrats and Republicans, lawyers and non-lawyers -- want to see changes in the system.

Special interest groups -- and now, some partisans -- will be out in full force. Already the Democratic Senatorial Campaign Committee has attempted to raise money off of my challenge to the status quo. Their fundraising letter gives an indication of the battle that lies ahead. Let me read you part of it: "If you understand politics, you will understand that the U.S. Senate with its unique rules of procedure may well end up being the last bastion for the protection of the justice system we cherish against an attack spearheaded by the Vice President of the U.S., who clearly intends to try to make a campaign issue of 'greedy' trial lawyers."

I am confident that citizens and legislators on both sides of the aisle will resist the special interest and partisan appeals, and join us in improving our system of civil justice. The public doesn't view this as a partisan issue, and politicians shouldn't either. And I know this about the American people. They understand the issues. They're tired of the excuses; tired of the complaints from those with a vested interest in the status quo.

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Neville are Finance 510 term paper
 Univ. of Texas

Table 8.1. *Lawyers and physicians*

Country	Growth in GNP	Population (1980) (millions)	Ratio of population to physicians	No. of physicians (1980)	Ratio of lawyers (1983) to doctors (1980)	No. of lawyers		GDP (1985)
						(1965)	(1983)	
Algeria	3.2	18.9	2,630	7,186	0.11	80	800	58,180
Argentina	2.2	27.7	430	64,419	0.78	12,000	50,000	65,920
Australia	2.7	14.5	560	25,893	0.27		7,068	162,490
Austria	4.1	7.5	400	18,750	0.12	200	2,200	66,050
Bangladesh	0.0	88.5	10,940	8,090	1.11	8,000	9,000	16,110
Belgium	3.8	9.8	400	24,500	0.5	5,600	12,300	79,080
Canada	3.3	23.9	550	43,455	0.92	14,100	40,000	346,030
Chile	1.6	11.1	1,930	5,751	2.14	5,000	12,300	16,000
Costa Rica	3.2	2.2	1,460	1,507	1.3	723	1,959	3,810
Denmark	3.3	5.1	480	10,625	0.28	2,250	3,000	57,840
Finland	4.0	4.9	530	9,245	0.97	4,475	9,000	54,030
France	3.9	53.5	580	92,241	0.3	14,900	27,215	510,320
Germany	3.3	60.9	450	135,333	0.32	24,300	43,100	624,970
Hong Kong	6.8	5.1	1,210	4,215	0.32	346	1,332	30,730
India	1.4	673.2	3,690	182,439	1.23	70,000	225,000	175,710
Ireland	3.1	3.3	780	4,231	0.59	1,300	2,500	18,430
Israel	3.8	3.9	370	10,541	0.71	3,500	7,500	20,270
Italy	3.6	56.9	340	167,353	0.28	39,400	46,600	358,670
Japan	7.1	116.8	780	149,744	0.09	8,800	14,000	1,327,900
Jordan	5.7	3.2	1,700	1,882	0.37	400	700	3,450
Malaysia	4.3	13.9	7,910	1,757	0.74	750	1,300	31,270
Nepal	0.2	14.5	30,060	482	2.07		1,000	2,340
Netherlands	3.2	14.1	540	26,111	0.15	2,270	4,000	124,970
Nigeria	4.1	84.7	12,500	6,776	0.3		2,000	75,300
Norway	3.5	4.1	520	7,885	0.27	1,650	2,100	57,910
Pakistan	2.8	82.2	3,480	23,621	0.93	11,000	22,000	28,240
Panama	3.3	1.8	980	1,837	0.49		900	4,880
Singapore	7.5	2.4	1,150	2,087	0.47	300	990	17,470
Spain	4.5	37.4	460	81,304	0.68	30,000	55,000	164,250
Switzerland	1.9	6.5	410	15,854	0.21	2,100	3,300	92,690
Turkey	3.6	44.9	1,630	27,546	0.65	10,000	18,000	48,820
U.K.	2.2	55.9	650	86,000	0.62	29,500	53,000	454,300
U.S.	2.3	227.7	520	437,885	1.29	355,000	565,000	3,946,600
Uruguay	0.7	7.4	6,580	1,125	0.27	200	300	4,530

Sources: For the lawyer data see Dunn (1983), International Bar Directory (1985), and Neville (1986). The remaining data come from the World Bank (1982 and subsequent annual reports).

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Black Hole Tariffs and Endogenous(?) Policy Theory



OFFICE OF THE VICE PRESIDENT

WASHINGTON

President's Council on Competitiveness
Fact Sheet on Product Liability Reform

July 24, 1991

"Product liability reform legislation is a top priority for this administration. Our present system is unfair and is a burden on America's ability to compete. It puts a drag on innovation and reduces incentives to develop new, safer products for the consumer. The cost to business is 15 to 20 times higher in the U.S than in Europe and Japan, which means fewer jobs for Americans. And, the system is unfair to victims who receive less than 50% of the money spent on liability cases. Now is the time for Congress to act to reform our product liability system."

Vice President Dan Quayle

July 24, 1991

"By reducing legal uncertainty, the enactment of balanced federal product liability reform will enhance the international competitiveness of American businesses. The legislative proposals now before the House and Senate are an excellent step in that direction."

Secretary of Commerce Robert Mosbacher

July 24, 1991

An Administration Priority.

The Administration is committed to the goal of restoring basic fairness and stability to the product liability laws in the United States. Such reform is essential to business innovation, U.S international competitiveness, and consumer safety and welfare.

- o President Bush, in his State of the Union address, called upon Congress to enact essential product liability reform legislation.
- o Secretary of Commerce Robert Mosbacher testified before the Senate Commerce Committee in 1990 in support of product liability reform legislation.
- o On November 30, 1989 Vice President Quayle announced the

Administration's product liability reform initiative developed by the Council on Competitiveness. The Administration strongly supports the Fairness in Product Liability Act of 1991 (S 640) and efforts to pass similar legislation in the House of Representatives. The Vice President has commended the efforts of Senators John Danforth, Robert Kasten, Jay Rockefeller and Representatives Roy Rowland, Norman Lent, Hamilton Fish, and John Dingell on behalf of such legislation.

Restore Basic Principles of Fairness.

The administration's reform initiative will restore basic principles of fairness to America's product liability system:

- o First, protection of an innocent person's legal right to fair compensation for medical expenses, lost wages, property damage, and other actual losses.
- o Second, elimination of "deep pocket" liability by making each party responsible for non-economic damages attributable to his or her own percentage of fault, so that a person who creates harm to others will know that he or she will be held accountable.
- o Third, cooperation and the prompt and fair settlement of differences should be encouraged through alternatives to costly and time-consuming litigation, which only reduces the compensation available to the injured party.

Strengthen U.S. Competitiveness.

Our current product liability system -- with its excessive litigation costs -- is a self-inflicted burden on America's ability to compete. U.S product liability laws are more onerous than those of other major industrial countries, such as Japan and European nations. Product liability reform legislation can help strengthen U.S competitiveness by requiring clear and convincing evidence before punitive damages can be awarded.

- o The estimated cost of product liability suits in the U.S --\$80 billion per year -- equals the combined profits of the nation's 200 largest corporations.
- o Total U.S liability insurance costs are estimated to be 15 times higher than Japan's and on average 20 times higher than the European nations'. These costs are reflected in higher prices for U.S goods and hamper our ability to compete with foreign manufacturers.

Enhance Product Innovation.

Equally devastating is the chilling effect of the liability system on product innovation. The fear of potential lawsuits deters businesses, especially small and start-up businesses, from introducing new and safer products.

- o Many products are no longer being produced for American consumers -- single-engine aircraft, vaccines against deadly Japanese encephalitis, and gymnastic equipment are but a few examples.
- o Many companies decide against introducing new products. For example, Monsanto will not market an inexpensive, safe asbestos substitute and Genentech declined to go forward with a new hepatitis vaccine developed through biotechnology because of liability risks.
- o 36% of American businessmen in a recent survey state that they stopped some manufacturing as a result of product liability risks. 15% laid off workers and 8% closed plants.

Reform Advances Consumer Welfare and Safety.

Safety and health considerations, the principle rationale for continuing the current system, are undermined by the current product liability regime. Consumers are not always offered new, safer products (like vaccines and the Monsanto asbestos substitute). Also, the costs of excessive liability risks are reflected in higher prices for goods and services.

- o The cost of DPT vaccines rose from \$2.80 per dose to \$11.40 per dose to cover liability insurance costs.
- o In a February, 1990 Consumer News article, Bonnie Guiton, Special Advisor to the President for Consumer Affairs states "These are among the ways in which America's current product liability system works against consumers...Done properly, however, product liability reform can better consumers...."
- o A 1989 Rand Corporation study reveals that on average only 46% of total expenditures from tort lawsuits went to compensate injured parties. In some product liability cases, legal fees and expenses consume 70% of the total amount spent.

For more information please contact: 456-6614

THE PRODUCT LIABILITY ALLIANCE

1725 K Street, N.W., Suite 710

Washington, D.C. 20006

(202) 872-0885

To: John
F & I

①

TO: The Product Liability Alliance

FROM: Victor E. Schwartz and Liberty Magarian
Crowell & Moring
Counsel to The Product Liability Alliance

DATE: October 4, 1991

RE: Senate Commerce Committee Votes to
Favorably Report S. 640

At an executive markup session of the Senate Committee on Commerce, Science and Transportation on Thursday, October 3, 1991, the Committee voted 13-7 to report favorably S. 640 to the full Senate. The vote, which is listed below, was identical to that which occurred on S. 1400 in the 101st Congress.

During the discussion which occurred before the vote, Chairman Hollings repeated his same arguments in opposition to the bill -- that it is a "bad bill"; the federal Government had no business taking product liability law away from the states; the proponents have put forth no data to show that a need for the bill exists; the bill creates uniformity only in favor of businesses.

Senator John B. Breaux (D-LA) called the bill the "Republican big government legislation." He opposed the bill because nothing in the record indicated that it would bring down insurance rates, because the proponents' competitiveness argument makes no sense at all, and because there is no compelling reason for the federal

Government to get involved in this area particularly because insurance laws are all handled by the states.

Senator Gore complained that the bill only creates one way uniformity in favor of defendants. He pointed out that the bill contains restrictions on punitive damages but does not create a right to punitive damages in states where they do not currently exist. He expressed his concern about the FDA defense against punitive damages. He noted a report that appeared in that morning's newspaper about jaw implants, which were approved by the FDA, and inserted in 26,000 people in the United States that break down and cause bone degeneration. Gore was concerned that if the manufacturer of these jaw implants were found "negligent," it would be protected against punitive damages under S. 640.

Senator Ford opposed the bill for a variety of reasons. He made a particular point of the fact that the bill creates federal product liability law without creating jurisdiction in federal courts. He also said that the National Federal of Independent Businesses opposes S. 640 because the workers' compensation offset provision increases workers' compensation costs on small businesses. Ford said that the bill hurts small businesses and only takes care of big businesses. In fact, NFIB supports S. 640, but has specific concerns about the workers' compensation provision which they have raised before.

Senator Hollings offered an amendment which would require reporting to the federal government on the legislation's effect on insurance rates. This same amendment was offered by Senator Rockefeller in the 99th Congress and was incorporated into that

bill without opposition. Hollings cited to the record during the 99th Congress, pointing out that Rockefeller and Ford worked out the amendment and that Stevens supported it. Rockefeller responded that Hollings' description of the amendment's history is correct. Rockefeller said that he would be willing to work with Hollings in passing such legislation in some other form, for example, as a stand alone bill, but opposed Hollings' amendment because he suspects that Hollings was not offering it in order to help pass S. 640. Rockefeller described it as a "death knell amendment." Senator Ford interjected that although he had worked with Rockefeller during the 99th Congress to resolve some of the his concerns with the amendment, he never supported the provision. In the vote on Hollings' insurance amendment, Ford initially "passed," and then after all votes were recorded, changed his vote to "yes" because he was upset that Kasten was pushing the bill through the Committee without accepting any amendments. Hollings' amendment was defeated by a tie vote of 10-10.

The votes on the insurance amendment and on S. 640's final passage were as follows:

<u>Senator</u>	<u>Insurance Amendment</u>	<u>Final Passage</u>
Ernest F. Hollings (D-SC)	Yes	No
Daniel K. Inouye (D-HI)	Yes	Yes
Wendell H. Ford (D-KY)	Yes	No
J. James Exon (D-NE)	No	Yes
Al Gore (D-TN)	Yes	No
John D. Rockefeller, IV (D-WV)	No	Yes
Lloyd Bentsen (D-TX)	No	Yes
John F. Kerry (D-MA)	Yes	No
John D. Breau (D-LA)	Yes	No
Richard H. Bryan (D-NV)	Yes	No
Charles S. Robb (D-VA)	No	Yes
John C. Danforth (R-MO)	No	Yes
Bob Packwood (R-OR)	Yes	No

Larry Pressler (R-SD)	No	Yes
Ted Stevens (R-AK)	Yes	Yes
Robert W. Kasten, Jr. (R-WI)	No	Yes
John McCain (R-AZ)	No	Yes
Conrad Burns (R-MT)	No	Yes
Slade Gorton (R-WA)	Yes	Yes
Trent Lott (R-MS)	No	Yes

The 13-7 vote was a significant victory. It shows that support for the bill is solid. It was also significant that our opponents sent their "heavy hitters" to attend the markup. Ralph Nader and Joan Claybrook attended, as did Tommy Boggs who represents the Association of Trial Lawyers of America. After the markup, we had the opportunity to debate Ralph Nader on some of the issues with the press outside the committee room. We learned that Nader's principal arguments are these: (1) there is "no crisis" or compelling need for the legislation, (2) S. 640 is uniform only to the benefit of businesses, but not in creating rights for consumers (e.g., punitive damages), (3) proponents argue that the bill is "modest," but once it is passed, they will come back with proposals for anti-consumer amendments, (4) U.S. product liability laws have no effect on competitiveness because manufacturers from foreign countries such as Japan are increasingly bringing their businesses into the United States and opening up plants here. Nader indicated that they will propose amendments in the Judiciary Committee. He specifically mentioned the issue of "secrecy agreements" (i.e., an amendment to prohibit sealed settlements and protective orders).

S. 640 will receive a sequential referral to the Judiciary Committee. The length of that referral is being negotiated at this time. The Senate Small Business Committee, which does not

have jurisdiction over the bill, will hold hearings on the effect of product liability on small business during the week of November 11.

DM 7/24

THE PRODUCT LIABILITY ALLIANCE

1725 K Street, N.W., Suite 710
Washington, D.C. 20006
(202) 872-0885

MEMORANDUM

TO: The Product Liability Alliance

FROM: Victor E. Schwartz *and* Liberty Magarian *LM*
Crowell & Moring
Counsel to The Product Liability Alliance

DATE: September 23, 1991

RE: Senate Commerce Committee Hearings on S. 640

The Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation held a second day of hearings on S. 640 on Thursday, September 19, 1991. Consumer Subcommittee Chairman Richard Bryan (D-NV) chaired the hearings which were attended by Commerce Committee Chairman Ernest Hollings (D-SC) and Senators Jay Rockefeller (D-WV), Lloyd Bentsen (D-TX), Robert Kasten (R-WI), John McCain (R-AZ), Conrad Burns (R-MT), Larry Pressler (R-SD), and Trent Lott (R-MS).

The hearings were divided into two parts, the first dealing with the general aviation liability bill and the second dealing with S. 640, the Product Liability Fairness Act. In opening statements, Senator Bryan expressed pleasure that the hearings have been going well and that the Committee was hearing from all sides on the issues. Senators McCain and Burns expressed their support for both bills. Senator Kasten thanked Bryan for holding hearings even though he has not been supportive of the bills. Kasten said that the process was going as it should and that he expected S. 640 to be reported favorably by the Commerce Committee by a vote of more than two to one in favor, and then a referral to the Judiciary Committee. He said that unlike past efforts, there would then be ample time to bring S. 640 to the Senate Floor. Kasten said that some witnesses testifying in opposition to the bill are talking about provisions in bills that were proposed five years ago and that S. 640 is more moderate and balanced. Senator Bentsen, who rarely appears at product liability hearings, said that as a pilot, he has deep concern about what is happening to the aviation industry. Senator Bentsen did not comment on S. 640.

During the first portion of the proceedings on the general aviation liability bill, S. 645, there was an initial panel of two

congressional witnesses: Senator Nancy Kassebaum (R-KS) and Congressman Dan Glickman (D-KS), both of whom are sponsors of the aviation bill. A second panel included Don Bigler, the president of Continental Motors, a major manufacturer of piston engines and Mr. Robert Creamer, Executive Director of Citizen Action, a national consumer "watch dog" group. Their testimonies focused on whether the problems in the general aviation industry were related to the product liability system or to general economic problems in the marketplace. Mr. Creamer, during the question and answer period, stated that he would support mandatory arbitration procedures as a way to improve the system. This comment produced an immediate response from Senator Hollings, whose principal criticism of S. 640 at the prior hearings involved pressure that would be put on plaintiffs to participate in arbitration procedures because they could be subject to a penalty of attorneys fees and costs if a refusal to arbitrate was "unreasonable or not in good faith." Hollings asked Creamer if he wanted to amend the Seventh Amendment to the U.S. Constitution, which guarantees a right to trial by jury. Creamer did an about face from his recommendation about mandatory arbitration procedures and responded that he did not support any procedures at the federal level and that voluntary arbitration procedures are much superior to mandatory. He then said he was against mandatory.

The second portion of the hearings focused on S. 640. There was a single panel of six witnesses, three in favor of S. 640 and three opposed.

**Professor Michael Rustad, Professor of Law,
Suffolk University Law School**

Professor Rustad testified that there is no problem with punitive damages in product liability cases and that there is no need for federal intervention. He said that corporate fears about punitive damages are unfounded because, according to his research, sustained jury awards of punitive damages are very rare. He said that in general, punitive damage awards are not higher than compensatory damage awards and that they only exceed compensatory damages in approximately one third of the cases. He said that his data indicate that jury awards of punitive damages are overturned in 50 percent of the cases. Most punitive damage awards are reversed on appeal.

**Professor Kathryn Kelly, Associate Professor of Law
The Catholic University of America**

Professor Kelly testified in favor of S. 640 and spoke in particular about the punitive damages provision. She discussed the Supreme Court's decision in Pacific Mutual Life Ins. Co. v. Haslip, in which the Supreme Court suggested that there are some due process restrictions on the states' authority to allow punitive damages. She said that all of the Supreme Court justices, in their various opinions in the case, expressed great concern about how punitive damages are awarded today. She

explained that the four areas in which S. 640 addressed punitive damages (the standard of liability; the elevated burden of proof; the issue of defendant's wealth as a factor affecting the amount of punitive damages; and the necessity of specific factors for courts to evaluate the legitimacy of punitive damage awards) are either endorsed by the Supreme Court or spoken favorably about in the Haslip opinion. Professor Kelly explained that when she was in private practice for 12 years, her experience was that the irrationality of punitive damages had a negative effect on settlement. The manufacturers she represented did not factor punitive damages into the value of their cases for settlement because they viewed punitive damages as arbitrary, and this fact made settlement less likely. Manufacturers also were less likely to settle a case if they were accused of punitive damage conduct because they were interested in going to trial to vindicate their reputation. In closing, Professor Kelly urged the Commerce Committee and Congress to respond to the Supreme Court's clear invitation to create rationality in the area of punitive damages.

**Professor Marc Galanter, Evjue-Bascom Professor of Law
University of Wisconsin Law School**

Professor Galanter testified that his studies about product liability litigation show that there has been no "litigation explosion." His studies have focused only on data from the federal courts. He acknowledged that no data specifically about product liability cases are available from state courts. Professor Galanter's studies separated asbestos cases and found that in non-asbestos cases, product liability filings in the federal courts have been shrinking steadily (40 percent decrease) since 1985. He said that all of the increase in product liability filings since 1985 has been attributable to asbestos cases. Although he has no data about state court filings, where most product liability cases occur, he said that "scattered evidence" shows that product liability filings in the state courts are moving in the same direction as in the federal courts.

**Peter Huber, Manhattan Institute, Coeditor of
The Brookings Institution's *The Liability Maze***

Peter Huber appeared in order to provide information about his recent book published by The Brookings Institution, The Liability Maze, which has received substantial attention during the product liability hearings this month. Nicholas A. Ashford of MIT, who coauthored a chapter on the chemical industry, was a witness at the September 12 hearings. Huber explained that the experts who authored chapters in The Liability Maze generally concurred that product liability is not a major factor in promoting safety in most industries and that, rather, the major factors are regulation, market forces, or media publicity. He said that there is an emerging consensus, reflected by the authors, that when product liability becomes arbitrary and uncertain, it ceases to become a specific deterrent against bad conduct or unsafe products and becomes a general deterrent that

slows down growth in an entire industry. In the international context, he reported that there is a move within the European Economic Community to have standards that are more similar to the United States strict liability laws. He explained, however, that there are major differences in our systems, for example, in European countries there is no trial by jury, no contingency fees, and "loser pays" rules. Huber acknowledged that Professor Ashford concluded that there is under deterrence in the chemical industry. Huber said that "Ashford is entitled to his views, but that those views are based on a quite expansive and original concept of social costs." Huber said that by using most conventional concepts of losses associated with accidents, the other authors in the report came to a different and more sound conclusion.

Mr. J. Kendell Few, Few & Few, P.A.

Mr. Few, a plaintiffs' attorney in South Carolina, testified in opposition to the arbitration provision in S. 640. He said that "S. 640 is nothing more and nothing less than a frontal attack on the Seventh Amendment [right to trial by jury]." He argued that, under S. 640, when a person injured by a defective product exercises his "sacred right to a trial by jury" and that is subsequently determined "by a glassy-eyed judge" to be an unreasonable decision, it was unjust to force him to reimburse manufacturers for "the legal fees of a small army of pin-striped briefcase carriers." Mr. Few gave a very emotional and passionate testimony. He may have displeased some senators, however, by his rhetoric and by suggesting that they did not appear at hearings unless television cameras were rolling. Senator Rockefeller said, "We do not find your remarks entertaining." Mr. Few said that he would not know how to respond to his grandchildren when they sat at his feet and asked him "what was it like when we used to have a Seventh Amendment." He appeared to be critical of arbitration procedures in general calling arbitration "the rich man's court."

Professor James J. Henderson, Cornell Law School

Professor Henderson's oral testimony addressed two basic issues: (1) There is an empirical factual basis for concluding that there is a need to reform product liability, and (2) S. 640 is the appropriate response to this need. Professor Henderson, who coauthored an article reporting the results of a study of trends in product liability decisions by courts in the 1980s, testified that there is a need to reform the system. In response to Professor Rustad's testimony that there is a need for more conclusive data about punitive damages, Professor Henderson said "You will wait until hell freezes for conclusive proof." He said that the data regarding judicial decisions and plaintiffs' success rates is enough of a basis for Congress to act.

He said that there has been some improvement since 1985 because since that time, statutes at the state level have approached the problem on a piecemeal basis, and also courts have changed their mood, which is reflected in a lowered number of

product liability filings. He currently is working on a follow-up study using data from the last two years and reported that this new data confirms his previous study.

Professor Henderson then addressed the content of S. 640. He explained that it is not really a "one-way uniformity" bill. He noted that several sections, the discovery rule statute of limitations and the 25-year statute of repose for capital goods, would benefit plaintiffs in a number of states. He said that other sections, the settlement and alternative dispute resolution provisions, the product sellers provision and the workers' compensation offset provision, do not impact plaintiffs' rights. He said that there were only three sections, the punitive damages provision, joint and several liability provision, and alcohol and drug defense, which do cut back on plaintiffs' rights. As to these sections, he believes that the scales of justice have become unbalanced in favor of plaintiffs and that the only way to address that is through legislation that must be somewhat one-sided.

Questions

There was a brief period for questioning of these witnesses. During this time, Senator Hollings reiterated his argument about one-sided uniformity, focusing on a provision in the preemption section which excludes commercial loss claims from coverage of the bill (Hollings apparently feels that this benefits manufacturers because their own disputes involving commercial loss will not be subject to the limitations of the bill) and the alternative dispute resolution procedure provision which imposes penalties on plaintiffs who choose to exercise the right to a jury trial. Hollings asked Professor Kelly why other areas of tort law, including automobile accident cases, medical malpractice, and insurance laws, should not be federalized. Professor Kelly responded that there have been many efforts to enact federal automobile no-fault laws, but such efforts have been unsuccessful. (They have been strongly opposed by Hollings.) Hollings asked Professor Kelly whether she thought that punitive damages would be appropriate in a situation such as the recent crash of a New York City subway killing five people, in which the operator was drunk. Professor Kelly responded that punitive damages probably would be appropriate in such a case because the subway operator had a "conscious, flagrant indifference to safety," the very words contained in S. 640. In response to Hollings' question about how much she would award as punitive damages, Professor Kelly responded that it would depend on many factors including the financial condition of the defendant. Professor Kelly added that Professor Rustad's data that 50 percent of punitive damage awards are overturned by appellate courts indicate that juries are not being given adequate guidelines when deciding punitive damage awards and that this means there has been a breakdown in the system.

Senator Rockefeller, during his period to ask questions, told Professor Rustad that his testimony is "interesting," but the Committee was not interested in the quantity of product liability cases. Rockefeller said that the focus was on the predictability of the product liability system. Rockefeller told Professor Kelly that her point about appellate reversals of punitive damage awards, as reflected in a recent General Accounting study, is very important. Rockefeller asked Peter Huber to comment on Professor Rustad's statements that American emphasis on safety gives us top quality products so that we can compete internationally. Huber responded that he found no demonstrable evidence that the U.S. product liability system gives a competitive edge on safety.

Subcommittee Chairman Bryan asked Professor Kelly to comment on the fact that S. 640 does not provide uniformity with regard to punitive damages because it allows states to decide not to have them at all. Professor Kelly responded that the Supreme Court's Haslip opinion shows a very strong feeling among some of the justices that punitive damages should be abandoned altogether because they do not perform their intended function of deterrence. She said that on the other side of the scale are those who believe that punitive damages do perform their deterrence function. As a result, the Supreme Court concluded that the due process clause did not prohibit or require punitive damages, just that they should be more rational. Therefore, it would be appropriate for Congress to make punitive damages more rational without either requiring or prohibiting them.

Conclusion

Overall, these hearings went very well for our side. Our witnesses were extremely well prepared and articulate. The other side seemed to be more filled with either rhetoric or data -- they did not focus on what is actually in S. 640, with the exception of the arbitration (ADR) provision.

We are preparing a memorandum which explains that the arbitration provision in S. 640 does not interfere with the right to a jury trial, particularly because in existing arbitration programs any party who is unsatisfied with the results of arbitration may reject the arbitration award and proceed to a jury trial. This concludes the Senate Commerce Committee hearings on S. 640. The bill will be brought up for markup at the Committee's next Executive Session which tentatively is scheduled for Tuesday, October 1, 1991.

MOVIES / Jeffrey Staggs

On and off screen, Hulk knows his role

Hulk Hogan should be commended. He, perhaps more so than any other celebrity, understands his responsibility as a role model to children.

The World Wrestling Federation's resident good guy seems to relish this role, as his new movie, "Suburban Commando," demonstrates. A science fiction-action-comedy (get all that?), it stresses family, friendship and personal integrity. In the end, all the bad guys are vanquished, the good guys have come out on top, and the hero takes off into the sunset with the girl.

"Suburban Commando" somehow calls to mind the old Westerns of John Ford. (Did I say that?) It *should* resemble a Sestern, having been directed by Burt Kennedy, an

old Hollywood warhorse who directed a bagful of them, including "Support Your Local Gunfighter," "The War Wagon" and "Welcome to Hard Times."

Mr. Kennedy's first foray into science fiction features Mr. Hogan as Shep Ramsey, an intergalactic warrior who takes refuge on Earth to recharge his ship. His boss tells him to take six weeks off to relax — Shep is a little stressed from having just saved the universe, you see.

In the opening scene, Shep blows up the ship of Gen. Suitor, an evil warlord who wants to rule the universe. Shep's boss also tells him that Suitor has sent two bounty hunters to bump him off.

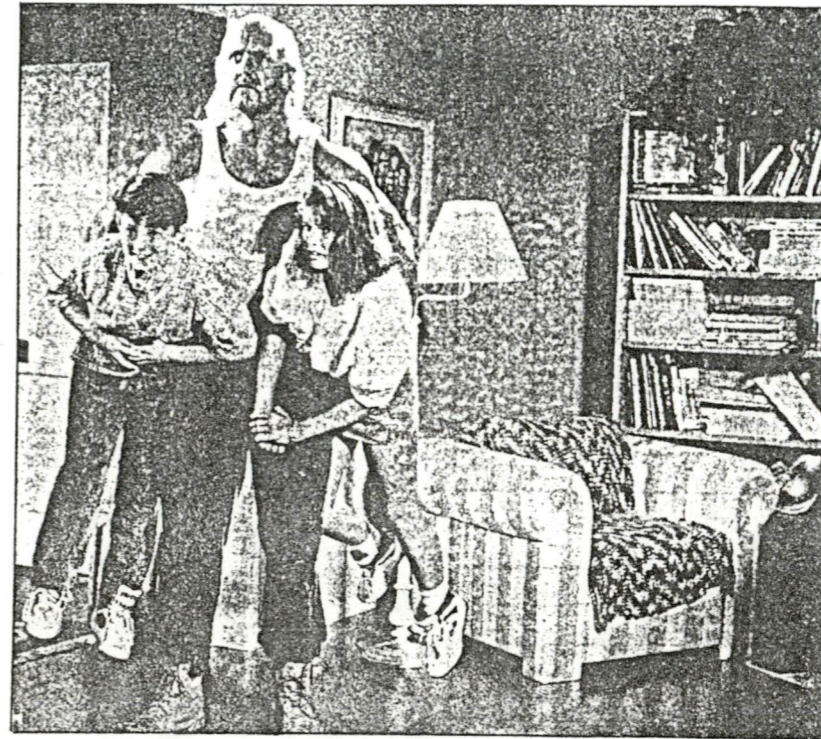
On Earth, Shep rents a room from a suburban family while he works on his ship, hidden in an

abandoned disco. Christopher Lloyd plays Charlie Wilcox, a wimpy, bumbling architect, utterly lacking in self-confidence. Mr. Lloyd adds to his repertoire of wonderfully realized quirky characters — Judge Doom in "Who Framed Roger Rabbit?" the Klingon commander in "Star Trek II," Reverend Jim on TV's "Taxi."

Charlie's wife, Jenny (Shelly Duvall), converts his workshop into an apartment — in one day! — to bring in extra money. Charlie needs, and deserves, a raise. But he is too intimidated by his boss, the deliciously sleazy Larry Miller, to ask for it.

Once Shep settles in, we are given 20 minutes or so of the obligatory what-happens-when-cultures-collide humor: See Shep try to kill the mailman. See Shep try to ride a neighborhood boy's skateboard, only to fall on his tailbone.

And see Shep confront Charlie's roughneck neighbors: These four men build dragsters. Shep moves one of their cars, which is blocking Charlie's driveway. Shep asks if



Hulk Hogan offers Michael Faustino and Laura Mooney a lift.

★ ★ 1/2

TITLE: "Suburban Commando"

RATING: PG (mild violence)

CREDITS: Directed by Burt Kennedy.

Screenplay by Frank Cappello

RUNNING TIME: 85 minutes

MAXIMUM RATING: FOUR STARS

they're going to beat him up, to which the head roughneck responds, shocked and disgusted, "This is the '90s — we're going to sue you." The man then gives Shep a rundown of the legal torture he'll go through.

As Shep, Mr. Hogan doesn't do a whole lot of acting. He just goes with the maniacal persona that has won him so much fame as a wrestler. He doesn't have to work very hard to come across as an alien, either. He is, after all, 6 feet 7 inches tall and weighs 302 pounds. You wanna talk screen presence?

This is a children's movie, so the violence is tame, sometimes even boring. Shep's Arnoldesque one-liners really should have been left out, but most references to other movies is done so knowingly.

Dear President Baker,

Get Your Elementary School
District #48 P.O. Box 200 Beaver-
top Oregon 97005. When
a kid forgets cold lunch they
don't let you call home or when
you forget your ticket in the
class, or you forget your money
at home you don't get lunch.
Can they do that? Write Back

orange 11
Amanda

Donovan
12020 Blakeney Ct.
Beaverton, OR 97005



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TAKE TIME FOR A LITTLE
BEACH THERAPY.

LAW

David Scull,
XXIV, 52;

also CAPITAL
JUSTICE; JU-
PREME COURT.

OF. Bad laws
necessary; and
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ary. (At Pan-
Y., May 20,
Ed. XIII, 449.

It is a capital
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) *Mem. Ed.*

LAW

LAW—VALUE OF. We need good laws just as a carpenter needs good instruments. If he has not tools, the best carpenter alive cannot do good work. But the best tools will not make a good carpenter, any more than to give a coward a rifle will make him a good soldier. (*Outlook*, March 25, 1911.) *Mem. Ed.* XIX, 148; *Nat. Ed.* XVII, 106.

LAW—VIOLATION OF. Every time a law is broken, every individual in the community has the moral tone of his life lowered. (At Tuskegee Institute, Tuskegee, Ala., October 24, 1905.) *Mem. Ed.* XVIII, 473; *Nat. Ed.* XVI, 352.

LAW. See also ADMINISTRATION; LEGISLATION; PROSPERITY.

LAWYERS—CONTRIBUTION OF. A lawyer is not like a doctor. No real good for the community comes from the development of legalism, from the development of that kind of ability shown by the great corporation lawyers who lead our bar; whereas good does come from medical development. The high-priced lawyer means, when reduced to his simplest expression, that justice tends to go to the man with the longest purse. (Letter to W. R. Nelson, July 1912.) *Roosevelt in the Kansas City Star*, p. xxiii.

LAWYERS AS STATESMEN. There is not a greater delusion than the belief that a lawyer is, *per se*, also a statesman. On the contrary, the mere lawyer is rather more unfit than, say, the mere dentist, or mere bricklayer, or mere banker, to be a public man. The ablest lawyer often has had public experience of one type or another which makes him more apt than the ordinary business man to be able to excel in public life; but it is not because he is a lawyer at all; it is because he has great ability and a certain knowledge of public affairs. I could go still further and say that to be a great lawyer is, while a good thing in a judge, very far from being the most important thing. (To H. C. Lodge, April 11, 1910.) *Lodge Letters* II, 374.

LAWYERS. See also JUSTICE; LAW; LEGALISM.

LEADERS—DEMANDS UPON. We, the men who compose the great bulk of the community, wish to govern ourselves. We welcome leadership, but we wish our leaders to understand that they derive their strength from us, and that, although we look to them for guidance, we expect this guidance to be in accord-

T. Roosevelt

LEADERS

ance with our interests and our ideals. *Outlook*, July 9, 1910, p. 508.

LEADERS—DUTY OF. A council of war never fights, and in a crisis the duty of a leader is to lead and not to take refuge behind the generally timid wisdom of a multitude of councillors. (1913.) *Mem. Ed.* XXII, 623; *Nat. Ed.* XX, 535.

LEADERS—NEED FOR. In order to succeed we need leaders of inspired idealism, leaders to whom are granted great visions, who dream greatly and strive to make their dreams come true; who can kindle the people with the fire from their own burning souls. The leader for the time being, whoever he may be, is but an instrument, to be used until broken and then to be cast aside; and if he is worth his salt he will care no more when he is broken than a soldier cares when he is sent where his life is forfeit in order that the victory may be won. In the long fight for righteousness the watchword for all of us is spend and be spent. It is of little matter whether any one man fails or succeeds; but the cause shall not fail, for it is the cause of mankind. (At Carnegie Hall, New York City, March 20, 1912.) *Mem. Ed.* XIX, 222; *Nat. Ed.* XVII, 170.

LEADERS—RESPONSIBILITY OF. Doing our duty is, of course, incumbent on every one of us alike; yet the heaviest blame for dereliction should fall on the man who sins against the light, the man to whom much has been given, and from whom, therefore, we have a right to expect much in return. We should hold to a peculiarly rigid accountability those men who in public life, or as editors of great papers, or as owners of vast fortunes, or as leaders and moulders of opinion in the pulpit, or on the platform, or at the bar, are guilty of wrongdoing, no matter what form that wrongdoing may take. (At Pan-American Exposition, Buffalo, N. Y., May 20, 1901.) *Mem. Ed.* XV, 313; *Nat. Ed.* XIII, 447.

LEADERS—RISE OF. If during the lifetime of a generation no crisis occurs sufficient to call out in marked manner the energies of the strongest leader, then of course the world does not and cannot know of the existence of such a leader; and in consequence there are long periods in the history of every nation during which no man appears who leaves an indelible mark in history. If, on the other hand, the crisis is one so many-sided as to call for the development and exercise of many distinct attributes, it may be that more than one man will appear

Grant/Simon
A:LAWYERS
Draft one
October 16, 1991

**REMARKS: SIGNING OF EXECUTIVE ORDER
ON CIVIL JUSTICE REFORM
THE ROOSEVELT ROOM
WEDNESDAY, OCTOBER 23, 1991
TIME?**

[Acknowledgements]

A little over two months ago, Vice President Quayle outlined the Administration's agenda for civil justice reform before the American Bar Association. ((That speech unleashed a national debate // a flurry of mail here at the White House // and some of the best **lawyer jokes** I've heard in **years**..))

But I ^{am not} ~~didn't~~ come here today to make an easy hit on lawyers. Frankly, I don't think the problem is the lawyers -- the problem is a system spun out of control. The legal system now costs Americans an estimated 300 billion dollars a year, and in 1989 alone, more than 18 million civil suits were filed in this country -- one for every ten adults. **Sadly, we are now the most litigious society in the world.**

In order to restore sanity to our civil justice system, a working group of the Vice President's Competitiveness Council has recommended concrete steps that we can take -- starting today -- to get our legal system back on track. These fifty recommendations include:

- o **Changes in the rules of discovery**, to end unnecessary and burdensome requests;
- o **Adoption of the English rule**, or "loser pays" rule, to weed out frivolous lawsuits in certain areas;

- o **Encouragement of alternative dispute resolution**, so that Americans have more choices than just formal litigation;
- o **Caps on punitive damages**, to end their arbitrary application and outlandish awards;
- o And **changes in the rules on expert evidence**, to end the practice of "hired guns" on the witness stand.

I've named only a few of our recommendations. Some of these proposals require federal legislation, which we hope to transmit to the Congress very soon. ^{we've already} We're moving our reforms forward at the state level too, with the help of state attorneys general, district attorneys, and A.B.A. members around the country. Other proposals require action by the Supreme Court and federal committees. And still others can be implemented by today's Executive Order. This Order will apply some of these recommendations, when possible, to the federal government.

With all that said, let me get to the heart of the matter. We could discuss compensatory and punitive damages, discovery limits, and reforming summary judgments all day long. But that's not really the point. **What's actually at stake here is much more important.**

I'm talking about access to health care and quality of life -- parents having a tough time finding an obstetrician in certain states because of malpractice insurance. Many times, beneficial new products simply never reach the marketplace at all because of liability concerns.

This is also an issue of climbing unemployment and business foreclosures. ~~W~~ we got a letter the other day from an architect in California who wrote, "I have many friends who are going out of business because of fear of lawsuits."

It also affects inflation and consumer prices. ^{Name} the owner of Zaun's Trustworthy Hardware in Iowa wrote to us: "As a business owner myself, the liability insurance is getting out of hand. The manufacturers could significantly lower their prices both wholesale and retail, which would stimulate our economy." One study showed that foreign companies often have product liability insurance costs that are 50, 80, even 90 percent lower than their counterparts in the United States.

Maybe other countries don't have this problem because every other Western democracy has the "loser pays" rule to discourage lawsuits at the drop of a hat. Maybe it's because we have nearly three-quarters of the world's lawyers here in America. Maybe it's because the pop culture in this country encourages lawsuits.

((For example, I don't know if you've seen Hulk Hogan's new movie /// but at one point he asks the bad guys if they're going to beat him up. // You know what they replied? "Hey, this is the '90s -- we're going to sue you."))

The problem is pervasive in our society. Every parent who has signed a boy up for football practice has seen it. Every small business owner who pays ^{liability} insurance has seen it. From the hinderance of new medicines to local bans of fireworks displays

on the Fourth of July, **fear of outlandish litigation is strangling the American Dream.**

Americans understand that civil justice reform means growth, competitiveness, and jobs. People of all walks of life -- Republicans, Democrats, businessmen, factory workers, parents, and yes -- lawyers -- want to see changes in our legal system.

That's why I feel so strongly about these recommendations by the Vice President. It's not a partisan issue -- but I know that already the special interest groups and the partisan appeals have begun to fight us -- it's a matter of fighting the vested interests and changing the status quo to ensure a better and more prosperous life for all Americans.

Today we're taking the first step. And now it's my pleasure to sign this Executive Order.

#

BRAD ZAUN
Owner



We're The Problem Solvers!

6931 Douglas Ave.
Urbandale, Iowa 50322

Bus: 515-276-2434

8-14-01

ent Quayle,

I appreciate your comments about the number of lawyers in this country, it took guts to be so blunt.

The problem is that there are too many mouths to feed in their field.

As a business owner myself, the liability insurance is getting out of hand. The manufactures could significantly lower their prices both wholesale and retail, which would stimulate our economy.

Business is great here in Des Moines thanks to you, and President Bush, keep up the great work!

Sincerely,

Brad Zaun

charles w. yaeger
architect

box 942
big bear lake, calif. 92315
phone (714) 866-2472

AUG. 16, 91

DEAR V. P. QUAYLE

THANK YOU FOR YOUR STAND ON LEGAL
REFORM. I HAVE MANY FRIENDS WHO
ARE GOING OUT OF BUSINESS BECAUSE
OF FEAR OF LAWSUITS.

OUR SMALL TOWN HAD ONE LAWYER,
IT NOW HAS ELEVEN & THEY ARE
ENCOURAGING LAWSUITS AT EVERY
CHANCE.

THANK AGAIN

They must be
breeding!

Charles W. Yaeger



PASCOE BUILDING SYSTEMS, INC.

JOHN B. GROT
PRESIDENT/CHAIRMAN OF THE BOARD

August 14, 1991

Vice President Dan Quayle
The White House
Washington, D.C. 20500

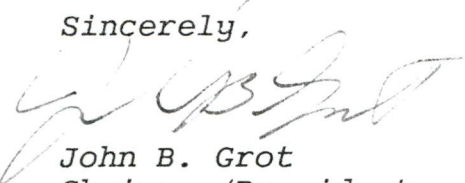
Dear Vice President Dan Quayle:

I would like to tell you how much I support your proposals for revamping the legal system including strict limits on awards for personal injury suits and the elimination of outrageous fees lawyers are collecting allegedly in the name of justice, which is costing all of us dearly.

Having been involved in such frivolous cases as a defendant and having paid the outrageous legal fees to defend myself, I have experienced both the pain and expense, which is virtually without recourse.

The legal system is truly out of control and the lawyers that are milking and bleeding the system and the economy must be stopped!

Sincerely,


John B. Grot
Chairman/President

JBG:cai

cc: President George Bush
Senator Sam Nunn
Senator Wyche Fowler
Congressman Richard Ray

FOR
MORE
THAN **40**
YEARS

MBMA



Dear Vice Pres. Quayle,

August 13, 1991

Thank you for finally speaking out about the horrors of American life via the court system. It is a Sham! I see no end to the blackmail provided by our judicial process. Please, continue to speak out! America will back you!

Warm regards,
Susan Blais



World Federation of Women
740 W. 214 ST., TORRANCE, CA 90502
(213) 320-5464

ation of Women
V. 214 St.
alifornia 90502

ABA

ELSA MCPHERSON-STUART DIRECTOR

8/14/91.

Attn: V. P. Layle -

RE: Admin. Calls for wide
Legal Reforms -

L.A. Times - 8/14/91

Good Show - you're right
So don't stop now -
make it stick -

Elsa Stuart.



1132

August 16, 1991

Dear Vice President Quayle:

Re: The Legal System

I applaud your brave initiative as expressed in your speech before the American Bar Association the other day. If possible I'd like to see the full text.

I almost went to law school 3 times and now own a small over-regulated business. I'm also a CPA and was trained as an economist. I've spent a fair amount of time in court and consider myself a student of the legal system.

I hope that your initiative leads to a commission with a broad mandate to evaluate the efficiency and productivity of our legal system. I hope significant reforms ultimately result.

Among the areas that I feel should be analyzed are:

- Rules of evidence
- Limitations on witness testimony
- Economics based guidelines for compensatory and punitive damages
- Assessment of legal and true court costs
- Contingency fees
- Concepts of strict liability
- Valuation of human life in a social context.

In an antitrust context, I wonder how legal fees can be so high along with an oversupply of lawyers?

Sincerely yours,

David Sandler

Just ask yourself what that means for our country in the years ahead --

for our ability to create wealth, to generate jobs, and to improve the standard of living for the American people.

Here is one person's outlook, from a letter I received two weeks ago:

As a businessman, I can tell you that the basic thrust of the law of the 1980's and 1990's is to discourage enterprise, keep new products off the market, [and impose] a general attitude of "caution rather than creativity."

That letter is but one of the many I've received on this subject from all over the country.

Now, I can't say that all of them have been friendly.

One lawyer from Iowa wrote -- I'm not kidding you --

**"Dear Mr. Vice President ... I met you ... early this year. ... [A
photographer] took my picture with you. ... My wife framed
[it]. ... I have just taken it down. **

**I would mail it back to you, but I don't want to incur the
expense." **

**And he goes on: "I shall search out the photographer who
took our picture and have him destroy the negative." **

**After reading his letter I told my staff: "Put that guy down as
'undecided.'" **

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

May 15, 1991

HEALTH CARE LIABILITY REFORM

FACT SHEET

As part of the Administration's continuing efforts to improve the delivery of health care services throughout our nation, the President today transmitted to Congress the Health Care Liability Reform and Quality of Care Improvement Act of 1991. This new initiative will reduce the costs and increase the availability of quality health care by addressing the problems of medical malpractice. In part because of liability risks, too few physicians -- especially obstetricians and gynecologists -- are available to serve rural and low-income communities. The Administration's medical professional liability reforms will enable more physicians to serve these communities.

The Administration's proposal is built on three principles:

1. Medical malpractice reform should seek both improved quality and lower legal costs.
2. Legal reforms should reduce the incentives for physicians to practice unnecessary defensive medicine or to abandon practice in certain inner city and rural areas.
3. Incentives for states to act are preferable to Federal preemption of state law.

Background

Malpractice costs -- the direct costs of insurance, litigation, and settlements, and the indirect costs of defensive medicine -- play a significant role in the rapid growth of health care spending. The costs associated with medical liability have increased more rapidly than any other component of physician practice costs. During the mid-1980's, medical liability insurance was the fastest growing component of a physician's practice expense, rising at an average annual rate of 21.9 percent.

Nationally, between 70 and 80 percent of obstetricians have been sued, and other medical specialties have also been

significantly affected. In Miami, Florida, for example, it was recently reported that neurosurgeons with good records paid \$220,000 per year for liability insurance.

The rise in insurance premiums has forced many physicians to close certain practices, leaving some areas of the country without adequate medical services. The American Academy of Family Physicians reported that, at the end of 1985, 23.3 percent of its members had stopped practicing obstetrics because of professional liability concerns.

The fear of lawsuits has also imposed enormous costs on patients. Some doctors have begun practicing defensive medicine, in which they order vast batteries of costly, and often unnecessary, tests in order to protect themselves from the possibility of lawsuits. Researchers shy away from potentially promising products and techniques for fear of lawsuits. Moreover, the specter of litigation weakens the doctor-patient relationship, one that should be built on trust.

Legislative Proposal

The Health Care Liability Reform and Quality of Care Improvement Act of 1991 is designed to create incentives for states to implement tort and quality reforms and also address claims arising under the Federal Tort Claims Act.

To encourage states to implement tort law and quality of care reforms, a bonus pool of funds will be distributed to states that have implemented these reforms. The incentive mechanism would take effect in three years to give states time to respond. Many states have already enacted tort reforms and are well on the way to being able to comply with these reforms. The tort reforms a state would be required to have in place to be eligible for the incentive funds are:

- A \$250,000 cap on non-economic damages -- those damages beyond economic expenses (e.g., for pain and suffering); a waiver may be granted for good cause, for example, to a state whose constitution does not permit a cap;
- The elimination of joint and several liability for non-economic damages (joint and several liability makes all parties responsible for the entire amount owed to the plaintiff);
- The elimination of the collateral source rule to prohibit double recovery by the plaintiff when compensation has been received from other sources such as health insurance;

- Allowing judgments for future costs, such as future medical bills, to be paid in periodic payments rather than as a lump sum; and
- An alternative dispute resolution mechanism such as mediation or pretrial screening panels.

In order to receive incentive payments, states would also be required to institute reforms to improve the quality of health care. These steps include:

- Cooperation with federal efforts to learn the comparative effectiveness of different medical treatments;
- Improved performance in the oversight of physicians through state medical boards; and
- A requirement that physicians sanctioned by the medical boards participate in continuing medical education in areas where the board has found deficiencies.

States could pursue alternatives to those activities involving medical boards if the alternatives were equally effective.

The incentive to implement tort law and quality of care reforms would be increased payments to states and hospitals in the qualifying states on a proportional basis. The incentive pools would be created by withholding two percent from the amount payable to states for Medicaid administrative costs and one percent from the annual increase payable to hospitals for operating costs through Medicare's prospective payment system. In Medicaid, the pool would be divided among states that have implemented the necessary tort reforms and quality assurance mechanisms. In Medicare, the pool would be directed to increased payments to hospitals in complying states.

Administrative Actions

The Administration will also take several administrative actions to reduce medical malpractice problems. These include:

- Gathering and disseminating scientific findings about the effectiveness of varying types of treatment, including clinical practice guidelines;
- Shifting the approach of Medicare's Peer Review Organizations (PROs) from after-the-fact review of hospital records toward providing statistical data which will enable hospitals to compare their performance;

- Providing the public with comparisons of the operation of state boards that license health care providers, along with technical assistance for improvement;
- Evaluating current risk management practices in health care settings and establishing an interagency study group to review malpractice cases against the federal government for lessons applicable across the health care system; and
- Expanding within the Federal Employees Health Benefits Program the number of plans that offer an alternative dispute resolution process instead of litigation.

#

DRAFT 10/08/91 A

EXECUTIVE ORDER

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CIVIL JUSTICE REFORM

WHEREAS, the tremendous growth in civil litigation has burdened the American court system, and has imposed high costs on American individuals, small businesses, industry, professionals, and government at all levels;

WHEREAS, several current litigation practices add to these burdens and costs by prolonging the resolution of disputes, thus delaying just compensation and encouraging wasteful litigation;

WHEREAS, the harmful consequences of these litigation practices may be ameliorated by encouraging voluntary dispute resolution, limiting unnecessary discovery, restricting the use of unqualified expert testimony, prudent use of sanctions, improving the use of litigation resources, and, where appropriate, modifying current fee arrangements;

WHEREAS, the United States does and should set a high standard for the conduct of its own litigation and can continue to do so without impairing the effectiveness of its litigation efforts;

WHEREAS, improving the quality of legislation and regulation to eliminate ambiguities in drafting would reduce uncertainty and unnecessary litigation; and,

WHEREAS, improving the quality of administrative adjudications would reduce the time and resources expended during the administrative process.

NOW, THEREFORE, I, GEORGE BUSH, by the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 31 of title 28, United States Code, and section 301 of title 3 of the United States Code, and in order to facilitate just and efficient resolution of civil claims involving the United States government, to encourage the filing of meritorious civil claims, to improve legislative and regulatory drafting to reduce needless litigation, to promote fair and prompt adjudication before Administrative tribunals, and to provide a model for similar reforms of litigation in the private sector and in various states, hereby order as follows:

Section 1. Guidelines to Promote Just and Efficient Government Civil Litigation. To promote just and efficient resolution of civil claims, those federal agencies and litigation counsel that conduct or otherwise participate in civil litigation in federal court on behalf of the United States Government shall respect and adhere to the following guidelines during the conduct of such litigation:

(a) Pre-filing Notice of a Complaint. No litigation counsel shall file a complaint initiating civil litigation without first making a reasonable effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement, or confirm that the referring agency previously handling the dispute

has made a reasonable effort to notify the disputants and achieve a settlement.

(b) Settlement Conferences. As soon as practicable after ascertaining the nature of a dispute in litigation, and throughout the litigation, litigation counsel shall evaluate settlement possibilities and make every reasonable effort to settle the litigation. Such efforts shall include offering to convene a settlement conference or moving the court for a conference pursuant to Rule 16 of the Federal Rules of Civil Procedure in an attempt to resolve the dispute without additional civil litigation.

(c) Alternative Methods of Resolving the Dispute in Litigation. Litigation counsel shall make every reasonable attempt to resolve a dispute expeditiously and properly before proceeding to trial.

1) Whenever feasible, claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal or structured Alternative Dispute Resolution (ADR) process or court proceeding. At the same time, litigation counsel should be trained in dispute resolution techniques and skills that can contribute to prompt, fair and efficient resolution of claims. Where such benefits may be derived, litigation counsel should suggest to the private parties the use of an appropriate ADR technique.

(2) It is appropriate to resolve claims of and against the United States or its agencies through the use of ADR

techniques or processes after a determination by litigation counsel that the use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims. ADR techniques shall not be selected arbitrarily.

(3) Litigation counsel shall neither seek nor agree to the use of binding arbitration or any other equivalent ADR technique. A technique is equivalent to binding arbitration if an agency is bound, without exercise of that agency's discretion, to implement the determination arising from the ADR technique.

(d) Discovery. To the extent practicable, litigation counsel shall make every reasonable effort to streamline and expedite discovery in cases under that agency's supervision and control.

(1) Disclosure of Core Information. Litigation counsel shall, to the extent practicable, make reasonable efforts to agree with other parties, and to stipulate for an order memorializing such agreement, to mutually exchange a disclosure statement, containing core information relevant to the dispute. For purposes of this subsection, core information includes the names and addresses of people having information that is relevant to the proffered claims and defenses, and the location of documents most relevant to the case. This guideline to disclose core information shall not apply in cases while a dispositive motion is pending.

(2) Review of Proposed Document Requests. Each agency within the Executive Branch shall establish a coordinated procedure for the conduct and review of document discovery undertaken directly by that agency when that agency is litigation counsel. The procedure shall include (but is not necessarily limited to) review by a more senior lawyer prior to the request's service or filing in litigation to determine that the request is not cumulative or duplicative, unreasonable, oppressive, unduly burdensome or expensive, taking into account the requirements of the litigation, the amount in controversy, and the importance of the issues at stake in the litigation and that the documents are not obtainable from some other source that is more convenient, less burdensome or less expensive.

(3) Discovery Motions. Before petitioning a court to resolve a discovery motion, or petitioning a court to impose sanctions for discovery abuses, litigation counsel shall attempt to resolve the dispute with opposing counsel. If litigation counsel makes a discovery motion concerning the dispute, he or she shall represent in the motion that such attempt at resolution was unsuccessful or impracticable under the circumstances.

(e) Expert Witnesses. Litigation counsel shall make every reasonable effort to present only reliable expert testimony before a court.

(1) Widely accepted theories. Litigation counsel shall refrain from presenting expert testimony from experts who base their conclusions on explanatory theories that are not widely

accepted. For purposes of this provision, a theory is widely accepted if it is propounded by at least a substantial minority of the experts in the relevant field.

(2) Expertise in the field. Litigation counsel shall present expert testimony only from those experts whose knowledge, background, research, or other expertise lies in the particular field about which they are testifying.

(3) Expert disclosure. Litigation counsel shall offer to engage in disclosure of expert witness information, provided that the other parties agree to make the comparable disclosures.

(4) Ban on contingency fees. The amount of compensation paid to an expert witness shall not be linked to a successful outcome in the litigation.

(f) Sanctions. Litigation counsel shall take steps to seek sanctions measures where appropriate.

(1) Litigation counsel shall evaluate filings made by opposing parties and, where appropriate, shall petition the court to impose sanctions against those responsible for abusive practices.

(2) Prior to filing a motion for sanctions, the litigation counsel shall submit its motion for review to the sanctions officer within the litigation counsel's agency, or his or her designee, who shall be a non-career appointee, equivalent career official, or a senior supervising attorney within the agency, provided such person(s) are licensed to practice before a state court. The sanctions officer or designee shall also review

motions for sanctions against litigation counsel, the United States, its agencies or its officers.

(g) Improved Use of Litigation Resources. Litigation counsel shall employ efficient case management techniques and shall make reasonable efforts to expedite civil litigation in cases under that counsel's supervision and control. This includes but is not limited to:

(1) making reasonable efforts to negotiate with other parties about, and stipulate to, facts that are not in dispute;

(2) reviewing and revising pleadings and other filings to ensure that they are accurate and that they reflect a narrowing of issues, if any, that has resulted from discovery;

(3) requesting early trial dates where practicable;
and,

(4) moving for summary judgment in every case where the movant would be likely to prevail, or where the motion is likely to narrow the issues to be tried.

(h) Fees and Expenses. To the extent permissible by law, in civil litigation involving disputes over federal contracts pursuant to 41 U.S.C. 601 et seq., or in any civil case initiated by the United States, litigation counsel shall offer to enter into an agreement with opposing parties to a dispute for two way fee shifting arrangements, whereby the losing party would pay the prevailing party's fees and costs subject to reasonable limitations. The Attorney General shall review the legal authority for entering into such agreements.

Sec. 2. Principles to Enact Legislation and Promulgate Regulations Which Do Not Unduly Burden the Federal Court System.

(a) General Duty to Review Legislation and Regulations.

In promulgating new regulations, reviewing existing regulations, developing legislative proposals concerning regulation, and developing new legislation, all agencies, within current budgetary constraints and existing executive branch coordination mechanisms and procedures established in OMB Circular A-19, regarding legislation, and Executive Order 12291, regarding regulation, shall adhere to the following requirements:

(1) Legislation and regulations shall be reviewed to eliminate drafting errors and needless ambiguity.

(2) Legislation and regulations shall be written to minimize needless litigation.

(3) Legislation and regulations shall provide a clear and specific legal standard for affected conduct rather than a general standard, wherever practicable.

(b) Specific Issues for Review. In conducting the reviews required by subsection (a), each agency reviewing proposed legislation and regulations shall make every reasonable effort to ensure that the legislation or regulation:

(1) Contains or is subject to a statute of limitations;

(2) Specifies in clear language the preemptive effect, if any, to be given to the law;

(3) Specifies in clear language the effect on existing federal law, including all provisions repealed or modified;

(4) Provides a clear and specific legal standard for affected conduct rather than a general standard, or explains and enumerates those factors which underlie a general standard;

(5) Specifies whether private arbitration and other private dispute resolution agreements are appropriate under enforcement and relief provisions, subject to constitutional requirements;

(6) Addresses the question of constitutional severability;

(7) Specifies in clear language the retroactive effect, if any, to be given to the law or regulation;

(8) Specifies in clear language the applicable burdens of proof;

(9) Specifies in clear language whether it grants private parties a right to sue and, if so, the relief available and the conditions and terms for any authorized award of attorney's fees, if any;

(10) Specifies whether State courts are to have jurisdiction and, if so, whether an action would be removable to Federal court;

(11) Requires formal administrative proceedings, and the exhaustion of administrative remedies, before parties may file suit in court;

(12) Sets forth the standards governing the assertion of personal jurisdiction, if any;

(13) Defines key statutory terms, either explicitly or by reference to other statutes that explicitly define those terms;

(14) Specifies whether the legislation or regulation would apply to the federal government;

(15) Specifies whether the legislation or regulation applies to territories, the District of Columbia, and the Commonwealth of Puerto Rico; and,

(16) Addresses other important issues affecting clarity and general draftsmanship of legislation or regulations set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget, that are determined to be in accordance with the purposes of this order.

(c) Certification of Compliance for Agency Legislation or Regulations. When transmitting such draft legislation or regulation to the Office of Management and Budget, the agency must certify that (i) it has reviewed such draft legislation or regulation in light of this section, and (ii) either that the draft legislation or regulation meets the standards provided in subsections (a) and (b) of this section, or that it is unreasonable to require the particular piece of draft legislation or regulation to meet one or more of those standards. Where the standards are not met, the agency certification must include an explanation of the reasons for the departure from the standards. Recommendations and cost-benefit analyses under subsection (d) of

this section shall be included in the agency certification required by this subsection.

(d) One-Way Fee Provisions. Each agency shall review, and shall perform a cost-benefit analysis on, all provisions of any legislation or regulation that the agency proposes which provide for an award of attorney's fees in favor of only one class of parties, including those statutes which require the government to pay a prevailing private party's attorney's fees. The agency shall recommend against the enactment of the fee shifting provisions of such legislation if the costs significantly outweigh the benefits, or if the legislation does not define the fees and costs covered by the statute, or detail when an award of fees and costs would be appropriate. Such agency recommendations shall be presented to OMB through the A-19 legislative coordination and clearance process and included in the agency certification provided for in subsection (c) of this section.

Sec. 3. Principles to Promote Just and Efficient Administrative Adjudications. In order to promote just and efficient resolution of disputes, an agency that adjudicates administrative claims shall, to the extent reasonable and practicable, and when not in conflict with other sections of this order, implement the recommendations of the Administrative Conference of the United States, entitled "Case Management as a Tool for Improving Agency Adjudication," as contained in 1 C.F.R. § 305.86-7 (1991).

Sec. 4. Coordination by the Department of Justice.

(a) The Attorney General shall coordinate efforts by federal agencies to implement sections 1 and 3 of this order.

(b) To implement the principles and purposes announced by this order, the Attorney General is authorized to issue such guidelines for the Department of Justice. Such guidelines shall serve as models for internal guidelines which may be issued by other agencies pursuant to this order.

Sec. 5. Definitions. For purposes of this order:

(a) The term "agency" shall be defined as that term is defined in section 451 of title 28 of the United States Code, except that it shall exclude all departments and establishments in the legislative or judicial branches of the United States.

(b) The term "litigation counsel" shall mean the office in which trial counsel is employed, which shall in most cases be the United States Attorney's Office for the district in which the litigation is or will be pending, or the Department of Justice if the case is handled directly by attorneys at the Department in Washington. Special Assistant United States Attorneys are included within this definition. Those agencies authorized by law to represent themselves in court without assistance from the United States Attorney's Office or the Department of Justice are also included in this definition, as are private counsel hired by any federal agency to conduct litigation on the agency's behalf.

Sec. 6. No Private Rights Created. This order is intended only to improve the internal management of the Executive Branch

in resolving disputes, conducting litigation in a reasonable and just manner, and reviewing legislation and regulations. This order shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any other person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order. Nothing in this order shall be construed to obligate the United States to accept a particular settlement or resolution of a dispute, to alter its standards for accepting settlements, to forego seeking a consent decree or other relief, or to alter the existing delegation of settlement or litigating authority.

Sec. 7. Scope. This order is applicable to civil matters only; it is not intended to affect criminal matters, including enforcement of criminal fines or judgments of forfeiture. Subsections (c) and (d)(1) of section 1 of this order shall not apply (i) to any action to seize or forfeit assets subject to forfeiture, or (ii) any debt collection case involving an amount in controversy less than \$100,000. Notice pursuant to subsection (a) of section 1 is not required (i) in any action to seize or forfeit assets subject to forfeiture or in any bankruptcy, insolvency, or liquidation proceeding; (ii) where the assets or defendants that are the subject of the action are subject to flight; (iii) where exigent circumstances makes providing such

notice impracticable or would otherwise defeat the purpose of the litigation, such as in actions seeking temporary restraining orders or preliminary injunctive relief; or (iv) in those limited classes of cases where the Attorney General determines providing such notice would defeat the purpose of the litigation. The Attorney General shall have the authority to issue further guidance as to the scope of this order, except section 2, consistent with the purposes of this order.

Sec. 8. Conflicts with Other Rules. Nothing in this order shall be construed to require litigation counsel or any agency to act in a manner contrary to the Federal Rules of Civil Procedure, state or federal law, other court-imposed rules, or court order.

Sec. 9. Privileged Information. Nothing in this order shall compel or authorize the disclosure of privileged information, sensitive law enforcement information, or information affecting national security.

Sec. 10. Effective Date. This order shall become effective 90 days from the date of signature. This order shall not apply to litigation commenced prior to the effective date.

THE WHITE HOUSE,