threaten to fragment us as a people, each year on the glorious Fourth of July we are given a chance to come together proudly as one American people, to honor, in Jefferson's words, ''[T]he wisdom of our sages and the blood of our heros . . .'' that have been devoted to the principles embodied in our Constitution and our government.

This next Wednesday evening, as fireworks thunder over the Jefferson Memorial in Washington and are mirrored in the reflecting pond around it, patriotic strains will fill the air. Similar scenes will play out around the country. Whether in Washington or in small towns or medium-sized cities around the Nation, or in large cities, we may all be proud to be Americans first and foremost. Whatever other allegiances we might have, to party, church, state, or community, we are Americans first. Let us celebrate that and let us not forget it.

As you light your sparklers and fountains, as you hear the martial music of John Phillip Sousa, as you applaud the fireworks displays, as you eat the first sweet corn and tomatoes from the garden, look around you and feel proud. Be proud that 225 years ago, bold men risked their lives and their fortunes and their sacred honor to give us this wonderful system of States, this amazing governmental system, this land of the free, this home of the brave united as one nation under God and under the red, white, and blue flag of the United States of America. Feel glad that so many of your fellow citizens are standing at your shoulders watching the parade, or sitting nearby with their families looking up at the sky ablaze with man-made stars. In these crowds is our hope for a long future as a people united still under Old Glory, and under the Constitution of the United States.

Mr. President, Thomas Jefferson spoke of our constitutional government as the ''sheet anchor'' of our peace and safety. He chose his nautical allusion fittingly. A sheet anchor, according to the Merriam-Webster Dictionary, is a noun that first appeared in the 15th Century. It is a large, strong anchor formerly carried in the waist of a ship and used as a spare in an emergency, but the phrase has also come to be used for something that constitutes a main support or dependence, especially in times of danger. Truly, then, the Constitution is not just the organizing construct of our government, but also, as Jefferson saw it, the tool by which our Nation would preserve our liberties. It is fitting, then, to close with the words of the poet Henry Wadsworth Longfellow, who wrote about the republic in ''The Building of the Ship.''

Thou, too, sail on, O Ship of State!
Sail on, O Union, strong and great!
Humanity with all its fears,
With all the hopes of future years,
Is hanging breathless on thy fate!
We know what Master laid thy keel,
What Workmen wrought thy ribs of steel,
Who made each mast, and sail, and rope,
What anvils rang, what hammers beat,
In what a forge and what a heat
Were shaped the anchors of thy hope!
Fear not each sudden sound and shock,
'Tis but the wave and not the rock;
'Tis but the flapping of the sail,
And not a rent made by the gale!
In spite of rock and tempest's roar,
In spite of false lights from the shore,
Sail on, nor fear to breast the sea!
Our hearts, our hopes, are all with thee,
Our hearts, our hopes, ours prayers, our tears,
Our faith triumphant o'er our fears,
Are all with thee—are all with thee!

Mr. President, I yield the floor.

(Applause, Senators rising.)

The PRESIDING OFFICER. The Senator from Virginia.

Mr. WARNER. Mr. President, I certainly join my colleagues in expressing our warm appreciation for our senior colleague, our President pro tempore, for addressing the Senate in such a stirring manner. It lifts the hearts of all of us in this late hour on a Friday afternoon, which has, I guess, a degree of uncertainty as to the manner in which we are going to proceed.

## BIPARTISAN PATIENT PROTECTION ACT—Continued

AMENDMENT NO. 833, AS FURTHER MODIFIED

Mr. WARNER. Mr. President, I have an amendment which has been pending. I send to the desk a modification of that amendment.

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

The amendment (No. 833) as further modified, is as follows:

On page 154, between lines 2 and 3, insert the following:

''(11) LIMITATION ON ATTORNEYS' FEES.—

''(A) IN GENERAL.—Notwithstanding any other provision of law, or any arrangement, agreement, or contract regarding an attorney's fee, the amount of an attorney's contingency fee allowable for a cause of action brought pursuant to this subsection shall not exceed ⅓ of the total amount of the plaintiff's recovery (not including the reimbursement of actual out-of-pocket expenses of the attorney).

''(B) DETERMINATION BY DISTRICT COURT.—The last Federal district court in which the action was pending upon the final disposition, including all appeals, of the action shall have jurisdiction to review the attorney's fee in accordance with subparagraph (C) to ensure that the fee is a reasonable one and may decrease the amount of the fee in accordance with subparagraph (C).

''(C) DETERMINATION OF REASONABLENESS OF FEE.—

''(i) INITIAL DETERMINATION OF LODESTAR ESTIMATE.—

''(I) IN GENERAL.—To determine whether the attorney's fee is a reasonable one, the court first shall, with respect to each attorney representing the plaintiff in the cause of action, multiply the number of hours determined under subclause (II) by the hourly rate determined under subclause (III).

''(II) NUMBER OF HOURS.—The court shall determine the number of hours reasonably expended by each such attorney.

''(III) HOURLY RATE.—The court shall determine a reasonable hourly rate for each such attorney, taking into consideration the actual fee that would be charged by each such attorney and what the court determines is the prevailing rate for other similarly situated attorneys.

''(ii) CONSIDERATION OF OTHER FACTORS.—A court may increase or decrease the product determined under clause (i) by taking into consideration any or all of the following factors:

''(I) The time and labor involved.

''(II) The novelty and difficulty of the questions involved.

''(III) The skill required to perform the legal service properly.

''(IV) The preclusion of other employment of the attorney due to the acceptance of the case.

''(V) The customary fee of the attorney.

''(VI) Whether the original fee arrangement is a fixed or contingent fee arrangement.

''(VII) The time limitations imposed by the attorney's client on the circumstances of the representation.

''(VIII) The amount of damages sought in the cause of action and the amount recovered.

''(IX) The experience, reputation, and ability of the attorney.

''(X) The undesirability of the case.

''(XI) The nature and length of the attorney's professional relationship with the client.

''(XII) The amounts recovered and attorneys' fees awarded in similar cases.

''(D) RARE, EXTRAORDINARY CIRCUMSTANCES.—Notwithstanding subparagraph (A), in rare, extraordinary circumstances, the court may raise the attorney's fee above the ⅓ cap imposed under subparagraph (A) to ensure a balance of equity and fairness to both the attorney and the plaintiff.

On page 170, between lines 21 and 22, insert the following:

''(9) LIMITATION ON ATTORNEYS' FEES.—

''(A) IN GENERAL.—Notwithstanding any other provision of law, or any arrangement, agreement, or contract regarding an attorney's fee, subject to subparagraphs (C), (D), and (E), the amount of an attorney's contingency fee allowable for a cause of action brought under paragraph (1) shall not exceed ⅓ of the total amount of the plaintiff's recovery (not including the reimbursement of actual out-of-pocket expenses of the attorney).

''(B) DETERMINATION BY COURT.—The last court in which the action was pending upon the final disposition, including all appeals, of the action may review the attorney's fee to ensure that the fee is a reasonable one. In determining whether a fee is reasonable, the court may use the reasonableness factors set forth in section 502(n)(11)(C).

''(C) EQUITABLE DISCRETION.—A court in its discretion may decrease the amount of an attorney's fee determined under this paragraph as equity and the interests of justice may require.

''(D) RARE, EXTRAORDINARY CIRCUMSTANCES.—Notwithstanding subparagraph (A), in rare, extraordinary circumstances, the court may raise the attorney's fee above the ⅓ cap imposed under subparagraph (A) to ensure a balance of equity and fairness to both the attorney and the plaintiff.

''(E) NO PREEMPTION OF STATE LAW.—Subparagraph (A) shall not apply with respect to a cause of action under paragraph (1) that is brought in a State that has a law or framework of laws with respect to the amount of an attorney's contingency fee that may be incurred for the representation of a participant or beneficiary (or the estate of such participant or beneficiary) who brings such a cause of action.

Mr. WARNER. Mr. President, I want to comply with the wishes of the distinguished leaders.

Mr. DASCHLE. Mr. President, may we have order.

The PRESIDING OFFICER. The Senate is not in order. The Senate will suspend. Please take your conversations off the floor.

Mr. WARNER. Mr. President, I wish to accommodate the managers, but I am ready to proceed. I think I can describe my amendment in about 10 or 15 minutes or less. I urge colleagues to accept that offer to move ahead and give equal time to each side.

Mr. REID. I am sorry, I say to my friend, the distinguished Senator from Virginia, we have had trouble hearing over here.

The PRESIDING OFFICER. The Senate will be in order. The Senator from Virginia is entitled to be heard.

The Senator from Virginia.

Mr. WARNER. I say to my good friend, the distinguished majority whip, I am seeking now to address my amendment. It has been pending for some several days. I am perfectly willing to enter into a time agreement. I need but, say, 15 minutes.

Mr. REID. Say 30 minutes evenly divided?

Mr. WARNER. I am quite agreeable to 30 minutes equally divided.

Mr. REID. Our anticipation now—we will work this out, speaking with the managers of the bill—is to offer side by side with yours, or second degree, whatever your manager wishes to do, but you should go ahead and proceed. We are available during our 15 minutes to respond.

Mr. WARNER. Mr. President, might I have clarification? If I understand it on the second-degree, in the event it seems we need some adjustment in the time agreement with which to address that——

Mr. REID. Why not take an hour evenly divided, and if we don't need it, we will yield back the time?

Mr. GREGG. Mr. President, I am not sure what the Senator from Virginia wishes to do. I hope they will not second degree your amendment but, rather, offer an amendment which would be a stand-alone, side-by-side amendment.

Mr. REID. I am sorry, did you say you wanted to offer it side by side? That is what we want to do.

Mr. WARNER. That is perfectly agreeable. Could my amendment be voted on first?

Mr. REID. Of course—well, let me not get my mouth ahead of my head.

In the past what we have done, Mr. President, is the second-degree amendment could be a second-degree amendment that appears to be the one we would ordinarily vote on first. Through all these proceedings, the stand-alone was the one we would vote on first. In other words, that could have been a second-degree. That is what we have done in the past.

Mr. GREGG. Actually, we did reverse the order on the Snowe——

Mr. REID. It is not important whether it is first or second. Do you agree?

Mr. EDWARDS. We should go first.

Mr. REID. Through these entire proceedings—I don't know how many votes it has been now, but certainly it is lots of them—the one that would have been the second-degree should be voted on first. We think we should do it in this instance.

Mr. WARNER. Mr. President, I believe I have the floor. I believe the amendment is up. We are simply discussing a time agreement. I am not prepared to yield the right that I believe I now have with respect to proceeding with this amendment. But I want to accommodate my distinguished friend. He has been most helpful for 3 or 4 days, as I have worked on this amendment.

Could you be more explicit exactly what you think you would like to have? I understand you have to consult with others.

Mr. REID. What we would like to do is offer an amendment that would be voted on, a companion to yours.

Mr. WARNER. Fine.

Mr. REID. The only question now, it seems, is which one would be voted on first. What we have done during these entire proceedings except for one bipartisan amendment that was offered by the Senator from Maine, the one that would have been a second-degree is voted on first. We think we should follow that same order.

Mr. WARNER. I simply ask as a matter of courtesy—some 3 days I have been working with you—just allow mine to be voted first. Certainly we could have discussion on the one that is in sequence. I am confident Members will very quickly grasp the basic, elementary framework that I have in my amendment. And I presume any companion amendment you or others wish to introduce would likewise be very elementary. We could quickly make decisions, all Senators, on it and proceed with our business this afternoon.

Mr. REID. I say to the Senator from Virginia, I know some of our friends would rather we went first. We feel pretty confident of our vote, so we will go second.

Mr. WARNER. Mr. President, I like a man who is audacious. I accept that challenge. We will proceed on mine. I need only about 10 minutes to address it.

Mr. DASCHLE. Will the distinguished senior Senator from Virginia yield for a unanimous consent request.

Mr. WARNER. Oh, yes.

Mr. DASCHLE. We were able to reach this agreement with the cooperation of all our colleagues. I think we are now prepared to propound the agreement.

Mr. President, I ask unanimous consent that the following be the only first-degree amendments remaining in order to S. 1052, except the Warner and Ensign amendments which have been laid aside and which now are being debated, that they be subject to relevant second-degree amendments; all amendments must be offered and disposed of by the close of business today; and that upon disposition of these amendments the bill be read a third time and a vote on final passage of the bill occur without any intervening action or debate:

Frist substitute; Frist, liability; Craig, long-term care; Craig, nuclear medicine; Kyl, alternative insurance; Santorum, unions; Nickles, liability; Bond, punitives; Thompson, regarding point of order; Kennedy, two relevant; Daschle, two relevant; Carper, relevant, to be offered and withdrawn.

The PRESIDING OFFICER. Is there objection?

Mr. GREGG. Reserving the right to object, I ask if the majority leader would be willing to adjust his unanimous consent so Senator ENSIGN could modify his amendment, which is pending, and also, because we have not seen the Kennedy, Daschle, or Carper amendments, we would want to reserve the right to have a second-degree amendment.

Mr. DASCHLE. The amendments are subject to second degrees, of course. I ask consent the Ensign amendment be allowed to be modified.

Mr. CRAIG. Reserving the right to object.

Mr. GREGG. Reserving the right to object.

Mr. THOMPSON. Reserving the right to object, a simple point: My amendment was listed as one having to do with a point of order. If we could correct that, it actually has to do with venue.

Mr. DASCHLE. I ask consent the clarification be made with regard to the Thompson amendment.

Mr. GREGG. I also ask that the Nickles amendment be defined as relevant, rather than liability, and, since the majority leader has asked to reserve two relevant amendments, the Republican leader be given two relevant amendments.

The PRESIDING OFFICER. Does the majority leader modify the request?

Mr. DASCHLE. I ask unanimous consent that the request be so modified.

The PRESIDING OFFICER. The request is modified.

The Senator from Idaho.

Mr. CRAIG. Mr. President, may I inquire of the majority leader, is it your intent to at least shape the field of amendments into a set number but there is no time tied to those? Is that correct?

Mr. DASCHLE. That is correct.

Mr. CRAIG. Thank you.

The PRESIDING OFFICER. Is there objection to the request. Without objection, it is so ordered.

Mr. DASCHLE. I thank our colleagues.

The PRESIDING OFFICER. The Senator from Virginia is recognized.

Mr. WARNER. Mr. President, if I may just proceed, my understanding is that we have 30 minutes equally divided under the time agreement. Is that correct?

The PRESIDING OFFICER. That has not been propounded.

Mr. WARNER. Mr. President, I suggest we just leave it open. I want to

give adequate opportunity to those who wish to address this subject. I will proceed.

Mr. President, for some time I have followed this bill very carefully. I am, of course, quite aware of the name of it—the Patients' Bill of Rights. I want to ask the Senate to give serious consideration to protecting the right of a patient to receive what I regard as a fair return on such awards as a court may approve, presumably, by a jury recognizing the plaintiff's case has merit and assigns an award figure.

The McCain-Kennedy-Edwards bill provides new rights. But there is nothing in there to give the patients the protection from what could well be perceived by many as an unfair allocation of that award between attorneys and patients. Therefore, I think there should be a framework of caps on the maximum amount of the award to be made.

May I explain it.

It is kind of complicated because we have a Federal court and a State court. While I don't know the ultimate finality of this legislation, at this point the amendment provides for the treatment of caps in both courts, and they are somewhat different.

In addition, I believe very strongly that there is in rare instances and under extraordinary circumstances a case where an attorney would be entitled to in excess of the one-third cap that I am proposing in both Federal and State courts. An allowance has to be made for the exceptional type of case.

I am proposing a framework of caps. It would be giving the court the right to only approve attorney's fees in a case up to one-third of the award of the damages. It could well be that the client may have struck an arrangement with his attorney for less than one-third. It recognizes that situation.

Having the one-third cap strengthens the ability of the patient—the client—to get a fee structure which is consistent with their receiving the majority of the ultimate one-third as the basic structure in both the Federal and the State court.

In addition, in both Federal and State court, we have exceptions in rare cases, and extraordinary facts, where the judge can go above the one-third with no cap.

We have reposed confidence in our judiciary system. Indeed, we have reposed confidence in those members of the bar. Many years ago, I was privileged to be an active practitioner before the bar and had extensive trial experience as assistant U.S. attorney and some modest trial experience in other areas.

I recognize that the vast majority of the bar will work out a fee schedule with their client in such a way that there will be an equitable distribution. But there are instances where the patient could well be deserving of the award by the court and then prohibited from getting what I perceive as a fair and proportionate share by someone who does not follow the norm.

The norm in most cases does not exceed one-third. Contingent fees are usually one-third or less. Therefore, we put in the cap of the one-third.

I also want to make it clear that there is a good deal of expense to a lawyer associated with representing a client. They pass it on to the client, of course, but that expense is over and above the fees. If it is a 2-week trial with a lot of expenses associated with it, it does not come out of the one-third allocation. It is over and above, and again subject to the court's discretion.

We lay out a formula for the Federal courts under the lodestar method. That is a formula that was approved by the Supreme Court of the United States as it relates to attorney fees in Federal cases.

Here are basically the factors the court would review in the Federal system: The time involved by the attorney; the difficulty of the questions involved; the skill requisite to perform the legal services; or the preclusion of employment of the attorney due to acceptance of the case.

In other words, he is giving up other opportunities to take on this case.

What are the customary fees that are before the courts and the bar in the jurisdiction that the case is held? Whether the fee is fixed or contingent; time limitations imposed by the client on the circumstances; the amount involved in the return of the jury in most instances; the experience and reputation and the ability of the particular attorney, and on it goes. But it is carefully worked out through many years of following these cases.

Therefore, I believe that we are giving protection to the patient. For rare and extraordinary cases, the court can go above it. In some instances, the court will decide that the one-third is not appropriate, and that it should be some fee less than a third, again protecting the interests of the patient.

I find this a very reasonable amendment. It certainly comports with the basic objectives of this law; namely, to give some benefits to those who have suffered the grievances which are designated in this law.

I also recognize the Federal-State law; that is, what we call States rights. I have been a strong proponent of that throughout my career in the Senate.

I provide that in the case of a State court, if the State in which that court sits has a framework of laws which govern attorney fees, then this amendment does not apply.

I repeat that the State law would govern the return to the attorney of that amount to which he or she is entitled for their services—not this proposed amendment.

Mr. President, I see my colleague in the Chamber.

I yield the floor for the moment.

The PRESIDING OFFICER. The Senator from Nevada.

Mr. REID. Mr. President, I have a unanimous consent request I am going to propose in just a minute—or in even less than a minute.

Senator GREGG is in the Chamber, and I appreciate his listening.

Mr. President, I ask unanimous consent that I be recognized to offer an additional first-degree amendment, with 30 minutes for debate in relation to the Warner amendment and the Reid amendment to run concurrently prior to a vote in relation to the Warner amendment—which the Senator from Virginia indicated he wanted first—followed by a vote in relation to the Reid amendment, with no second-degree amendments in order prior to the votes.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

AMENDMENT NO. 852

Mr. REID. Mr. President, Senator WARNER and I have worked side by side all the time I have been in the Senate on the Environment and Public Works Committee. I have been his subcommittee chairman; he has been my subcommittee chairman. Twice I have been chairman of the full committee. I have been the ranking member of that committee.

There is no one I have worked with in the Senate who is more of a gentleman than the Senator from the Commonwealth of Virginia, Mr. WARNER. He has been a pleasure to work with. We tried to work this out on the attorney's fees. We have been unable to do that. But his amendment is, in my opinion, very complicated. It is going to create litigation, not solve it.

We have a fair way to address this issue. Even though personally, as an attorney, I had done a great deal of defense work where I was paid by the hour and a significant amount of work where I was paid on a contingency fee basis many years before I came back here, I think contingent fees should be based upon whatever the States determine is appropriate.

But I am willing to go along with the basic concept of the Senator from Virginia; and that is we will go for a straight one-third, no complications. It is very simple: A straight one-third.

Senator WARNER's proposal introduces a complex calculation in every case and ignores the agreements between injured patients and their lawyers. This proposal portends to tell State judges how to apply State law. We do not need to do that here in Washington.

This proposal ties only one side's hands in litigation. HMOs can hire all the attorneys they want and plaintiffs cannot. There is no restriction on how much money the attorneys for the HMOs make. We are not going to get into that today. We could. It would be a very interesting issue to get into.

But what we are saying is, when you walk down in the well to vote on the amendments, we have a very simple proposal: It is one-third, period. Under

Senator WARNER's proposal, it is something, and we will figure it out later based on how many hours, and where you did it, and what kind of case it was. Ours is simple, direct, and to the point. It would only complicate things to support the amendment of my friend from Virginia.

Mr. President, at this time, after explaining my amendment, I call my amendment forward and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The Senator from Nevada [Mr. REID] proposes an amendment numbered 852.

Mr. REID. Mr. President, I ask unanimous consent reading of the amendment be dispensed with.

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

The amendment is as follows:

(Purpose: To limit the amount of attorneys' fees in a cause of action brought under this Act)

On page 154, between lines 2 and 3, insert the following:

''(11) LIMITATION ON AWARD OF ATTORNEYS' FEES.—

''(A) IN GENERAL.—Subject to subparagraph (B), with respect to a participant or beneficiary (or the estate of such participant or beneficiary) who brings a cause of action under this subsection and prevails in that action, the amount of attorneys' contingency fees that a court may award to such participant, beneficiary, or estate under subsection (g)(1) (not including the reimbursement of actual out-of-pocket expenses of an attorney as approved by the court in such action) may not exceed an amount equal to ⅓ of the amount of the recovery.

''(B) EQUITABLE DISCRETION.—A court in its discretion may adjust the amount of an award of attorneys' fees required under subparagraph (A) as equity and the interests of justice may require.

On page 170, between lines 21 and 22, insert the following:

''(9) LIMITATION ON ATTORNEYS' FEES.—

''(A) IN GENERAL.—Notwithstanding any other provision of law, or any arrangement, agreement, or contract regarding attorneys' contingency fees, subject to subparagraph (B), a court shall limit the amount of attorneys' fees that may be incurred for the representation of a participant or beneficiary (or the estate of such participant or beneficiary) who brings a cause of action under paragraph (1) to the amount of attorneys' fees that may be awarded under section 502(n)(11).

''(B) EQUITABLE DISCRETION.—A court in its discretion may adjust the amount of attorneys' fees allowed under subparagraph (A) as equity and the interests of justice may require.

Mr. REID. Mr. President and Members of the Senate, the language in this amendment was not made up in some back room by my staff or somebody from downtown. It was taken—every word of it—directly from the amendment originally offered by the Senator from Virginia—exactly identical, not a word changed.

Certain paragraphs were taken out of his amendment. It is far too complicated. But every word in my amendment is directly from the amendment offered by the Senator from Virginia. I ask Senators to support my amendment, what should be a bipartisan amendment.

There are some people who want no restrictions. We have acknowledged that we are going to, in this instance, have a restriction. If there is going to be one, it should be direct and to the point, as is this one.

The PRESIDING OFFICER. Who yields time?

Mr. REID. Mr. President, I yield whatever time the Senator from Delaware wants.

Mr. BIDEN. Five minutes.

Mr. REID. Five minutes.

Mr. WARNER. Mr. President, for clarification, are we under a time agreement?

Mr. REID. Yes, we are.

Mr. WARNER. Was that in the unanimous consent agreement?

Mr. REID. Yes. But I say to the Senator, whatever time you need we can yield to you.

Mr. WARNER. Fine.

The PRESIDING OFFICER. The Senator from Delaware.

Mr. BIDEN. Mr. President, I always find these debates about attorney's fees fascinating. I find my friends on both sides of the aisle who usually are seeking to restrict attorney's fees are the most big-time free enterprise guys in the world. They are people who tell us we should not freeze and/or put limitations on the amount of money energy companies can make, even though it bears no relationship to cost. They are folks who told us out in California—when you have utility companies gouging the public—that we should not, even though we have authority under Federal law, put on some limitations. They are folks who tell us that, notwithstanding the fact that a drug company may be able to manufacture a pill for one-quarter of 1 cent and sell it for $75, there should not be any relationship between the amount of cost involved and the profit made.

I find it absolutely fascinating. For example—I am not going to do it—a great amendment to the amendment by my friend from Virginia would be the following: That any fee charged by an HMO for health care coverage must bear direct relationship to their cost and cannot exceed a profit rate of X amount. That would be fair, right?

All these folks who can't afford health insurance, who are getting banged around and battered, we are trying to help, but I imagine I would not get many votes for that. I bet my friend from Virginia would not vote for that because that is free enterprise.

My grandfather Finnegan used to have an expression. He said: You know, it's kind of fascinating. There's free enterprise for some people, free enterprise for the poor, and socialism for the rich. You find yourself in a position where, if you are representing the right interest, we talk about free enterprise; if you don't like the interests that are at stake, you find that you should have socialism, you should have imposed limitations on fees or on profits, based on whether you like what is going on.

I do not know whether most people know this, that an awful lot of these folks who want to bring suit against a giant company don't have any money. These giant companies, they have a lot of money and a lot of lawyers. So what they do is, they depose you to death, which costs thousands and thousands and thousands of dollars.

So what happens? You go to a lawyer, and you say: Look, I have this claim. And the lawyer sits down and says: OK, who knows what the jury will do, and who knows what will happen with regard to the defense that is going to be put up? And it seems to me you have a case. You have a 60-percent chance of winning this case. I'll tell you what I will do. I am going to front all the expenses. I am going to take all the chances.

It is sort of free enterprise. It may cost that law firm $50, $500, $5,000, $50,000, $100,000, and they are betting on the come. They are betting on the come. Some law firms actually risk their solvency on a case that they believe is worth pursuing.

Then you are going to come along and say: By the way—after the fact, after the risk is taken on behalf of a client, where you may get absolutely nothing and you may end up in the hole, losing a lot of money, because I can tell you, major corporations do what they are entitled to do under this system. They have batteries of lawyers, and they just depose the devil out of you. It costs. For example, the person taking down my comments right now, the cost to the American taxpayer for that transcription is hundreds of thousands of dollars a year—millions of dollars a year. We need to have a record, and we do it.

The same thing happens in the depositions. Somebody sits with a little machine like that and types away. So if I am the deep-pocket company and I want to run you out, all I do is I keep deposing you; I keep submitting interrogatories; and I run your cost up because you have to pay for that.

I guess the only point I am trying to make is—and I don't want to take the time because I am sure everybody's mind is already made up on this thing—if you feel good about lawyer bashing, if you feel good about making the case that you should have to justify, on an hourly basis, exactly what you do, and all of these things, not calculate the risk, not calculate the cost, then fine, have at it.

But I don't know; what is good for the goose isn't good for the gander. If we do this with regard to attorney's fees and we don't do this with regard to health care costs and fees, what is the fundamental difference? Tell me the fundamental difference, all of a sudden, in the great interest of my friends to protect the poor, aggrieved plaintiff, who has been wronged by the insurance company. At any rate, I am as anxious to get out of here as everybody is. I

wanted to make it clear: I think this is bad law, bad policy, a bad idea, and it is, in a literal sense, discriminatory.

Mr. REID. Mr. President, this legislation that is now before the body is not about attorney's fees. It is about patient protection, making sure people in America have certain rights that have been taken away from them. We want to reestablish something that is kind of old-fashioned in the minds of many—that is, when you go see your doctor, the doctor determines what kind of medicine you need and what kind of care you need. That is what this legislation is all about. It is not about attorney's fees.

If the people on the other side were interested in saving money, one of the amendments they should have would address the compensation of some of these employees. There is a list, and you can go to the top 10. The first one, including stock options, made $411,995,000 last year. That is just a little item they might be concerned about a little bit. We have a lot of money that isn't necessarily needed.

This is not about how much money people make. What it is about is trying to pass a Patients' Bill of Rights. I ask that we move forward as quickly as possible and vote and get on with the rest of the legislation.

The PRESIDING OFFICER. Who yields time?

Mr. REID. The Senator from Tennessee may have some of mine.

Mr. THOMPSON. A couple of minutes, if I may, Mr. President.

I have been listening to the debate. We are making it much more complicated than it needs to be. We are talking about whether or not this is a good idea. The sponsors of these two amendments always come forth with good ideas. I will not debate that these are possibly a couple of those good ideas.

I am afraid we are not permitted to get that far because not every good idea is constitutionally permissible. I simply do not see our authority, even if we want to do this under the Constitution, to say to a State court, having lifted the preemption that was there before, that in its deliberations and in its lawsuits it will be trying, that we have, in a government of enumerated powers, the authority to reach in and do that. This is not raising an army. This is not copyrights and patents. This is not interstate commerce. I simply see no basis of authority for the Congress to do this, whether it is a good idea or not in our system of enumerated powers.

If I am incorrect about that or there is something I am not thinking about, I will stand corrected. That is a concern of mine.

I yield the floor.

Mr. WARNER. Mr. President, if I could reply to my distinguished colleague, that very question I entertain because I take pride in my record of some 23 years in this body to protect State laws.

The first thing I did under my amendment was say, if there is a body of State law, then my amendment doesn't apply to those decisions in State courts. So I think there is some dozen or so that have a statutory framework for the regulation of attorney fees. Those States are the one side.

But we find authority that it is within the power of the Congress to regulate interstate commerce. We have a proposed bill giving new rights to litigants. We believe that comes within that clause. That is how I proceed to do it.

We are just very fearful, I say to my distinguished colleague, that patients will not be able to, without this authority of some cap, obtain a fair allocation of these proceeds in some few cases. I myself have a high confidence in the bar and the courts to exercise equity and fairness. In some instances, it might not prevail.

We have studied cases here where some lawyers are getting $30,000 per hour, in some of these tobacco cases. Mind you, $30,000 per hour. I just think it is time that we, the Congress of the United States, do what we can within the framework of our constitutional law to exercise and put a cap on that.

I say to my good friend from Nevada, he has marked up an earlier version of my bill. And at least you started with a pretty good base here, but you took out the essence of it. We did remain with a one-third fee, but giving the court the right to raise or lower this fee without any guidance whatsoever, even without the guidance of the word ''reasonableness'' put into the proposal by my friend from Nevada.

It seems to me that, while we are apart, we could possibly bridge our differences, if I could have the assurance that a patient, as we now call them under this proposed legislation—plaintiff, under ordinary circumstances—is given reasonable protections. I have tried to give the court the flexibility in those instances where, for example, if a trial took 2 or 3 weeks and then, through no real fault of the attorney or anyone else, there somehow was a mistrial—I have tried them myself. Jurors get ill, sick. For whatever reason, the court pronounces a mistrial and the attorney has to go back and try the whole case over again—that begins to add up in time and expense, and so forth. That attorney should be fairly compensated, and his client has to recognize that in rare and extraordinary cases the court can adjust the fee above the one-third. I find in here no guidance whatsoever.

Under the Federal law, I laid down a formula which has been approved by the Supreme Court and is followed now in our Federal system.

I further point out to my distinguished colleague from Nevada that the ERISA framework of laws governs much of the action in Federal court. And there ERISA puts an affirmative duty on a judge to review that attorney's fee. You are, in effect, modifying the framework of ERISA here, as I read it quickly, and not putting that affirmative duty on the court in the Federal system to review those attorney fees.

Mr. REID. Mr. President, I apologize to my friend. Did the Senator from Virginia ask me a question?

Mr. WARNER. Yes, I had been going on for some minutes now. I will go back over it again. I say to my good friend, you took an earlier version of my amendment, and in striking it out, No. 1, you left the one-third cap in, but you give the discretion to the judge to go up or down, with no guidelines by which that jurist goes up or down. In other words, there is no even standards of reasonableness. It could be implied, of course. But I looked upon the lodestar method, which is followed by the Federal courts in arriving at a fair and equitable fee situation. I just believe there is no guidance for the jurist in the proposal of my colleague.

Mr. REID. I say to the Senator from Virginia, in every State court in America, every day judges are called upon to use their discretion to determine attorney's fees. In estate cases, in cases where people are hired to represent indigent defendants, there are a multitude of cases in which judges every day use their discretion to make awards of attorney's fees.

Here, as the Senator has given a number of examples, if the judge, in rare instances, would find that somebody has been paid too much under the contract, he can take a look at that. Or there may be some very complicated appeal and maybe he would decide that there should be a little more there.

Tobacco has nothing to do with this.

Mr. WARNER. I missed the word. What has nothing to do with this?

Mr. REID. The Senator talked about the tobacco litigation. I say that has nothing to do with this matter now before the Senate because these attorney's fees were very high, of course, and litigation results because these attorneys recovered not hundreds, thousands, millions, but billions of dollars. Tobacco attorneys were hired by State attorneys general. I don't think there is anything that I can ever even contemplate that would be the same in relation to tobacco and these HMO cases. I would say that we have pretty well formulated both of our positions.

I respectfully say that the Senator from Virginia is taking away the discretion the State judges have. It makes it very complicated to determine attorney's fees. What we have come forward with is a process that is very specific, direct, and to the point, and leaves some discretion with State judges.

(Mr. NELSON of Florida assumed the chair.)

Mr. WARNER. I want to make it clear. I think it is clear in the amendment that the expenses are over and above the allocation of fees.

Mr. REID. I took that directly from your original amendment.

Mr. WARNER. I was also quite anxious to ensure that if a State has a

framework of law regarding the award of attorney's fees, this does not apply. I think it is important that we honor those States that have a framework and laws which set attorney's fees, which is in my amendment. I am just trying to help you improve yours so that you prevail.

Mr. REID. Well, I guess there is some reason that could be done. That is only going to complicate what we have. We are trying to give as much discretion as possible to State judges. I think they need that. I think one of the problems that I have with the Senator's original amendment is it takes away from State law, from what States can do. It seems interesting to me that we are so in tune with States rights around here all the time, unless it comes to something dealing with injured parties—whether it is product liability cases or whatever. We suddenly want to take away what the States have worked on for all these decades. I think my friend's amendment takes away a lot of what we have with our States.

Mr. WARNER. Mr. President, I will read to my friend section (E) of my amendment, page 6:

NO PREEMPTION OF STATE LAW.—Subparagraph (A) shall not apply with respect to a cause of action under paragraph (1) that is brought in a State that has a law or framework of laws with respect to the amount of an attorney's contingency fee that may be incurred for the representation of a participant or beneficiary—

And so forth. In other words, if the State has a framework of State laws, we in the Congress should not be trying to amend them, as I fear you are doing through an omission in yours. I have protected it in mine.

Mr. REID. Well, I understand what the Senator's intent is. When you are looking for intent, you want to be as precise and direct as possible. I respectfully say we should get on with the vote. I think we have said everything, but maybe not everyone has said it. You and I have.

Mr. WARNER. Let me point out one other thing. Again, there is a difference as to how these things are treated under Federal and State. As I said, ERISA gives certain protections that are involved in the Federal court. There Federal law requires relief grievance under ERISA and that is not found in my friend's amendment. You say it is implicit in every court in the land; therefore, it is not needed to be expressed. Is that your point?

Mr. REID. The reason we took your basic amendment and made it directly to the point as to the one-third is it becomes too complicated for a court to determine attorney's fees based on the complicated program you have set up. Ours is simple and direct. In rare instances, a judge can step in and raise them or lower them.

Mr. WARNER. I wanted to make sure they were explicit. That is my view. We have a difference of opinion on that.

Mr. President, I will soon suggest the absence of a quorum so I have some period of time to reflect on perhaps other suggestions I might have. I am willing to allow these amendments to be laid aside if the Senator would agree to proceed with others.

Mr. REID. We have been laying aside things so long——

Mr. WARNER. If that is of no help, we need not do that.

Mr. REID. I have no problem having a quorum call and we can talk. I really think we have to move on. I am willing to take my chances, whatever they might be. Other people are waiting around to offer amendments. We should move on if we can.

Mr. THOMPSON. Mr. President, I am prepared to move forward with an amendment, if that is desired by my two colleagues, while you have your discussions. If you want to go into a quorum call, we will wait.

Mr. REID. I would be happy to set these two amendments aside and let my friend from Tennessee, who offered probably the best elucidation on attorney's fees today—No. 1, he was concise and to the point. I think probably both of these are unconstitutional. I am willing to go forward.

I ask unanimous consent that the two amendments by Senators REID and WARNER be set aside and that the Senator from Tennessee be allowed to call up an amendment. The Senator's amendment is on the improved list, correct?

Mr. THOMPSON. Yes.

The PRESIDING OFFICER. Without objection, it is so ordered. The amendments are laid aside.

The Senator from Tennessee is recognized.

AMENDMENT NO. 853

(Purpose: To clarify the law which applies in a State cause of action)

Mr. THOMPSON. I send to the desk an amendment.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Tennessee [Mr. THOMPSON] proposes an amendment numbered 853.

On page 170, between lines 21 and 22, insert the following:

''(9) CHOICE OF LAW.—A cause of action brought under paragraph (1) shall be governed by the law (including choice of law rules) of the State in which the plaintiff resides.''

The PRESIDING OFFICER. The Senator from Tennessee is recognized.

Mr. THOMPSON. Mr. President, I let the amendment be read because it is probably the shortest amendment that will be considered tonight. It is very simple and straightforward. Basically, what it says is that in these lawsuits that we are dealing with, we apply the law of the State of residence and citizenship of the plaintiff in this case.

Let's go back just a bit and understand the lawsuit scheme that we have created by this litigation. We have created a Federal cause of action in Federal court for matters that are essentially contract; and we have created a State cause of action in State court for matters that have to do with medically reviewable situations.

What that has left us with is the ability of a claimant to bring a State court claim in any State where the defendant is doing business. If you have a medical insurer and they are doing business in several States, even though you live in Tennessee, you could bring your lawsuit in any number of States where that insurer is doing business. That is simply known as forum shopping.

The reason people do that is different States have different laws in terms of limitations on recovery. They have different rules of evidence. Some allow punitive damages—most do. Some cap those punitive damages. Some don't allow punitive damages at all. So I don't believe we want to create a situation where if we are going to have this liberal litigation scheme that we have set up, that we allow it to occur anywhere in the country, which might be the case with regard to some big defendants.

Now, employers in some cases are going to be defendants also, I believe it is quite clear. You not only have the insurance companies, but you also have the employers to look at and to see whether or not they are doing business in these various States and, if they are, then you could bring your lawsuit in any of those States in which they are doing business. I don't think that serves the purposes that we are trying to serve with this legislation.

Therefore, we have the authority, and I think it would be a wise exercise of our authority and discretion, to limit those lawsuits. If you are from the State of Tennessee and you have a legitimate claim and you want to bring a lawsuit, you ought to be bound by the law in the State from which you come. You should not be able to forum shop.

Now, there might be some Federal causes of action that are also of the medically reviewable kind. We have been talking in this debate for several days about State causes of action, but what we are really dealing with is the laws of those States. They are causes of action based on the laws of individual States. So if a person wants to bring his lawsuit, he can still bring it in Massachusetts if he lives in Tennessee, but he is bound by the law of Tennessee.

If there is a diversity situation in Federal court, where the Federal court has jurisdiction and you have a doing-business requirement satisfied as far as the corporate defendant is concerned, for example, you have diversity. You still are bound by the law of your home State. So that would prevent forum jumping.

I believe this is desirable. I heard several expressions of agreement with the proposition we did not want to create a system of forum shopping in this litigation. We are going to have this law apply to all 50 States. There will be lawsuits produced in all 50 States, and all 50 States have laws that will be applicable in the suits wherever they are

brought. A citizen ought to be bound by the laws of his or her State and not be able to shop all over the country for a potentially better situation than what they have in their State. It is a State cause of action. They should be bound by the laws of their home State.

That is the amendment. I hope my colleagues will see the wisdom of it and will reach agreement on it.

I yield the floor.

The PRESIDING OFFICER. The Senator from Nevada.

Mr. REID. Mr. President, I say to my friend from Tennessee, his argument is persuasive enough that all the managers on our side left the floor, so I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. AKAKA. Mr. President, I ask unanimous consent that I may be permitted to speak as in morning business for 5 minutes.

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

(The remarks of Mr. AKAKA are located in today's RECORD under ''Morning Business.'')

Mr. KENNEDY. Mr. President, I express great appreciation also for the Senator's strong support for our Patients' Bill of Rights. This has been an issue in which he has taken a great personal interest. He has been one of the strong supporters of this legislation for many, many years. Although he has not been a member of our committee, this is a matter I know he cares deeply about. He has been a strong supporter of all the amendments that have protected patients, and I don't think there has been a member who has been a stronger advocate for the patients and their rights than our good friend, the Senator from Hawaii. I thank him very much for his statement and all the work he has done to help bring the bill to where it is.

Mr. GREGG. Mr. President, I understand the Senator from Nevada will modify his amendment and we will have a voice vote, and the Senator from Tennessee will have an amendment agreed to, also. Hopefully, we can dispose of those two amendments right now.

The PRESIDING OFFICER. The Senator from Nevada.

AMENDMENT NO. 849, AS MODIFIED

Mr. ENSIGN. Mr. President, I call up amendment numbered 849 and I send a modification to the desk.

The PRESIDING OFFICER. Without objection, the pending amendment is laid aside.

The amendment will be so modified.

The amendment (No. 849), as modified, is as follows:

Subtitle C of title I is amended by adding at the end the following:

**SEC. 122. GENETIC INFORMATION.**

(a) DEFINITIONS.—In this section:

(1) FAMILY MEMBER.—The term ''family member'' means with respect to an individual—

(A) the spouse of the individual;

(B) a dependent child of the individual, including a child who is born to or placed for adoption with the individual; and

(C) all other individuals related by blood to the individual or the spouse or child described in subparagraph (A) or (B).

(2) GENETIC INFORMATION.—The term ''genetic information'' means information about genes, gene products, or inherited characteristics that may derive from an individual or a family member of such individual (including information about a request for or the receipt of genetic services by such individual or a family member of such individual).

(3) GENETIC SERVICES.—The term ''genetic services'' means health services, including genetic tests, provided to obtain, assess, or interpret genetic information for diagnostic and therapeutic purposes, and for genetic education and counseling.

(4) GENETIC TEST.—The term ''genetic test'' means the analysis of human DNA, RNA, chromosomes, proteins, and certain metabolites, including analysis of genotypes, mutations, phenotypes, or karyotypes, for the purpose of predicting risk of disease in asymptomatic or undiagnosed individuals. Such term does not include a physical test, such as a chemical, blood, or urine analysis of an individual, including a cholesterol test, or a physical exam of the individual, in order to detect symptoms, clinical signs, or a diagnosis of disease.

(5) GROUP HEALTH PLAN, HEALTH INSURANCE ISSUER.—The terms ''group health plan'' and ''health insurance issuer'' include a third party administrator or other person acting for or on behalf of such plan or issuer.

(6) PREDICTIVE GENETIC INFORMATION.—

(A) IN GENERAL.—The term ''predictive genetic information'' means—

(i) information about an individual's genetic tests;

(ii) information about genetic tests of family members of the individual; or

(iii) information about the occurrence of a disease or disorder in family members.

(B) LIMITATIONS.—The term ''predictive genetic information'' shall not include—

(i) information about the sex or age of the individual;

(ii) information about chemical, blood, or urine analyses of the individual, including cholesterol tests, unless these analyses are genetic tests, as defined in paragraph (4); or

(iii) information about physical exams of the individual, and other information relevant to determining the current health status of the individual.

(b) NONDISCRIMINATION.—

(1) NO ENROLLMENT RESTRICTION FOR GENETIC SERVICES.—A group health plan, and a health insurance issuer offering health insurance coverage, shall not establish rules for eligibility (including continued eligibility) of any individual to enroll under the terms of the plan or coverage based on genetic information (or information about a request for or the receipt of genetic services by such individual or a family member of such individual) in relation to the individual or a dependent of the individual.

(2) NO DISCRIMINATION IN RATE BASED ON PREDICTIVE GENETIC INFORMATION.—A group health plan, and a health insurance issuer offering health insurance coverage, shall not deny eligibility or adjust premium or contribution rates on the basis of predictive genetic information concerning an individual (or information about a request for or the receipt of genetic services by such individual or a family member of such individual).

(c) COLLECTION OF PREDICTIVE GENETIC INFORMATION.—

(1) LIMITATION ON REQUESTING OR REQUIRING PREDICTIVE GENETIC INFORMATION.—Except as provided in paragraph (2), a group health plan, or a health insurance issuer offering health insurance coverage, shall not request or require predictive genetic information concerning an individual or a family member of the individual (including information about a request for or the receipt of genetic services by such individual or a family member of such individual).

(2) INFORMATION NEEDED FOR DIAGNOSIS, TREATMENT, OR PAYMENT.—

(A) IN GENERAL.—Notwithstanding paragraph (1), a group health plan, or a health insurance issuer offering health insurance coverage, that provides health care items and services to an individual or dependent may request (but may not require) that such individual or dependent disclose, or authorize the collection or disclosure of, predictive genetic information for purposes of diagnosis, treatment, or payment relating to the provision of health care items and services to such individual or dependent.

(B) NOTICE OF CONFIDENTIALITY PRACTICES AND DESCRIPTION OF SAFEGUARDS.—As a part of a request under subparagraph (A), the group health plan, or a health insurance issuer offering health insurance coverage, shall provide to the individual or dependent a description of the procedures in place to safeguard the confidentiality, as described in subsection (d), of such predictive genetic information.

(d) CONFIDENTIALITY WITH RESPECT TO PREDICTIVE GENETIC INFORMATION.—

(1) NOTICE OF CONFIDENTIALITY PRACTICES.—A group health plan, or a health insurance issuer offering health insurance coverage, shall post or provide, in writing and in a clear and conspicuous manner, notice of the plan or issuer's confidentiality practices, that shall include—

(A) a description of an individual's rights with respect to predictive genetic information;

(B) the procedures established by the plan or issuer for the exercise of the individual's rights; and

(C) a description of the right to obtain a copy of the notice of the confidentiality practices required under this subsection.

(2) ESTABLISHMENT OF SAFEGUARDS.—A group health plan, or a health insurance issuer offering health insurance coverage, shall establish and maintain appropriate administrative, technical, and physical safeguards to protect the confidentiality, security, accuracy, and integrity of predictive genetic information created, received, obtained, maintained, used, transmitted, or disposed of by such plan or issuer.

(3) COMPLIANCE WITH CERTAIN STANDARDS.—With respect to the establishment and maintenance of safeguards under this subsection or subsection (c)(2)(B), a group health plan, or a health insurance issuer offering health insurance coverage, shall be deemed to be in compliance with such subsections if such plan or issuer is in compliance with the standards promulgated by the Secretary of Health and Human Services under—

(A) part C of title XI of the Social Security Act (42 U.S.C. 1320d et seq.); or

(B) section 264(c) of Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. 1320d–2 note).

(e) SPECIAL RULE IN CASE OF GENETIC INFORMATION.—With respect to health insurance coverage offered by a health insurance issuer, the provisions of this section relating to genetic information (including information about a request for or the receipt of genetic services by an individual or a family

member of such individual) shall not be construed to supersede any provision of State law that establishes, implements, or continues in effect a standard, requirement, or remedy that more completely—

(1) protects the confidentiality of genetic information (including information about a request for or the receipt of genetic services by an individual or a family member of such individual) or the privacy of an individual or a family member of the individual with respect to genetic information (including information about a request for or the receipt of genetic services by the individual or a family member of such individual); or

(2) prohibits discrimination on the basis of genetic information than does this section.

At the end of title II, insert the following:

**SEC. 203. ELIMINATION OF OPTION OF NON-FEDERAL GOVERNMENTAL PLANS TO BE EXCEPTED FROM REQUIREMENTS CONCERNING GENETIC INFORMATION.**

Section 2721(b)(2) of the Public Health Service Act (42 U.S. C. 300gg–21(b)(2)) is amended—

(1) in subparagraph (A), by striking ''If the plan sponsor'' and inserting ''Except as provided in subparagraph (D), if the plan sponsor''; and

(2) by adding at the end the following:

''(D) ELECTION NOT APPLICABLE TO REQUIREMENTS CONCERNING GENETIC INFORMATION.—The election described in subparagraph (A) shall not be available with respect to the provisions of subsections (b), (c), and (d) of section 122 of the Bipartisan Patient Protection Act and the provisions of section 2702(b) to the extent that the subsections and section apply to genetic information (or information about a request for or the receipt of genetic services by an individual or a family member of such individual).''.

Mr. ENSIGN. I ask that the yeas and nays be vitiated.

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

Mr. ENSIGN. Mr. President, I understand both sides have agreed to this amendment. It has to do with genetic testing. We debated it last night. I appreciate Senators KENNEDY, GREGG, and MCCAIN working together, along with the White House, to make sure we are not discriminating against people based on genetics; that people with the breast cancer gene or colon cancer gene, or whatever gene they may have been born with, will not be discriminated against in the future. I appreciate everybody working with us on this matter.

Mr. KENNEDY. Mr. President, we are prepared to accept this amendment.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment (No. 849), as modified, was agreed to.

Mr. KENNEDY. I move to reconsider the vote by which the amendment was agreed to.

Mr. GREGG. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

AMENDMENT NO. 853

The PRESIDING OFFICER. The Senator from Tennessee.

Mr. THOMPSON. I believe I am correct in saying my amendment has been accepted and it is agreeable to have a voice vote.

Mr. KENNEDY. The Senator is correct.

The PRESIDING OFFICER. The question is on agreeing to the Thompson amendment, No. 853.

The amendment (No. 853) was agreed to.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

AMENDMENT NO. 833, AS FURTHER MODIFIED

Mr. REID. Mr. President, I ask that the amendment of the Senator from Virginia be called up, the yeas and nays be withdrawn, and it be agreed to by voice vote.

Mr. WARNER. Reserving the right to object, should we lay out a full understanding of our agreement?

Mr. REID. I think we should just vote.

Mr. WARNER. Your amendment is withdrawn?

Mr. REID. Yes.

Mr. WARNER. I send a modification to the desk.

Mr. REID. This is the Warner substitute.

Mr. WARNER. Mr. President, my modification has been sent to the desk.

The PRESIDING OFFICER. The amendment is so modified.

The amendment (No. 833), as further modified, is as follows:

(Purpose: To limit the amount of attorneys' fees in a cause of action brought under this Act)

On page 154, between lines 2 and 3, insert the following:

''(11) LIMITATION ON ATTORNEYS' FEES.—

''(A) IN GENERAL.—Notwithstanding any other provision of law, or any arrangement, agreement, or contract regarding an attorney's fee, the amount of an attorney's contingency fee allowable for a cause of action brought pursuant to this subsection shall not exceed ⅓ of the total amount of the plaintiff's recovery (not including the reimbursement of actual out-of-pocket expenses of the attorney).

''(B) DETERMINATION BY DISTRICT COURT.—The last Federal district court in which the action was pending upon the final disposition, including all appeals, of the action shall have jurisdiction to review the attorney's fee to ensure that the fee is a reasonable one.

On page 170, between lines 21 and 22, insert the following:

''(9) LIMITATION ON ATTORNEYS' FEES.—

''(A) IN GENERAL.—Notwithstanding any other provision of law, or any arrangement, agreement, or contract regarding an attorney's fee, the amount of an attorney's contingency fee allowable for a cause of action brought under paragraph (1) shall not exceed ⅓ of the total amount of the plaintiff's recovery (not including the reimbursement of actual out-of-pocket expenses of the attorney).

''(B) DETERMINATION BY COURT.—The last court in which the action was pending upon the final disposition, including all appeals, of the action may review the attorney's fee to ensure that the fee is a reasonable one.

''(E) NO PREEMPTION OF STATE LAW.—Subparagraph (A) shall not apply with respect to a cause of action under paragraph (1) that is brought in a State that has a law or framework of laws with respect to the amount of an attorney's contingency fee that may be incurred for the representation of a participant or beneficiary (or the estate of such participant or beneficiary) who brings such a cause of action.

Mr. WARNER. We have worked it out together. I ask that the yeas and nays be withdrawn.

The PRESIDING OFFICER. Without objection, the yeas and nays are vitiated.

Mr. WARNER. I understand we will proceed to a voice vote and the amendment of my distinguished colleague will be withdrawn.

The PRESIDING OFFICER. The question is on agreeing to the amendment (No. 833), as further modified.

The amendment (No. 833), as further modified, was agreed to.

Mr. WARNER. I thank my distinguished colleague from Nevada.

Mr. WARNER. Mr. President, I move to reconsider the vote and move to lay that motion on the table.

The motion to lay on the table was agreed to.

AMENDMENT NO. 852, WITHDRAWN

Mr. REID. I ask unanimous consent my amendment be withdrawn.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

The PRESIDING OFFICER. The Senator from New Hampshire.

Mr. GREGG. As I understand it, we are down to two amendments on our side: Senator KYL's and Senator FRIST's, which will be the substitute.

I hope we can get a time agreement on Senator KYL. How much time does the Senator need? He does not know. And Senator CARPER, on the other side, is going to make a statement and maybe offer an amendment.

Before they go, since people are a little confused, so they can get ready, we are heading toward the finish line. Before we get to the finish line, I want to mention that a lot of people do a lot of work around here. They are called the staff. They are extraordinary. I especially want to thank my staff, Senator KENNEDY's staff, Senator FRIST's staff, who have worked so hard on this. I am sure there are many folks on the other side, but I specifically want to thank Stephanie Monroe of my staff, Colleen Cresanti, Steve Irizarry, Kim Monk, and Jessica Roberts for all they have done to make this process move smoothly for me and allow me to be successful. They really have put in extraordinary hours. I greatly appreciate it. They are exceptional people, and we thank them very much.

Now I suspect the Senator from Arizona is probably ready.

The PRESIDING OFFICER. The Senator from Nevada.

Mr. REID. If I may say to my friend from Arizona, we have not seen his amendment. If we could see it? I wonder if, in the meantime, we could have

the Senator from Delaware make a statement.

Mr. KYL. Might the Senator from Nevada yield? I have given a copy both to Senator MCCAIN and also to Senator GREGG to give to you. I am sorry if you do not have it yet. Maybe Senator KENNEDY has a copy.

Mr. KENNEDY. I just received this a minute ago. I am just reviewing it. We will be prepared to go ahead in a few moments. I know the Senator from Delaware has waited. I understand it is a short statement. Then I hope we go to the amendment and we will be prepared to enter a short time agreement or whatever limitation to which the Senator from Arizona will be agreeable.

Mr. REID. I ask the Senator from Delaware, through the Chair, how much time he wishes to take.

Mr. CARPER. No more than 15 minutes.

Mr. REID. The Senator from Delaware wishes to speak for up to 15 minutes. I ask unanimous consent he speak at this time.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

The Senator from Delaware.

AMENDMENT NO. 855

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

The legislative clerk read as follows:

The Senator from Delaware [Mr. CARPER] proposes an amendment numbered 855.

Mr. CARPER. I ask unanimous consent the reading of the amendment be dispensed with.

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

The amendment is as follows:

(Purpose: To disallow punitive damages)

On page 153, strike line 9 and all that follows through page 154, line 2, and insert the following:

"(10) STATUTORY DAMAGES.—The remedies set forth in this subsection shall be the exclusive remedies for any cause of action brought under this subsection. Such remedies shall include economic and noneconomic damages, but shall not include any punitive damages.

Mr. CARPER. Mr. President, the amendment before us, which I will ask to be withdrawn in a few moments, is one Senator LANDRIEU and I offer, and I know has the support of a number of Members of this body from both sides of the aisle.

A great deal of effort has gone into crafting a compromise with respect to the appropriate venue, Federal or State, for bringing litigation in cases where an HMO has acted inappropriately.

As I have studied this issue over the last week or so, the way the underlying bill assigns venue for State action and for action that is more appropriate in the Federal courts, I have come to believe that the sponsors of the legislation figured it out just right. When it comes to determining damages that might be assigned in cases brought in Federal courts, I personally have concluded that there should not be a cap with respect to economic damages.

I further agree with the approach that is taken in the underlying bill, that in cases where noneconomic damages are sought in Federal courts, particularly in cases where children may be involved who are not working, who do not have a livelihood, or in cases where a spouse—perhaps a woman, but it could easily be a man—who is not in the workforce and stays at home with a family, we may not, if we cap noneconomic damages, be really fair to that young person or to the spouse who is working from the home.

However, with respect to damages at the Federal level, as they pertain to punitive claims, I am not comfortable with the approach that is embodied in the underlying bill. Senator BREAUX and Senator FRIST have offered an approach which I think is better in this regard, and I just want to mention it. It deals with whether or not there should be punitive damages awarded on actions taken in Federal courts. I conclude they have it right and those punitive damages should not be allowed in the Federal courts.

Having said that, for actions that are brought in State courts, the laws and rules of the States should prevail. If there are caps in the State courts, that is the business of the States, and that is appropriate. If there are no caps on punitive damages in actions brought before the State courts, that is appropriate as well.

As we try to find the compromise here, I believe the underlying bill has it right with the appropriate middle ground on caps and venue. I believe the underlying bill has it right with respect to damages in a Federal action: No caps on either economic or noneconomic damages. I also believe the underlying bill has it right with respect to the proper venue, State versus Federal.

I believe my friend from Louisiana and my friend from Tennessee have a better idea with respect to punitive damages and they simply should not be allowed in Federal court.

Senator LANDRIEU is probably en route to the Chamber now to say a few words with respect to the amendment. I do not see that she has arrived yet. If I may, I would like to just reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from North Carolina.

Mr. EDWARDS. Mr. President, I want to add a word for my colleague from Delaware. He and I have been working together on this legislation since it came to the floor and beforehand. He has a very well thought out position. Some of his positions I do not entirely share, but he has been very careful and very thoughtful about all these issues and has been working very vigorously with us on this legislation. He cares deeply about patient protection. He cares deeply about making sure that people all over this country have real patient's rights. He cares deeply about the uninsured. This is an issue he and I have talked about many times. He has made enormous contributions to the legislation that is now on the floor.

I thank the Senator from Delaware for all of his work in this regard, and I yield the floor.

The PRESIDING OFFICER. The Senator from Delaware.

Mr. CARPER. Let me say, too, to my friend from North Carolina, I thank him very much for his overstatement of my contribution. He is very generous.

I say back to you, you have been just a terrific manager and cosponsor of this legislation, and thank you for giving us the opportunity to work closely with you and your staff.

That having been said, I still do not see Senator LANDRIEU joining us on the floor. Were she here, she would speak in support of this amendment, but would go on to add some concerns she has with respect to capping noneconomic damages, particularly as they pertain, as I referred to earlier, to young people and spouses who may be staying at home and are not in the workplace.

Mr. EDWARDS. I thank my colleague.

AMENDMENT NO. 855 WITHDRAWN

Mr. CARPER. That having been said, Mr. President, I ask unanimous consent that the amendment be withdrawn, and I yield the remainder of my time.

The PRESIDING OFFICER. Without objection, the amendment is withdrawn.

The Senator from New Hampshire.

Mr. GREGG. I rise to say I wish we were voting on the amendment of the Senator from Delaware. I believe the punitive damages issue in this bill is a major issue.

I understand the decision not to go forward. We know the probable outcome of the vote. But there is no question in my mind that his amendment would cause a movement in the right direction on the issue of punitive damages. This bill, as all of us have pointed out who have concerns about it, is going to be candy land for lawyers. One of the reasons it is going to be is because of the punitive damage language which allows forum shopping for the best punitive damage opportunities; whereas, under today's law, punitive damages are radically distributed, and should be because the purpose is to create quality health care, and punitive damage awards would drive up insurance costs. That is passed on to the consumer, which means fewer people can afford insurance.

As a practical matter, I want to say that I think the Senator from Delaware is on the right track, and I hope the conference will listen to his comments.

Mr. CARPER. Mr. President, will the Senator yield? I say to my friend from New Hampshire that my fervent hope is that when the bill passes the Senate

and later the House, and the conference committee is established, the conferees will have a full opportunity to revisit this issue. My hope is that the final compromise will reflect this amendment.

I also want to express to the Senator from New Hampshire my heartfelt thanks for the leadership he has provided to the Republican side of the aisle on this issue, and my appreciation for a chance to work with him, as well as the Senator from Massachusetts.

Thank you.

Mr. GREGG. I thank the Senator from Delaware.

The PRESIDING OFFICER. The Senator from Arizona is recognized.

AMENDMENT NO. 854

Mr. KYL. Mr. President, I send an amendment to the desk.

The PRESIDING OFFICER. The clerk will report.

The senior assistant bill clerk read as follows:

The Senator from Arizona [Mr. KYL] proposes an amendment numbered 854.

Mr. KYL. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

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

The amendment is as follows:

(Purpose: To permit choices in costs and damages)

On page 156, between lines 15 and 16, insert the following:

''(17) DAMAGES OPTIONS.—

''(A) IN GENERAL.—In addition to plans or coverage that are subject to this Act, a plan or issuer may offer, and a participant or beneficiary may accept, a plan or coverage that provides for one or more of the following remedies, in which case the damages authorized by this section shall not apply:

''(i) Equitable relief as provided for in subsection (a)(1)(B).

''(ii) Unlimited economic damages, including reasonable attorneys fees.

''(B) PROTECTION OF THE REGULATION OF QUALITY OF MEDICAL CARE UNDER STATE LAW.—Nothing in this paragraph shall be construed to preclude any action under State law against a person or entity for liability or vicarious liability with respect to the delivery of medical care. A claim that is based on or otherwise relates to a group health plan's administration or determination of a claim for benefits (notwithstanding the definition contained in paragraph (2)) shall not be deemed to be the delivery of medical care under any State law for purposes of this section. Any such claim shall be maintained exclusively under this section.''.

On page 170, between lines 21 and 22, insert the following:

''(9) DAMAGES OPTIONS.—

''(A) IN GENERAL.—In addition to plans or coverage that are subject to this Act, a plan or issuer may offer, and a participant or beneficiary may accept, a plan or coverage that provides for one or more of the following remedies, in which case the damages authorized by this section shall not apply:

''(i) Equitable relief as provided for in section 502(a)(1)(B).

''(ii) Unlimited economic damages, including reasonable attorneys fees.

''(B) PROTECTION OF THE REGULATION OF QUALITY OF MEDICAL CARE UNDER STATE LAW.—Nothing in this paragraph shall be construed to preclude any action under State law against a person or entity for liability or vicarious liability with respect to the delivery of medical care. A claim that is based on or otherwise relates to a group health plan's administration or determination of a claim for benefits (notwithstanding the definition contained in section 502(n)(2)) shall not be deemed to be the delivery of medical care under any State law for purposes of this section. Any such claim shall be maintained exclusively under section 502.''

Mr. KYL. Mr. President, it has been requested that the time agreement on this amendment be 30 minutes on my side and 10 minutes in opposition, with an up-or-down vote at the conclusion of the debate. I propound that unanimous consent request.

The PRESIDING OFFICER. Is there objection?

Mr. REID. Reserving the right to object, Mr. President, that is fine with no second degrees in order. Is that right?

Mr. KYL. That would be my understanding. I thank the Senator from Nevada.

The PRESIDING OFFICER. Does the Senator so modify his request?

Mr. KYL. I do indeed modify my unanimous consent request.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. KYL. Mr. President, I rise to introduce the consumer health care choice amendment. This amendment would amend section 302 of the underlying legislation to provide that employers and health plan issuers would be free to offer, and participants and beneficiaries free to choose, health plans with two remedy options, in addition to the underlying plan: equitable relief—the benefit or value of the benefit; and unlimited economic damages.

The bill provides damages as provided under S. 1052 unlimited economic and non-economic, and up to $5 million in punitive damages.

This amendment applies only to the new remedies established by S. 1052 for Federal contract actions and state ''medically reviewable'' claims. It explicitly protects the regulation of medical care delivery under state law.

The problem: Increased premium costs lead to greater numbers of uninsured. The Congressional Budget Office predicts that S. 1052 would result in a 4.2 percent increase in premiums costs. This predicted increase is in addition to the 10–12 percent increase employers are already facing this year.

The CBO report illustrates the cold truth about a critical, but often overlooked, public policy issue: The irrefutable link between health-care premium increases and the number of Americans without insurance. As the Congress debates the various health-care proposals, we must keep this linkage in mind.

Supporters of S. 1052 are quick to claim that their bill will improve health care, but not so quick to admit that it will also raise costs and cause the ranks of the uninsured to swell. We know this will happen, because cost increases will cause some employers to stop offering health-care coverage, making insurance unaffordable for more Americans. This fact is politically inconvenient.

We should keep an important statistic in mind. According to the Lewin Group consulting firm, for each one percent premium increase, an additional 300,000 citizens lose their insurance.

As I mentioned, the Congressional Budget Office predicts that S. 1058 will increase premiums by 4.2 percent. A premium increase of this amount would cause about 1.3 million Americans to become uninsured as a result of S. 1052. The Office of Management and Budget recently predicted that between 4–6 million more Americans would become uninsured as a result of S. 1052.

How can we call this a Patients Bill of Rights when it will result in fewer patients?

I believe our first goal should be to ''do no harm''; or, at a minimum, to reduce the harm, as my amendment will do.

My amendment would allow employers or plans to offer two options for employees to voluntarily choose, in addition to the general plan covered by this bill, Option No. 1: A low premium policy with a remedy limited to the benefit, or the value of the benefit. Option No. 2: A mid level premium policy that would allow for full economic damages only.

There are in addition to the higher premium policy that would allow for the full range of damages provided under S. 1052.

This amendment should be appealing to employers and plans as a way to control their costs and appealing to employees as a way to hold down their premiums by voluntarily limiting their right to sue.

Data from the CBO and the Kaiser Family Foundation estimate that S. 1052 would cost a typical family with health coverage roughly $300 per year. Certainly, we should promise not to pass legislation that would reduce or completely consume the $300 or $600 rebate that many Americans will be receiving sometime this summer as a result of the tax-relief bill just signed into law by President Bush.

If adopted, this amendment would afford Americans a chance to recoup some of the loss imposed by S. 1052.

Some have argued that so-called patients' rights legislation that includes an unlimited right to sue is overwhelmingly popular with Americans. It is worth noting that a Kaiser Family Foundation/Harvard School of Public Health Survey from January 2001 asked the following question to voters: ''Would you favor a law that would raise the cost of health plans and lead some companies to stop offering health care plans to their workers?'' In answer to this question, only 30 percent voiced support, and 70 percent voiced opposition to such a law.

Fortunately, we don't have to force people to make that choice. We can give them a choice. For those who prefer the right to sue and are willing to

pay they have their plan. For those who are willing to forgo lawsuit, they can buy their plan. And, state remedies apply in any event—so called ''quality of care'' suits.

Certainly, enhancing a patient's right to sue is cold comfort to those who currently can't afford health insurance, or those who lose their coverage due to increased costs.

Clearly, the proposed legislation to reform health care comes with a steep price tag attached. Before we commit to passing legislation, perhaps we should first promise not to pass a bill that will lead to more uninsured Americans.

My amendment would merely reduce this price tag, and reduce the harm we will do by enacting S. 1052.

This amendment is very simple. I ask for my colleagues' attention because I can't imagine that anyone would want to oppose this amendment if the concern is really about patients rather than lawyers.

Let me restate that. If we are really concerned about health care for patients rather than fees for lawyers, this amendment will probably do more to provide that we keep people insured than anything else we have done during the last week because it provides for a simple option.

For any plan of an employer that provides coverage under this bill, they may also offer another option. That option is a plan that would enable their employees to forego damages in court. It is that simple. You can't just do that. You have to be providing a plan that is covered by this act, so that the full benefits, including all of the rights to go to court and file lawsuits for damages, are preserved. You still have the right to choose that policy.

We all know that policy is going to cost more money. The reason it is going to cost more money is because lawsuits drive up the cost of insurance, which drives up premiums, which means that fewer employers can pay for insurance, which means that fewer employees are insured. And that is what is concerning all of us.

This amendment makes it possible to offer, in addition to the higher cost policy, a lower cost policy that would say you can forego your rights to litigation. You can just receive the benefits that ERISA provides for today. Those benefits are health care that you contracted for—or the dollar value of that health care.

There is a second option in here. That is a limited one, which is you could also go to court and get unlimited economic damages, but no pain and suffering damages or punitive damages. Maybe some companies would write that kind of a policy, too. But either of those policies would have a lesser premium than the policy that would be offered as the underlying plan under this legislation.

To some who say there might be a case where there is a quality of care decision which just needs to go to court, and damages need to be collected, my amendment specifically protects all of the State court litigation that is currently developing about quality of care.

Even if an employee exercised an option to buy this lower cost policy, that employee would still have all of the rights of litigation for damages in State court.

Some have said: Isn't this a little bit similar to the Enzi amendment? The answer is no. The Enzi amendment said if a particular group of employees were merely offered a specific kind of policy, they wouldn't be covered by the act. That is not my amendment. All employers are covered by the act under my amendment. It is just if they offer a plan to their employees, they may in addition to that plan offer this lower cost alternative.

Why do I offer this?

As we know, the Congressional Budget Office predicts that the underlying bill would result in a 4.2-percent increase in premium costs. This is in addition to the 10- or 12-percent increase that employers are already facing this year.

The Congressional Budget Office report illustrates the cold truth that has been overlooked in this debate; that is, the irrefutable link between health care premium increases and the number of Americans without insurance.

There is a study by the Lewin Group, a consulting firm, which says that for each 1 percent of premium increase, an additional 300,000 citizens lose their insurance.

We have CBO's estimate that the cost of premiums is going to increase 4.2 percent. We have a study that says every 1 percent, an additional 300,000 people lose their insurance.

Do the math. Under this bill, more than a million Americans are going to lose their insurance if something isn't done to keep the cost of those premiums down.

The Office of Management and Budget recently predicted that between 4 million and 6 million more Americans would become uninsured as a result of S. 1052.

That is where this amendment comes in. It is probably the best way to ensure that we can get premiums down over an alternative that doesn't have as much risk for the insurer, and, therefore, won't have to have as high a premium.

But I reiterate, it is not in lieu of the benefits that we are promising under this bill but, rather, in addition to. It is an option.

For this to occur, three voluntary decisions would have to be made.

First of all, some insurance companies would have to develop a product that they might offer to employers or plans to sell for their lower cost option.

Second, employers would have to decide that in addition to the plan offered under the bill, they would offer one of these lower cost alternatives that is on the market.

Third, employees would have to decide to take advantage of that lower cost option.

It is all a matter of choice. Nobody is making anybody do anything. None of the benefits under the legislation go away at all, nor is the State court remedying.

It seems to me, since it is all voluntary, that there is nothing mandatory but it gives us one opportunity to reduce premium costs. We all ought to be supportive of this proposal.

I ask that the remaining time that I have not be yielded but, rather, see if there are any others who might wish to speak.

The PRESIDING OFFICER. The Republican leader.

Mr. LOTT. Mr. President, if Senator KENNEDY will allow me to speak at this point, let me say, first of all, that I think progress is being made. Senator REID has been working. Everybody has been trying to cooperate. I believe, after this very important amendment, we will have the substitute, and hopefully we would be ready to go to final passage.

I don't want to usurp the majority's role here, but I want people to realize that we are to the point where perhaps we can begin to wrap this up.

I thank Senator KYL for agreeing to not have lengthy debate. He feels very strongly about it, and this is certainly a very good and valuable alternative.

I heard Senator BOND of Missouri say repeatedly that when it comes to health care, we should make it available, affordable, and safe. One of our greatest concerns about this bill in its present form is health insurance for patients, and what they have available through managed care is not going to be affordable. Rates are going to go up. They are going to lose coverage for a variety of reasons. So it is a question of availability and affordability.

This is a good, viable alternative. This provides a low-cost option that will, hopefully, result in more people keeping their coverage. But it is an option. It is not in place of; it is in addition to what will be available otherwise. It just gives plans the option of offering a low-cost alternative that forgoes lawsuit damages under the law. The State court would still have the ''quality of care'' damage available. Those lawsuits would still be there. You don't replace that.

So I want to emphasize, it is not in lieu of but it is in addition to the plans offered under the bill. This really is about patients, and it really is about the freedom to have a choice, to have an option to choose to have this coverage but not going to lawsuits later on. By paying less, they will be able to afford it. That will give them an option. I think this would be a very attractive way to make sure it is available and affordable.

I would like to speak at greater length on this myself, but in the interest of time I yield the floor.

The PRESIDING OFFICER. The Senator from Kentucky.

Mr. MCCONNELL. Mr. President, I commend the Senator from Arizona, Mr. KYL, for his amendment, which is strikingly similar in concept—as he and I discussed off the floor earlier—to the Auto Choice proposal I have introduced each of the last two Congresses, cosponsored by Senator Moynihan and Senator LIEBERMAN.

Essentially what is envisioned in these kinds of choice proposals is giving the consumer the option of opting out of the litigation lottery in return for a lower premium and lower cost.

I want to ask the Senator from Arizona if it is his view that this is similar in concept to the Auto Choice measure that I just described that we have discussed off the floor.

Mr. KYL. Mr. President, if I may answer the question of the Senator from Kentucky, I am remiss for not acknowledging that my idea for this amendment came exactly from the proposal the Senator has just discussed. It seemed to me that if it worked well in that context, it would also work well in this context. I should have mentioned that earlier. I know the Senator did not ask the question to get credit, but credit certainly is due him for this idea.

Mr. MCCONNELL. I cannot announce the support of others, but I wanted to mention that on the Auto Choice bill there was also the support of Michael Dukakis, JOE LIEBERMAN, Pat Moynihan, the Democratic Leadership Council, the New York Times, and the Washington Post.

I cannot say for sure that they would support the amendment offered by the Senator from Arizona, but the concept he describes of giving the consumer the option—the consumer gets the option of leaving aside the litigation lottery in return for a lower premium and defined benefits provided for that lower premium. It does not really deny anybody. It does not deny them the right to sue. It does not put a cap on damages. It does not tell the lawyers what to charge. It simply says to the consumer: You have a choice.

What the Senator from Arizona is suggesting is to take what is a sound idea for the automobile insurance market, Auto Choice, and apply it to the health insurance market.

Under his amendment, employers would have the option of offering their employees up to two additional insurance choices. Given the additional causes of action permitted under this bill, I believe giving consumers the option not to participate in the personal injury litigation lottery is only appropriate.

It is important to note, just like my Auto Choice option, choosing Senator KYL's ''Health Choice'' option would be completely voluntary to both the employer and the employees. An employer who offers his employees health insurance would not be allowed to offer only the limited-litigation health policies. Nothing in the Kyl amendment would. The employer must offer the plans envisioned in the Kennedy-McCain bill.

Therefore, nothing in the Kyl amendment would take away any right. It would merely allow consumers who don't want to sue their health insurance plan, a lower cost health insurance option.

While we have made significant progress at improving this legislation, many of us on this side of the aisle have lingering concerns that this bill will dramatically increase the number of uninsured Americans. We ought do everything possible to minimize this impact and that is why I wholeheartedly endorse the proposal of the Senator from Arizona. Patients need more choices and should not be forced into a system of jackpot justice without their consent.

As the Senator from Arizona has pointed out, we hope not to have a greater number of uninsured when this is all over. One of the great fears many of us have who are going to be voting against this bill is that that is exactly what the result of it will be. But the Senator from Arizona has astutely offered an amendment that will certainly provide an opportunity for a number of people to receive lower premiums and thereby, hopefully, reducing the increase in the number of uninsureds which so many of us fear.

So I express my strong support for the Senator's amendment. I tell him, I think it is a very good idea. I hope the Senate will support it. It seems to me it is entirely consistent with the theme of the underlying bill. I commend the Senator from Arizona for his fine amendment.

Mr. KYL. I thank the Senator.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, as I listened to the proposal by the Senator from Arizona, the thought came to my mind about the right of an individual to waive rights. That is deeply ingrained as part of the law of the United States, so much so that when you talk about constitutional rights in a criminal case—where the rights are much more deep-seated, much more profound, based on the Constitution—that right to waive does exist.

In a sense, what the Senator from Arizona is proposing is that an individual who seeks health insurance would have the right to waive certain rights, which is recognized in law.

The keyword which I found persuasive in what the Senator from Arizona had to say was the word ''voluntary.'' I would add to that—I think this is part of his concept—that it be a knowing waiver—a voluntary, knowing waiver. And I would expect that, as part of that, the individual would have counsel to understand his rights, because you cannot understand your rights for damages—the complexities—unless you know what they are, and whatever may be said about lawyers on this floor, you need a lawyer to tell you what your rights are. Then the individual would be in a position to evaluate the reduction in premiums, and thereby which savings would be passed on to him for what he was giving up.

In that context, I think the proposal passes muster.

Mr. KYL. I thank the Senator.

Mr. SPECTER. I yield the floor.

The PRESIDING OFFICER. The Senator from Wyoming.

Mr. ENZI. Mr. President, I, too, thank the Senator from Arizona, Mr. KYL, for bringing this amendment to us.

This debate has been framed as though everybody had all of their insurance paid for by the company for which they work. I know that is not the case. Throughout America, most people participate in the cost of their insurance. So it is going to be very important for every individual who has to participate in the cost of their insurance to be searching, with their employer, for a lower cost way of doing it. This is one of those solutions. This is very innovative. It will fill a void we have left by doing the bill, particularly if the estimates are true on how much insurance is going to go up based on this ability to sue. If it goes up dramatically, there are going to be a lot more people who are going to hope there is this kind of an alternative around.

So I congratulate the Senator from Arizona for this approach.

The PRESIDING OFFICER. The Senator from Wyoming.

Mr. THOMAS. Mr. President, I also join in congratulating the Senator from Arizona. This seems to be the most commonsense amendment we have seen since we have been discussing this issue. It provides choice and provides an opportunity for lower cost insurance, and it allows people to choose what they want to pay for, for what they get.

So I urge support for the Senator's amendment and thank him for it.

The PRESIDING OFFICER. The Senator from Tennessee.

Mr. THOMPSON. Mr. President, I also urge support for Senator KYL's amendment because I think it deals with the essential nature of what this whole debate is about; that is, the tradeoff between coverage and cost. That is what the whole debate is about.

Some would have us believe we can have additional coverage without additional cost. It cannot happen. Somebody pays the freight sooner or later. We all know it is going to result in additional health care costs.

So what this amendment does is recognize that tradeoff, and it provides the individual the opportunity to make that choice—recognizing that tradeoff—which results in a very good approach and a very good amendment.

So I urge my colleagues to give serious consideration to supporting this amendment.

The PRESIDING OFFICER. The Senator from New Hampshire.

Mr. GREGG. Mr. President, I join with my colleagues in congratulating Senator KYL for bringing this amendment forward. It is exactly one of the

items we need to improve this bill significantly. This bill has a lot of problems. We all know that. But an amendment such as Senator KYL's will at least help it out in some parts. It will be very constructive to the whole process. I certainly hope my colleagues in the Senate will join in supporting it. It is the right amendment. I congratulate him for bringing it forward.

I yield the floor.

The PRESIDING OFFICER. Who yields time?

The Senator from Massachusetts.

Mr. KENNEDY. How much time do we have?

The PRESIDING OFFICER. The opponents have 10 minutes under the previous order.

Mr. KENNEDY. I yield myself 5 minutes.

Mr. President, having been on the floor for the better part of the last 8 or 9 days, I rarely have heard such wonderful statements and comments about any amendment as have been given to the Senator from Arizona. I have gone back and read it and reread it and thought that somehow I must be making a mistake in thinking that this amendment just didn't make it, but in any event, the Senate is going to make that judgment.

I read the Kyl amendment and it reminded me of the great French philosopher who said that laws, in their sublime impartiality, treat the rich and the poor alike, from sleeping under the bridges and stealing bread. This is just exactly what the Kyl amendment does.

Mr. GREGG. Will the Senator yield? That quote would be much better if it were read in French.

Mr. KENNEDY. Petite a petite, l'oiseau fit son nid.

To continue, this is what this amendment does. It says that any employer can go out and sell an insurance policy that is consistent with this bill. It doesn't indicate what contribution the employer has to make. It doesn't indicate that the employer has to make any contribution at all. All it says is he has to sell it.

On the other hand, they can sell the other policy—that is cheap—which the employer can help subsidize for that employee. And that basically undermines this whole bill and denies all of the workers all of the protections that we have talked about. That is a great choice. That is really a wonderful choice to have. And we all know what can happen. This basically undermines the whole concept of this legislation.

There is no guarantee under the Senator's proposal that there is going to be a comparable and that the employer is going to do it. All they have to do is just sell the policy. So this is an extremely unfair and weighted alternative. Basically, it will provide a way, a vehicle for millions and millions and millions of hard-working American families to lose the benefits of this legislation, and it just doesn't make sense.

The PRESIDING OFFICER. The Republican leader.

Mr. LOTT. I believe that perhaps if Senator KYL or others can yield back their time, we are ready to go to the Frist-Breaux substitute. Senator FRIST is here ready to proceed. Is that acceptable on all sides?

Mr. REID. We would vote on the Kyl amendment subsequent to the Frist-Breaux amendment being offered.

Mr. LOTT. That is correct. We would vote in stacked series, Kyl, Breaux-Frist, and then I presume we would be ready for final passage.

Mr. KYL. Mr. President, if I could just conclude my remarks in support of my amendment and in response to Senator KENNEDY, how much time remains under my time?

The PRESIDING OFFICER. The Senator has 12 minutes.

Mr. KYL. I understand that Senator FRIST would like to quickly proceed. There are several people who would like to speak in support of my amendment. Therefore, what I would like to propose is that we lay my amendment aside, go to Senator FRIST, and I take up the remainder of my time prior to the vote.

Mr. REID. I have no objection.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered. The amendment is laid aside.

AMENDMENT NO. 856

Mr. FRIST. Mr. President, I call up amendment No. 856 and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The senior assistant bill clerk read as follows:

The Senator from Tennessee [Mr. FRIST], for himself and Mr. BREAUX, proposes an amendment numbered 856.

Mr. FRIST. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

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

(The text of the amendment is printed in today's RECORD under ''Amendments Submitted.'')

Mr. FRIST. Mr. President, I will be brief, given the late hour.

At this juncture, I have introduced an amendment which is a comprehensive approach to the Patients' Bill of Rights. Essentially this bill is the Frist-Breaux-Jeffords bill which was introduced on May 15 of this year, modified with several of the amendments, which we will speak to shortly in the introduction either now or, if we have an interruption, we will speak to them in the 15 minutes on this side.

What I wish to stress is that this amendment is a comprehensive replacement amendment for the bill. It involves strong patient protections, access to specialists, access to specialty care, access to emergency rooms, elimination of gag clauses, continuity of care.

It has a strong appeals process, internal and external appeals. It requires full exhaustion of the internal and external appeals process. If the external decision—again, that is an independent physician, unbiased, independent of the plan—overrides the plan, then and only then does one go to court for the extraordinary damages. At any time during the appeals process you can go for what is called injunctive relief. Once you go for these damages, what are they? Economic damages are unlimited; noneconomic damages are $750,000 or three times economic damages. And that is a change from the underlying Frist-Breaux-Jeffords bill.

There are no punitive damages. In our bill, as I mentioned, we require full exhaustion of the internal and external appeals process. We go to Federal court. We have not had very much debate over the last week on the Federal versus State court. Senator BREAUX will be speaking more directly to that. It is critical, we believe, that we take this new Federal cause of action to the Federal courts. There are strong timelines.

The purpose of this amendment is to make sure people get the care they need when they need it—not a year later or 2 years later or 5 years later. It is a balanced approach. The amendment itself is the Frist-Breaux-Jeffords of May 15. We have included the amendments put forth by Senator THOMPSON and modified by Senator MCCAIN on the exhaustion of internal/external appeals. We have also included the Snowe-DeWine language. That is the direct decisionmaker language that they drew upon from our bill, the Frist-Breaux-Jeffords bill. But we took the specific Snowe-DeWine amendment and placed it in our bill; in addition, the amendment of Senator BOND, with the 1 million uninsured, then the liability would be repealed, which passed on the floor, is also a part of our bill.

Secondly, we did raise the noneconomic caps from $500,000 to $750,000 or three times economic damages.

As a physician, as someone who has taken care of patients, as someone who recognizes that the purpose of a Patients' Bill of Rights is for patients to get the care when they need it, not extraordinary lawsuits, not frivolous lawsuits and skyrocketing costs, all of which will be absorbed by the 170 million people, we believe this bill is the balanced, responsible way of delivering a strong enforceable Patients' Bill of Rights.

I yield, if I might, to the cosponsor, coauthor of the bill, Senator BREAUX. Senator JEFFORDS will be speaking a little bit later. The three of us, as part of the Frist-Breaux-Jeffords amendment, have worked very hard over the last 2 years to put together this balanced bill, the only tripartisan bill in the Senate which comprehensively addresses the Patients' Bill of Rights.

I yield to Senator BREAUX.

Mr. BREAUX. Mr. President, do we have a time agreement on this amendment?

The PRESIDING OFFICER. There is no time established on this amendment.

Mr. BREAUX. Let's try it without an agreement. We will see how it goes without any kind of agreement.

Mr. President, I rise to comment on the bill that is now before the Senate. It is the Frist-Breaux-Jeffords substitute bill.

Before doing so, while the Senator from Tennessee is still on the floor, I want to say something about how enjoyable it has been to work with him. While most of us are going to be leaving this Chamber tonight or tomorrow sometime to spend time with our family on vacation or have an enjoyable period of time that we can rest and relax, the Senator from Tennessee, because of what he does professionally and what he believes in, is going to be leaving on a flight tonight to go to Africa. He is going to Africa to do surgery on women and children and families who cannot afford health care on the continent of Africa.

I want to say how proud all of us can be of one of our colleagues who has that type of attitude. He not only serves his constituents in Tennessee in this body but also serves so much of humanity in various places in the world by volunteering at his own cost, on his time, with his medical expertise, serving people who have no health care. We are talking about a Patients' Bill of Rights on the floor of the Senate. He really, truly is practicing that by providing medical services to people who can't afford it in various parts of the world.

For those who are interested in getting a Patients' Bill of Rights enacted into law, let me say that, without the amendment that we have offered, the bill will not become law because the President has clearly indicated he will veto a bill that does not contain some of the main principles that you can find in the Frist-Breaux-Jeffords substitute.

What I am talking about is not that complicated. The White House has said we are creating new Federal rights, Federal remedies, and we are amending a Federal statute—the ERISA laws of the United States. If there is going to be any litigation dealing with these new Federal rights, they ought to be handled in the Federal courts. Why do we recommend that? Why does the President say that is important? So we can have one consistent way of handling all of these potential suits that will be filed. Instead of having 50 different courts, with 50 different jurisdictions, with 50 different rules of evidence and 50 different procedures on how to handle litigation, you would have any disputes dealing with these Federal rights handled in the Federal court systems of the United States.

Our opponents argue that the Federal courts don't want any more suits to be filed. Neither do the State courts. There is not a State court or district court anywhere in the United States that is going to say we need more litigation, come sue on a State level. Neither the Federal nor State courts want any additional litigation because they are as full as they possibly can be. So the argument that the Federal courts don't want them—well, neither do the States. I think from a matter of trying to make sure we have a system that works, that is, a national system that protects Federal rights, it should be in Federal court.

If this is not part of the final package, the final package, indeed, will not become law, and that would be a very serious mistake for the people in this country.

Second, we have recommended some type of caps—a reasonable amount of caps on noneconomic damages. We have no caps on economic damages, of course, but we suggested a cap of $750,000 for pain and suffering, for noneconomic damages, or three times the amount of economic damages, whichever is greater. We tie it to inflation. I think that is reasonable.

We had also suggested something I think would be very important for the patients and, indeed, the lawyers who are concerned about litigating cases. There are no caps on our bill for gross negligence. At an earlier time we had offered that there would be no caps for wrongful death if a person was killed as a result of some decision made dealing with medical necessity. Then there would be no caps whatsoever either for gross negligence or wrongful death.

Those two ingredients are very important. What happens when this bill leaves this body, if we are truly interested in getting an agreement, is that somehow between now and the time this bill gets down to the White House, these concerns are going to have to be addressed in a fashion that I think means they are going to have to be adopted. It does us no good to have a bill that is going to be vetoed. We will help no patients. They get a good political issue, but they don't get any help, any guarantees. We will have spent all of this time arguing about things that cannot become law. So I think the clear thing that our bill provides, which I think is absolutely essential either now or at some time, is that we have a degree of Federal jurisdiction that enforces the Federal rights that we are creating in this legislation, and that we address the question of unlimited damages in a way that allows the White House to be able to sign this bill.

I will tell you that in reading what we have done with all of the amendments—the Snowe, Thompson, and DeWine amendments —where we have split jurisdiction, and the Kennedy-McCain bill which says some of the suits will be in State court and some in Federal court, our suggestion is just the opposite. The new rights will be in Federal court, and all the previous ones in the State courts will remain.

We need to do some work on this. We have created something that is as complicated as the Egyptian hieroglyphics. If you had a flowchart on what we are suggesting in the bill now before the Senate, we could not figure out where you go and when you go to the different courts and for what rights. That is unacceptable. This thing needs a lot of work before it can become law because I am afraid that what we have created tonight in this bill is unmanageable and unworkable. Our suggestion makes it a great deal better.

I am under no illusions about what is going to happen, but I know I am also not under any illusions about what can be signed into law and what cannot. I fear that what we have tonight cannot be signed into law without the recommendations we have made.

I yield the floor. I see my colleague from Vermont is also with us.

The PRESIDING OFFICER. The Senator from Vermont is recognized.

Mr. JEFFORDS. Mr. President, for nearly 5 years, Congress has debated how best to enhance protections for patients enrolled in managed care plans without unduly increasing health care costs, imposing significant burdens on America's employers, and adding to the ranks of the uninsured. Our debate over the last two weeks has given us ample opportunity to thoroughly discuss these critical issues.

Through the amendment process the McCain-Edwards-Kennedy bill has been significantly improved. I particularly commend Senator SNOWE for her amendment on employer liability and Senator THOMPSON for his amendment on exhausting the appeals process.

However, I believe the McCain-Edwards-Kennedy bill is still fundamentally flawed in two critical areas. First, the bill would subject plans to excessive damages in the new federal cause of action. And second, by subjecting plans and employers to a new State cause of action, the bill destroys the current national uniformity for employers. The bill would subject employers or their designated agents to lawsuits in 50 different States.

The better alternative to the McCain-Edwards-Kennedy bill is our amendment. It is based on the legislation that I introduced with Senator FRIST and Senator BREAUX. It has much in common with the McCain-Edwards-Kennedy bill. They share 11 provisions that provide new patient protections. Each provides for information to assist consumers in navigating the health care system. Most importantly, the bills provide for an internal and external independent review process with strong new remedies when the external view process fails. Our primary area of disagreement lies in the degree that employers are protected from multiple causes of action in multiple venues and the provision of a reasonable cap on damages.

President Bush has made clear that our amendment meets the principles he has outlined for patient protection legislation that he would sign into law. This balanced legislation also is supported by a wide range of groups representing nearly 400,000 of America's physicians and health professionals.

Our amendment protects all Americans in private health plans and at the

same time, it gives deference to the states to allow them to continue enforcing managed care laws consistent with the new federal rules.

Under our amendment health plans that fail to comply with independent review decisions or that harm patients by delaying coverage will be held accountable through expanded federal court remedies, including unlimited economic damages. In addition, patients can go to court at any time to get the health benefits they need through injunctive relief if going through the internal or external review process would cause them irreparable harm.

We hope that everyone who is committed to passing legislation that can become law this year will join us in supporting this amendment.

I yield the floor.

The PRESIDING OFFICER. The Senator from North Carolina.

Mr. EDWARDS. Mr. President, over the course of the last 2 weeks, during the course of this debate, we have made great progress and consensus has been reached on many issues, beginning with the issue of scope, how many Americans would be covered by this patient protection legislation.

We have worked with Senators across the aisle and have been able to resolve that issue and resolve it in a way that all Americans are covered and there is a floor of protection for all Americans.

Second, we were able to resolve the issue of access to clinical trials, an issue on which there has been some disagreement in this body.

Third, we have been able to resolve the issue of employer liability in a way that protects employers from liability without completely eliminating the rights of patients. We have done it in a balanced way so that 94 percent—every small employer in America—are 100-percent protected.

We have also resolved the issue of exhaustive appeals so patients will go through the appeals process to get the care they need before they go to court.

Medical necessity is another issue resolved during the course of this debate.

All of these issues are the issues of great work many days, many hours of compromise, negotiation, and consensus reached in the Chamber of the Senate. This substitute abandons a number of those consensus agreements, starting with the issue of scope.

On the issue of scope, the Senator from Louisiana and I were able to fashion a provision that provides a floor and protects all Americans. That provision was voted on and consensus was reached. That consensus provision is not in this substitute.

Second, on the issue of exhaustion, the Senator from Tennessee and I worked to fashion a provision that provides that all patients exhaust the appeals before they go to court in a way that does not prevent patients who have an extended appeal from being harmed by that extended appeal. In other words, if it goes on 31 days or more, they can go to court simultaneous with the appeal. That exhaustion provision on which there was a huge vote in favor of it in the Senate is not in this substitute.

Third, the independence of the review panels: I concede I have not seen the language, but assuming it is the same language that was originally in the Frist-Breaux bill, it has no provision specifically requiring the so-called independent review panel be, in fact, independent; nothing requiring that the HMO not be able to control or dictate who, in fact, is on the appeals panel. It is like the HMO being able to pick the judge and the jury. So there is not established to anyone's satisfaction that, in fact, that appeals panel will be independent.

Finally, on the issue of going to Federal court versus State court, the American Bar Association, the Federal judiciary, the U.S. Supreme Court, the State attorneys general, all the objective, large legal bodies in this country have said that these cases should go to State court.

That is what our legislation provides. Unfortunately, under this substitute, the vast majority of cases would, indeed, go to Federal court.

Many Americans live hundreds of miles from the closest Federal courthouse. It would be much more difficult for these injured patients to get a lawyer to represent them in a Federal action, particularly one that might take place hundreds of miles away, and most important, and the reason so many of these objective bodies said these cases belong in State court, is that it will take so long to get the case heard. There is such a backlog already, it makes no sense to send these cases to Federal court.

What we have done instead is say: You, HMO, if you are going to overrule doctors, if you are going to make health care decisions, we are going to treat you exactly as we treat the other health care providers. We treat them exactly the same. It is the reason this is such a critical provision to the American Medical Association, to all the doctors groups across this country and to the consumer groups across America.

There are fundamental differences in our underlying legislation, as amended, and in the substitute, starting with the issue of scope, about which we have reached consensus, going to the issue of exhaustion of administrative remedies, which is not in this substitute; the required independence of the review panel is not in the substitute; the requirement that the cases that every objective body says should go to State court, including the U.S. Supreme Court, those cases go to Federal court instead under this provision.

We have made tremendous progress. I am very pleased with the work of all of our colleagues—Republicans, Democrats, and Independent—in this process. The work has been productive. We have done important work in the Senate, but it is not important to us. It is important for the people of this country, the families of this country who deserve more control over their health care decisions, who deserve real rights, enforceable rights.

That is what we have been able to accomplish over the last 2 weeks. Unfortunately, in every respect in which this substitute is different from the underlying legislation, as amended, it favors the HMO versus the patient. In every respect, we favor the patient; they favor the HMO.

I say to my colleagues who sponsored this amendment, I know they are well-intentioned. I know they worked very hard on it. I respect every one of them, and I respect the work they have done, but I believe the work we have, in fact, done in this Chamber over the last 2 weeks is a much better product and, most importantly, will provide meaningful protections for the patients and families of this country who deserve finally to have the law on their side instead of having the law on the side of the big HMOs.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. Mr. President, I yield myself 5 minutes.

The PRESIDING OFFICER. There is no time limit.

Mr. KENNEDY. Mr. President, I thank my good friend, Dr. FRIST. Senator FRIST has been the chairman of our Public Health Subcommittee and he and I have worked on a lot of different health care issues together.

I thank Senator JEFFORDS who has been a strong ally on many health care issues over a long period of time.

I have also worked extensively with the Senator from Louisiana, Mr. BREAUX, on many health care issues.

The fact is, when you have this combination of people making a strong recommendation, it is worthy for the Senate to give a true examination of their product and their recommendation this evening.

Having said all of that, it is worthwhile in the final minutes of this debate and before action that we give special consideration to the viewpoints of the doctors, the nurses, and the patients who have followed this issue and have really breathed life into this issue over a long time.

Tonight, at this time, there is only one matter that is before us that has the complete support of the medical profession, the nurses, the doctors, all of the groups that represent the children in this country, all the groups that represent the disability community, all of the groups that represent the Cancer Society, all the groups that represent the aged, all the groups that represent the special needs of people who have special medical challenges. They have had a chance to review each and every provision. They know every aspect of every page of all the legislation and the amendments, and they come down virtually unanimously in

support of the McCain-Edwards legislation.

Senator EDWARDS has already outlined and Senator MCCAIN will further outline the various concerns.

Let me mention matters we have focused on during this debate.

The clinical trials: We are in the century of life sciences, and we are putting resources into and investing in the NIH. We are never going to get the benefits of the research in the laboratory to the bedside unless we have effective clinical trials.

We have strong commitments on clinical trials; Breaux-Frist is short on that, and it will take up to 5 years to begin the clinical trials.

Specialty care: We guarantee specialty care. Any mother who brings in a child who has cancer will be able to get the specialty care. Breaux-Frist does not provide it. If it is not within that particular HMO, then it is not a medically reviewable decision. There are restrictions in the bill.

We have debated the issues of the appeals. Breaux-Frist still has provisions where the HMO will be selecting the appeal organization, which is effectively selecting the judge and jury in these appeals.

Liability: As has been pointed out, Breaux-Frist brings all the liability into the Federal system. Every patients group and every group that concerned itself about getting true accountability for patients understands the importance of keeping liability in the State court.

Even though the words are similar, although we have the issues of medical necessity, although we use the words of specialization, although the words of appeals are used in both bills, there is a dramatic and significant difference. Those are the two choices before the Senate.

I thank our colleagues and friends on the other side. There really is only one true Patients' Bill of Rights that is going to protect the patients in this country, the families, the children, the women, the workers in this Nation, and that is the McCain-Edwards bill. I hope we support that shortly.

The PRESIDING OFFICER. The Senator from Nevada.

Mr. ENSIGN. I ask unanimous consent action with respect to Ensign amendment No. 849 be vitiated and the Senate vote in relation to the amendment following the disposition of the Kyl amendment, with up to 10 minutes equally divided for debate prior to that vote.

Mr. LOTT. Reserving the right to object, I hope the Senator will withhold. I think a continued effort is underway, and if he will withhold at this point—I prefer not to object—let's see if we can't work it out.

Mr. ENSIGN. I withdraw my unanimous consent request.

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

The Senator from Arizona.

Mr. MCCAIN. Mr. President, I thank Senators BREAUX and FRIST for their efforts. I believe they have a goodwill attitude toward this issue. I especially thank Dr. FRIST for his leadership not only on this issue but on so many other health care issues that come before the Senate. I respect their commitment in protecting patients and holding health plans accountable. I do not believe the substitute has a mutually shared goal.

Both my colleagues, Senators EDWARDS and KENNEDY, point out some of the differences between our two bills. I remind Members that the amendment does provide very limited relief in Federal court and would only allow a handful of cases to be addressed: Only those patients who receive approval from the external medical review can go to court.

Numerous States, including my home State of Arizona, have enacted laws that permit injured patients to hold plans legally responsible for their negligent medical decisions. I believe this substitute nullifies these laws. My colleagues may assert they do not preempt State law, but I respectfully disagree. Delaying and denying care by an HMO is not a contract issue for Federal court. Delaying and denying of care is a medical malpractice and should be determined in State court.

As we know, this is a substitute. Over the last 2 weeks we have made some very important changes to this legislation, which is the appropriate way to legislate. We have made important changes on employer liability thanks to Senator SNOWE and Senator DEWINE and others; exhausting administrative procedure, thanks to Senator THOMPSON and Senator EDWARDS; limits on legal fees, an effort undertaken by Senator WARNER; reasonable scope, protecting all Americans, limitations on class action suits, and venue to prevent forum shopping, in which Senator THOMPSON and others were involved.

Some of these have been included in the substitute, and some have not. I believe all of these changes that have been made through open and honest debate on this legislation should be included.

Again, we still have avoided the fundamental issue of State and Federal court. I believe that issue is not resolved to the satisfaction of the patient as opposed to the HMO.

I take an additional minute to thank a number of people including the White House staff, Josh Bolton and Anne Phelps; Senator GREGG's stewardship on this side has been exemplary; Senators FRIST and BREAUX have obviously been very helpful; Senators SNOWE, LINCOLN, DEWINE, NELSON, and THOMPSON. I thank both leaders, Senator DASCHLE and Senator LOTT, as well as Senator REID and Senator NICKLES, who have been involved in this issue for a long time, as well as Senator EDWARDS and Senator KENNEDY.

Soon we will vote on this legislation. I believe we will prevail. I think this, like the campaign finance reform bill, has been open, honest, fair debate on which all sides have been heard, and I think, again, the Senate can be proud, no matter what the outcome, of the way we proceeded to address this issue which is important to so many millions of Americans.

This is an important issue to American citizens. This is an important issue to the person who cannot contribute a lot of money to American political campaigns. This is an important issue to average citizens whose voices are oftentimes drowned out in Washington, in my view, by the voices of the special interests, whether they be trial lawyers, insurance companies, HMOs, or others.

I think putting patients first and the HMOs second, as we crafted this legislation, is an important outcome and why I have to oppose the substitute and urge my colleagues to vote favorably when we reach final passage.

I yield the floor.

The PRESIDING OFFICER. The Senator from Oklahoma.

Mr. NICKLES. I will make two or three comments. First, I compliment and congratulate Senator KENNEDY and Senator GREGG for their patience and leadership in managing this bill and also managing the education bill. Also, I congratulate Senator MCCAIN and Senator EDWARDS for their contribution because they are going to pass a bill, and Senator DASCHLE, as well.

This has been a battle that some have been wrestling with for a long time. As a matter of fact, a year ago we passed legislation that was called Patients' Bill of Rights Plus. In my opinion, it is far superior to the legislation we are getting ready to pass tonight. It was legislation that allowed every plan to have an appeal, internal and external, and it was binding —not binding by lawsuits, but if you did not comply with external appeal, you could be fined $10,000 a day—a different approach. I think it is far superior.

In looking at the language we have today and in the underlying bill, the so-called McCain-Edwards-Kennedy bill, maybe some modest improvements have been made. It is the bill that will finally pass, but it is a bill that the President will not sign and the President shouldn't sign.

I hope we will pass good legislation but not pass legislation that will dramatically increase health care costs, as I am afraid it will. There has to be some reason that employers that voluntarily supply health care, purchase health care for their employees, that employers of all sizes are almost unanimous in their opposition. They are not compelled to buy health care for employees, but they want to. Now we are getting ready to threaten them with unlimited liability. We keep hearing about suing the HMOs, but suing the HMOs and/or employers and threatening them with unlimited liability, economic damages, unlimited noneconomic damages, pain and suffering—there are costs included.

Somebody said we solve that because we have a designated decisionmaker. If

there is a designated decisionmaker, the net result is, well, if you are going to hand off your liability to me, what am I protecting? What am I insuring?

With contracts that can be abrogated or breached, an independent reviewer can say, you have to cover other things, and you have a lot of liability if things do not work out. The net result will be the independent reviewer will say, defensive medicine, we will pay for anything because they don't want to be sued. They don't want to be liable. Then they increase premiums because whatever the liability is, they don't know how much it is or how expensive it is, and they will increase their rates. They don't plan on losing money and they don't want to go out of business, so there will be a lot of defensive medicine and they will charge extra premiums to the employer to make sure they don't go out of business.

So the cost estimates, some people have said, are 4- or 5-percent per year increases on top of the already 13- or 20-percent increases built in, in increased costs for health care. They are probably much more. The costs of the bill could increase the cost of health care by 8 to 10 percent. We should know that.

Again, we should do no harm. We should not pass legislation that will not work, that will do harm. It will do harm if you increase the number of uninsured. It will do harm if you price insurance out of the realm of affordability for millions of Americans. I am afraid that is what we are doing.

There is one other issue that has not received maybe enough attention. Senator COLLINS and Senator NELSON raised that. That is the issue of scope: Should the Federal Government be taking over regulating that the States do? I am concerned about the language. It was modified modestly. It said the States have to be substantially compliant with these new Federal regulations. That language goes so far that really the States are going to have to adopt almost identical language to what we have put in this bill. The net result? If they don't, HCFA takes over—the Health Care Financing Administration.

A couple of points: HCFA can't do it, HHS can't do it, the Department of Labor cannot do it. I want to make that point one final time.

We are ready to pass this mandate and say to the States: If you don't do it, Federal Government, you do it. If the States don't, you do it.

The Federal Government does not have the wherewithal to do it. Every State has hundreds of personnel involved in enforcing insurance regulation, and we are saying, you do it or we are going to take over. That is one of the largest unfunded mandates ever proposed by Congress.

I am a little mad at myself for not being able to offer a point of order that this is an unfunded mandate. One of the reasons I cannot is that it was not reported out of committee.

The unfunded mandates bill, the Congressional Accountability Act, says we have a report that comes out with the committee report and we can raise a point of order if you have an unfunded mandate on cities, counties, States, and the private sector. We cannot do that because we don't have a committee report because the bill was not reported out of committee. It was a year ago, but it is not now.

My point is this is an enormous unfunded mandate on counties and cities and States. We are mandating this on all those employees, saying: We know best, the Federal Government knows best. States, we know you have an emergency room procedure, but we are going to dictate a more expensive one.

I could go all the way down the list. My point is, even though we have done it, we cannot enforce it. You have nonenforceable provisions. There is no protection there. It may make us feel better, we may tell the American people we have provided the protections, but we cannot enforce it because the Federal Government cannot and should not take over State regulation of insurance. That is a mistake.

I am afraid the combination of the two, the expanded liability—you can sue employers and the providers for unlimited damages in State and/or Federal court for economic and noneconomic, unlimited in both cases. You can jury shop. You can find a place that would work. That is going to scare employers. Employers beware, the bill we are passing tonight makes you liable. You are going to have to pay a lot more in health care costs as a result of the bill we are passing tonight.

Again, my compliments to the sponsors. They worked hard. The opponents worked hard. We will pass a bill tonight. But I hope it will be improved dramatically in conference so we will have a bill that is affordable, will not scare people away from insurance, will not increase the number of uninsured by millions. My prediction is this bill would increase the number of uninsured by millions and cost billions and billions of dollars. I hope that is not the case. I hope it is fixed and improved in conference and we will have a bill that President Bush can sign and become law and of which we will all be proud. Unfortunately, I think the underlying bill does not meet that test.

With great reluctance I am going to be voting no on the underlying McCain-Kennedy-Edwards bill. I urge my colleagues to do likewise.

The PRESIDING OFFICER. The Senator from Alaska.

Mr. STEVENS. Mr. President, I regret deeply I will not be able to vote for this bill. My State does not have a problem with the HMOs that other people have expressed. Our State would be mandated by this bill to change its laws. The sensible amendment offered by Senator COLLINS was defeated. The Allard amendments that dealt with small business were defeated. The mandates in this bill will hamper our development of a sound health care delivery system for Alaska.

It is a vast area with a few people. We do not need the interference of the Federal Government. We need help. I think this bill will interfere with what we are doing. I hope by the time it comes out of conference I will be able to support it. I commend everyone who has tried, but this, the underlying bill, will not help our people; it will hurt them; and I cannot support it.

The PRESIDING OFFICER. The Senator from Tennessee.

Mr. THOMPSON. Mr. President, I think this bill is a lot better than when we started. There remains one area, of course, where we have substantial disagreement, and that has to do with where the lawsuits are going to be brought. The underlying bill still has a bifurcated system where some suits can be brought to State court and some in Federal court. I think that is the main thing the Frist-Breaux-Jeffords amendment tries to address.

We all can read the handwriting on the wall. I think we know how this is going to go. But it is very important our colleagues understand what we are doing. With regard to the underlying bill, there is a presupposition, apparently, that a client will walk into a lawyer's office with a tag around his neck saying, I'm a State suit, or, I'm a Federal suit. That will not be the case. There will be many cases that are mixed. Some will have to do with coverage denial, some will have to do with medically reviewable claims, some will be more of a contract case, some will be more of a tort case. Arguably, it could go in either court. Some will go to Federal court and the defendant will object and say, no, you belong in State court, and the judge will rule. Then there will be an appeal in that venue. Then that will be determined, and then it will go possibly to the opposite court. In other words, there will be litigation at one or more levels in order to determine where you are going to litigate.

Some, on the other hand, will go to State court, and there will be a fight there as to whether or not that belongs in State court. It may be remanded over to Federal court.

Some will come in with cases, parts of which will arguably be in Federal court and parts of the same case could arguably be in State court.

All I am suggesting is there is no easy solution to this. It has been pointed out that there are some down sides to bringing them in Federal court, too. They are overcrowded. We have heard examples of federally related lawyers and judges saying it ought to be in State court. If you took a poll among the State-related lawyers and judges, they would say just the opposite. But at least you avoid the problems I am talking about.

We are going into a system now where we are creating new law; we are creating new defendants. But wait, it is not just HMOs and employers. The

independent decisionmakers are subject to liability, too. The independent medical reviewer is subject to liability, too. They have a higher standard. I believe it is a ''gross or willful misconduct'' standard. It is a higher standard, but they can be sued for settlement value or whatever.

We have a complicated liability framework, so you have different people, different standards, new lawsuits. It is going to be extremely confusing for a long time, and it is going to result in much higher costs.

The tradeoffs may be there. The decisions were made that we adopted this in view of all that. But I think it is very important that at a time when health care costs are already going up in double digits, we are doing something that quite clearly is going to result in much more litigation, much more confusion about that litigation. Somebody ultimately has to pay for all that. It is going to ultimately result in higher costs to our citizens. I think it is important we understand that before we cast these votes.

I yield the floor.

The PRESIDING OFFICER. The majority leader.

Mr. DASCHLE. We are just about at the point now where I think we can begin voting on amendments. I ask unanimous consent that following the first amendment, all other votes be limited to 10 minutes. I ask further that the two managers be permitted to offer a joint managers' amendment following the passage, prior to the close of business today.

Mr. LOTT. Reserving the right to object, Mr. President, I will not object, I just want to clarify where we are. I believe we are ready to recognize Senator KYL—he had a little time left on his amendment—and then I believe we will be ready to have the three votes: Kyl amendment, Breaux-Frist, and final passage.

Mr. GREGG. Reserving the right to object, on the managers' package we are working to try to reach an agreement. Hopefully, we will reach an agreement. If we do not reach agreement—is my understanding correct that we have to reach agreement by the end of today? What is the parliamentary situation if we do not reach an agreement by the end of today?

Mr. DASCHLE. Mr. President, there would not be a managers' amendment if we couldn't find mutual agreement on the amendment.

Mr. GREGG. I thank the majority leader.

The PRESIDING OFFICER. The Senator from Arizona.

AMENDMENT NO. 854

Mr. KYL. Mr. President, I ask unanimous consent Senator NICKLES be shown as a cosponsor of amendment No. 854.

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

Mr. KYL. There are two people I know of who would like to speak briefly on my amendment. I would like to respond briefly to what Senator KENNEDY said and then summarize.

May I begin by congratulating the authors of the underlying legislation and expressing appreciation for all those who have worked with me. Especially I want to thank my colleague, JOHN MCCAIN, and congratulate him for his successful efforts in moving this legislation forward. It is not always easy when colleagues from the same State are not in total agreement on everything, but he let me know early on when I first came to the Senate he didn't expect to agree with me on every issue. He said he might even be in disagreement on some matters with me from time to time.

I appreciate his efforts and the efforts of all of those who have worked with me.

Just to summarize for those who were not here earlier, my amendment is very simple. It merely provides an option for employers that offer plans that are covered by this bill to also provide an alternative for their employees. That would permit the employees to have as their remedy the receipt of the health care or for the cost of that health care rather than going to court and getting damages as they are permitted to do under the bill. This should provide a lower cost alternative that could be made available to them. That, in turn, should provide a way for employers that might otherwise have to reduce the number of employees covered, or not have insurance for their employees at all, to continue to provide that coverage.

As I pointed out before, according to the Congressional Budget Office information, and the Lewin Group, probably over a million American citizens will lose their health care as a result of the increased expenses that could result from this legislation.

The effort that we have all tried to engage is to find ways to reduce those costs so premiums won't go up as much and so employers can continue to provide the care. The best way to do that is to allow them to provide a purely voluntary option for their employees to accept, which would not have the same lawsuit damage option but would provide them the health care for which they have contracted. It is about health benefits rather than lawsuits. We think this would provide the remedy for that.

The only comment that Senator KENNEDY made in opposition was that we are not regulating how the employer would have to contribute toward the insurance policies for their employees. That is very true. We are not doing that in the underlying bill. We are not doing it in the Breaux-Frist amendment. We are not doing it in my amendment. I don't think anybody here has suggested we should be mandating from the Federal Government how much money the employers have to pay for their insurance option that they provide for their employees. I do not think that is a relevant point.

I reserve the remainder of my time for those who wish to speak to it. Then I will be prepared to yield back.

Mr. KENNEDY. Mr. President, I will just take 1 minute.

The Kyl amendment will permit a company to offer a sham policy and a real policy. To get the real policy, an employee will have to weigh all of his or her rights under the liability provisions of the McCain-Edwards bill. Those are the alternatives. It basically undermines the whole concept of this legislation because it will permit employers and HMOs to escape any kind of accountability upon which this legislation is built. That creates a massive loophole which is undermining the whole purpose of this legislation.

I hope the amendment will be defeated.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. CRAIG. Mr. President, the hour is late, but the Kyl amendment is important. There is no sham here at all. It is the marketplace at work—voluntarily to provide the employee with options. The employer must provide health care programs if they are going to provide health care programs that fit this bill, that fit the Patients' Bill of Rights, but in doing so they also can provide a voluntary option if the employee chooses to take it, which simply says you waive your rights to a lawsuit. And guess what. It might cost that employee less money. Yet he and she, and their families, might still be covered.

Isn't that a reasonable option and a voluntary option to provide to the marketplace?

How dare we say that every attorney ought to have a right here? Why not say every employee has a right to a marketplace of options that this voluntary approach that the Senator from Arizona provides gives to the health care system of our country?

I support the amendment.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. Mr. President, over the past 8 days we have had amendment after amendment that have created massive loopholes in the very basic and fundamental fabric of this legislation, which is to protect patients, protect families, protect doctors, and protect medical decisions against the bottom line of HMOs.

This is another one of those in the parade, and it should be rejected.

The PRESIDING OFFICER. Who yields time?

The Senator from Alabama.

Mr. SESSIONS. Mr. President, I ask for 1 minute.

Mr. President, the option provided by Senator KYL is not a loophole. It is an option. Under his plan, all policies that an employer would offer would provide the external and internal reviews that we have in all of the plans. The option to go to specialists, the gag rule protections that we have made a part of this bill—all of that would be in the plan.

It would simply give the employee an option, if he thought it would save him money and he or she didn't intend to sue for benefits, to choose a policy that could be cheaper and simply not have certain lawsuit rights but, in fact, that operate for liability purposes under current law. It is no worse than current law. It is no better than current law. That is an option that could save a working family money that they need for their budget.

For those who want all matters to be exactly the same, I don't see why they would resist such an option. I think it is good for the employees.

I salute Senator KYL. I also note that Senator JEFFORDS had a hearing recently on the uninsured in America. We know there are over 40 million uninsured and that every 1 percent increase in insurance costs causes 300,000 people to drop off the insurance rolls.

I think it is a good move. I support it.

Mr. LOTT. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Mr. KYL. Mr. President, there is nothing mandatory in this legislation. It is all voluntary. It is a simple choice for the employees. I hope my colleagues will support the amendment.

The PRESIDING OFFICER. Is all time yielded?

Mr. KYL. Mr. President, I yield all time on this side.

The PRESIDING OFFICER. The question is on agreeing to the Kyl amendment No. 854. The yeas and nays have been ordered and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. NICKLES. I announce that the Senator from New Mexico (Mr. DOMENICI), the Senator from Alaska (Mr. MURKOWSKI), the Senator from Colorado (Mr. CAMPBELL), and the Senator from Texas (Mr. GRAMM) are necessarily absent.

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

The result was announced—yeas 42, nays 54, as follows:

[Rollcall Vote No. 218 Leg.]

YEAS—42

| | | |
|---|---|---|
| Allard | Frist | Roberts |
| Allen | Grassley | Santorum |
| Bennett | Gregg | Sessions |
| Bond | Hagel | Shelby |
| Brownback | Hatch | Smith (NH) |
| Bunning | Helms | Smith (OR) |
| Burns | Hutchinson | Snowe |
| Cochran | Hutchison | Specter |
| Collins | Inhofe | Stevens |
| Craig | Kyl | Thomas |
| Crapo | Lott | Thompson |
| DeWine | Lugar | Thurmond |
| Ensign | McConnell | Voinovich |
| Enzi | Nickles | Warner |

NAYS—54

| | | |
|---|---|---|
| Akaka | Bingaman | Cantwell |
| Baucus | Boxer | Carnahan |
| Bayh | Breaux | Carper |
| Biden | Byrd | Chafee |
| Cleland | Harkin | Mikulski |
| Clinton | Hollings | Miller |
| Conrad | Inouye | Murray |
| Corzine | Jeffords | Nelson (FL) |
| Daschle | Johnson | Nelson (NE) |
| Dayton | Kennedy | Reed |
| Dodd | Kerry | Reid |
| Dorgan | Kohl | Rockefeller |
| Durbin | Landrieu | Sarbanes |
| Edwards | Leahy | Schumer |
| Feingold | Levin | Stabenow |
| Feinstein | Lieberman | Torricelli |
| Fitzgerald | Lincoln | Wellstone |
| Graham | McCain | Wyden |

NOT VOTING—4

| | |
|---|---|
| Campbell | Gramm |
| Domenici | Murkowski |

The amendment (No. 854) was rejected.

Mr. KENNEDY. Mr. President, I move to reconsider the vote.

Mr. LEAHY. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

VOTE ON AMENDMENT NO. 856

The PRESIDING OFFICER. The question is on agreeing to the Frist-Breaux substitute amendment No. 856.

Mr. EDWARDS. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays are ordered and the clerk will call the roll.

The legislative clerk called the roll.

Mr. NICKLES. I announce that the Senator from Colorado (Mr. CAMPBELL), the Senator from New Mexico (Mr. DOMENICI), the Senator from Texas (Mr. GRAMM), the Senator from Alaska (Mr. MURKOWSKI), and the Senator from Mississippi (Mr. LOTT) are necessarily absent.

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

The result was announced—yeas 36, nays 59, as follows:

[Rollcall Vote No. 219 Leg.]

YEAS—36

| | | |
|---|---|---|
| Allard | Enzi | McConnell |
| Allen | Frist | Roberts |
| Bennett | Grassley | Santorum |
| Bond | Gregg | Sessions |
| Breaux | Hagel | Smith (NH) |
| Brownback | Hatch | Smith (OR) |
| Bunning | Helms | Stevens |
| Burns | Hutchinson | Thomas |
| Cochran | Hutchison | Thompson |
| Collins | Jeffords | Thurmond |
| DeWine | Kyl | Voinovich |
| Ensign | Lugar | Warner |

NAYS—59

| | | |
|---|---|---|
| Akaka | Dorgan | McCain |
| Baucus | Durbin | Mikulski |
| Bayh | Edwards | Miller |
| Biden | Feingold | Murray |
| Bingaman | Feinstein | Nelson (FL) |
| Boxer | Fitzgerald | Nelson (NE) |
| Byrd | Graham | Nickles |
| Cantwell | Harkin | Reed |
| Carnahan | Hollings | Reid |
| Carper | Inhofe | Rockefeller |
| Chafee | Inouye | Sarbanes |
| Cleland | Johnson | Schumer |
| Clinton | Kennedy | Shelby |
| Conrad | Kerry | Snowe |
| Corzine | Kohl | Specter |
| Craig | Landrieu | Stabenow |
| Crapo | Leahy | Torricelli |
| Daschle | Levin | Wellstone |
| Dayton | Lieberman | Wyden |
| Dodd | Lincoln | |

NOT VOTING—5

| | | |
|---|---|---|
| Campbell | Gramm | Murkowski |
| Domenici | Lott | |

The amendment (No. 856) was rejected.

Mr. STEVENS. Mr. President, I move to reconsider the vote, and I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. The question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed for a third reading and was read the third time.

Mrs. LINCOLN. Mr. President, I wish to enter into a colloquy with the distinguished manager of the bill to clarify the intent of the sponsors.

Section 202 of the bill amends the Public Health Service Act with a new section 2753 that applies all of the requirements of title I of the Patients Bill of Rights to each health insurance issuer in the individual market.

Current law, at section 2763 provides that none of the preceding requirements of the ''individual market rules'' apply to health insurance coverage consisting of ''excepted benefits''.

Similar provisions exist in current law at section 2721 of the Public Health Service Act for the group insurance market. A parallel provision exists in ERISA at section 732 for ''excepted benefits''.

Is it the intent of the managers of the bill that current law section 2763 and the parallel provisions for the group market in the Public Health Service Act and ERISA remain in full force notwithstanding the language of new section 2753?

In other words the requirements of title I of the Patients Bill of Rights would apply to individual and group health insurance other than ''expected benefits'' coverage.

Mr. KENNEDY. The Senator is correct. It is the intent of the managers of the bill that the requirements of title I do not apply to insurance coverage consisting of ''excepted benefits''.

Ms. CANTWELL. Mr. President, I rise today to speak in support of the bipartisan McCain-Edwards-Kennedy Bipartisan Patient Protection Act. Managed care reform, particularly the enactment of a comprehensive Patients' Bill of Rights, is one of the most important issues currently before either body of the U. S. Congress. After all the debate we have had on the floor in the last two weeks, I believe we are at the cusp of providing true, meaningful protections for every American in every health care plan.

Unfortunately, while over 160 million Americans rely on managed care plans for their health insurance, HMOs can still restrict a doctor's best advice based purely on financial costs. The fact is, we know that the great promise of managed care—lower costs and increased quality—has in all too many cases turned into an acute case of less freedom and greater bureaucracy.

I want to tell my colleagues about the Malone family from Everett, Washington. Their son, Ian, was born with brain damage that makes it very difficult for him to swallow, to even cough and gag properly. He cannot eat or breathe without being carefully watched. He's fed through a tube in his stomach since he can't swallow.

The doctors at Children's Hospital in Seattle—one of the best pediatric care institutions in the world—said that Ian could leave the Intensive Care Unit but would need 16 hours of home nursing care a day for Ian. And while initially the Malone's health insurance company paid for this care, it decided to cut it off. Ian's father says that ''The insurance company told us to give Ian up for adoption and let the taxpayers step in and pay for his care. They didn't care. It was all about saving money.''

It seems that the week's rhetoric has centered on the idea of business and employers versus patients—as if these two interests are inherently antithetical, rather than complementary. But they are not. In fact, I believe the Bipartisan Patient Protection Act is a balanced approach to protecting patients and protecting the business of managed care.

My home State of Washington has been a leader in providing health care to all of its citizens and has enacted strong patient protections at the state level. Under Washington State law, patients have the right to accurate and accessible information about their health insurance; the right to a second opinion; timely access to services by qualified medical personnel; the right to appeal decisions to an independent review board; and the ability to sue providers for damages if they are substantially harmed by a provider's decisions.

I believe that States are the laboratories of democracy and I do not take lightly the possibility that any federal legislation would undermine or preempt state law. I spent six years on the Health Care Committee in the State House of Representatives and just this last year Washington passed a comprehensive Patient's Bill of Rights. In issues such as the one before us this week, it is paramount that federal legislation enhance state protections, not undermine them.

And that is what this bill does. The McCain-Edwards-Kennedy compromise explicitly preserves strong state patient protection laws that substantially comply with the protections in the Federal bill. This is an extremely important point. The standards for certifying state laws that meet or exceed the Federal minimum standard ensure that only more protective State laws replace the Federal standards.

But I find it ironic that opponents of a strong, enforceable, Patients' Bill of Rights have traditionally limited the scope of the patient protections in their managed care reform legislation to those individuals in self-insured plans, which are not regulated by the States, and assert that the States are responsible for the rest.

This approach denies Federal protections to millions of Americans—teachers, police officers, firefighters and nurses who work for State and local governments; most farmers and independent business owners who purchase their own coverage; most workers in small businesses who are covered by small group insurance policies, and millions more who are covered by a health maintenance organization. We need federal protections so that all Americans are guaranteed basic rights.

In fact, no state has passed all the protections in the bipartisan McCain-Edwards-Kennedy Patients' Bill of Rights. To fail to enact this bill would mean that neighbors, and sometimes workers in the same company, will have different protections under the law. The scope of this legislation simply ensures that all Americans in all health plans have the same basic level of patient protections.

Let me focus for a few minutes on what this bill does.

This bill protects a patient's right to hear the full range of treatment options from their doctors, and it prohibits financial incentives to limiting medical care.

This bill allows patients to go to the first available emergency room when they are facing an emergency—regardless of whether that particular E.R. is in their managed care network.

This bill allows women to go directly to their obstetrician or gynecologist without going through a ''gatekeeper,'' and it allows parents to bring their children directly to pediatricians instead of having to go through primary care physicians.

This bill allows patients with life-threatening or serious illnesses, for whom standard treatments are ineffective, to participate in approved clinical trials.

This bill has laid out stringent, tough, enforceable internal and external review standards, and we have ensured that a truly independent body has the capability and authority to resolve disputes for cases denying access to medical care.

This bill promotes informed decision-making by patients, by requiring health plans and insurance companies to provide details about plan benefits, restrictions and exclusions, and other important information about coverage and rights under the legislation.

Finally, the Bipartisan Patient Protection Act holds insurers and HMOs accountable for their acts.

Twenty years ago, very few Americans were in managed care plans. Since the early 1990s, however, insured workers' enrollment in traditional fee-for-service plans has dropped from about 50 percent to under 25 percent. The broad shift to managed care has been driven, largely, by cost concerns. But in our need to control health care costs, it is imperative that we do not forget what we are supposed to be doing—providing health care.

There will be few issues more important in the 107th Congress than the one we are voting on today. Health care affects people personally, every day of their lives, and we have a real responsibility to ensure that any changes we make put the patient's interests first. That is what this bill does, and I proudly rise in support of the Bipartisan Patient Protection Act.

Mr. FEINGOLD. Mr. President, I was prepared to offer an amendment to S. 1052 concerning mandatory arbitration to ensure that HMOs are held accountable for their actions, which after all is one of the primary purposes of this bill. I have been asked not to offer that amendment, so I wanted to discuss it with the lead sponsors of the bill and ask them to clarify their intent.

Some managed care organizations currently require patients to sign mandatory binding arbitration contracts before any dispute arises. These provisions effectively deny injured patients the right to take their HMO to court. Instead they are forced to go into binding arbitration, which can be a stacked deck against patients. We have spent much of the past 10 days debating whether injured patients should be able to go to court to vindicate their rights. It is clear that a majority of the Senate supports such rights, otherwise we would not be about to pass this legislation. So I am asking my colleagues to clarify that it is the intent of the sponsors that injured patients are granted legal rights under this legislation that permit them to go to either state or federal court to pursue compensation and redress, notwithstanding a mandatory arbitration provision in an HMO contract. Can they further clarify that it is not the intent of the sponsors of this legislation that patients can lose the legal rights we are providing in this bill by being forced into mandatory binding arbitration? In these arbitrations, the HMO chooses the arbitrator, there are substantial up-front costs that the patient has to bear, there is limited discovery, no right to appeal, and no public record or precedential value of the decision.

Mr. McCAIN. I thank my friend from Wisconsin for raising this very important issue about this legislation. We have come very far on this legislation. It is the intent of the bill's sponsors and of the majority about to pass this bill that patients will have the full legal rights provided under this historic legislation. It is not our intent to provide these important legal rights on the one hand and then allow them to be taken away by mandatory arbitration contracts entered into before a dispute arises. We have said that this bill gives patients the right to an external appeal process and to go to court, and we intend that cases arising under these rights should be heard by the external reviewer in court, and not by private arbitrators.

Mr. KENNEDY. If the Senator would yield, I agree that our bill would be severely undermined if health insurers could avoid the protections we have tried to guarantee in this bill by inserting a clause in the fine print of the contract to require binding arbitration of disputes that might later arise.

Mr. EDWARDS. I agree with my distinguished colleagues that HMOs should not be permitted to revoke the protections we have worked so hard to provide in this bill through the use of mandatory binding arbitration provisions in their contracts. Patients have no ability to bargain over the fine print of the health insurance contracts. That is why we have had to provide federal standards in this bill, and it would be wholly contrary to the approach of this bill to allow a backdoor route for these standards and protections to be avoided.

Mr. FEINGOLD. I thank my colleagues, the prime sponsors of this legislation for these clarifications. Based on these assurances, I will not offer my amendment. I yield the floor.

Mr. ROCKEFELLER. Mr. President, during the past five years, we have debated the merits and faults of assorted patients' rights legislation. We have offered statistics, we have shared stories, and we have reduced strong legislation—legislation that held the real possibility of protecting all Americans—to weaker law that protects a minority of the population. Our work at times spoke of this issue in the abstract, yet there is nothing abstract about it. The 180 million Americans enrolled in health care plans have always understood exactly what it means to have insufficient coverage. However, they are not sitting on the edges of their seats, watching our heated arguments and waiting breathlessly for an outcome. Instead, they are engaged in the battles they have fought for far too long, and their disputes have far higher stakes. They are, quite literally, fighting with managed care organizations for their lives. The American people are tired, Mr. President, and deserve relief from these battles. They deserve good health and the peace of mind that comes with quality care. It is time we cast aside our partisan bickering and give the American people the right to health care, as well as the right to seek redress if denied quality health care. It is time to pass the Patients' Bill of Rights.

Recognizing that 43 million Americans go without health insurance each day, and millions more carry partial to inadequate health coverage, I have worked with my colleagues both in committee and on the floor to deliver quality care that truly benefits patients. I am convinced that such health care coverage must include liability when needed care is denied, resulting in injury or death. Quality care must also include patients' access to medical specialists, and an appeals and review process when such access is denied. The McCain-Edwards-Kennedy bill includes these stipulations and goes one step further. It ensures that, for the first time, all Americans enrolled in health plans will be given access to the care they need.

With this in mind, I would like to enthusiastically endorse the McCain-Edwards-Kennedy Patients' Bill of Rights. A bipartisan effort in all regards, the legislation before us will ensure access to the quality of care that all Americans need—access which they deserve. First and foremost, it grants every individual with health coverage the same quality care. Under this McCain-Edwards-Kennedy legislation, for example, women, children, and the critically ill—often, the groups that are denied the care they need—will be given access to doctors who will determine their best medical interests.

If denied such care, patients will also be given the opportunity to immediately appeal decisions. By employing independent review boards, victims will be able to seek second opinions prior to the denial of care. The McCain-Edwards-Kennedy bill ensures access to medical treatments, before it is too late. To date, thousands of patients have died as a result of decisions made by non-medical HMO personnel who merely sought to reduce cost and increase profits. With this legislation, that need not happen ever again.

We have now come to agreements so that the pending legislation will allow employees to seek punitive damages only if their employers willfully and negligently deny medical care that results in injury or death. Though some might argue that this will increase the cost of health care and, by extension, increase the number of uninsured in America, studies in states that have implemented similar protections have shown that this just is not the case. This right serves as a check against irresponsible decision-making and is critical to the legislation before us.

Finally, the McCain-Edwards-Kennedy Patients' Bill of Rights provides hope for those suffering from chronic illness by encouraging the use of clinical trials if no other treatment exists. Alzheimer's, AIDS, and cancer patients, for example, have real hope that alternative therapies may improve their suffering and offer a long-term cure. This element of the legislation is long overdue. I fought along with other members of this body for this right as part of the Medicare program—yet the same opportunity does not exist for those with private coverage. It is a right—and it is time to help the seriously ill so that they can fight their illness, not their insurance company.

We have been debating this issue for five years, in spite of the fact that we all agree patients deserve quality health care. Here on the floor, we concur on many of the issues that held this legislation up in conference last year. I was a member of that conference committee, and can safely say the negotiating we have done here has greatly improved the bipartisan support for the Patients' Bill of Rights, previously lacked in conference. We have negotiated and agree upon scope between state and federal law, and on the definition of ''medical necessity,'' as well as employer liability. We all agree that women should have access to OBGYN care, children should have access to pediatric care, and all patients should have access to emergency room care. I ask, then, what is holding us back? Indisputably, Americans have suffered too long and have endured too much. They deserve quality care—they deserve the Patients' Bill of Rights, and we must give it to them. I urge my colleagues to vote for the McCain-Edwards-Kennedy Patients' Bill of Rights.

Mr. KOHL. Mr. President, I rise today in support of S. 1052, the Bipartisan Patients Protection Act. After nearly 5 years of debate and partisan fighting, I am pleased that the Senate has finally passed a real, meaningful bipartisan Patients Bill of Rights. It is a step that is long overdue.

For many years, the growth of managed care arrangements helped to rein in the rapidly growing costs of health care. That benefits all patients across the Nation and helps to keep health care costs in check for everyone.

However, there is a real difference between making quality health care affordable and cutting corners on patient care. In Wisconsin, we are lucky that most health plans do a good job in keeping costs low and providing quality care. But too often across this nation, HMOs put too many obstacles between doctors and patients. In the name of saving a few bucks, too many patients must hurdle bureaucratic obstacles to get basic care. Even worse, too many patients are being denied essential treatment based on the bottom line rather than on what is best for them.

The Patients Bill of Rights will ensure that patients come first—not HMO profits or health plan bureaucrats. It makes sure that doctors, in consultation with patients, can decide what treatments are medically necessary. It gives patients access to information about all available treatments and not just the cheapest. Whether it's emergency care, pursuing treatment by an appropriate specialist, providing women with direct access to an OB-GYN, or giving a patient a chance to try an innovative new treatment that could save their life—these are rights that all Americans in health plans should have. And questions concerning these rights should be answered by caring physicians and concerned families—not by a calculator. This bill puts these decisions back in human hands where they belong.

This legislation will also make sure these rights are enforceable by allowing patients to hold health plans accountable for the decisions they make. First, all health plans must have an external appeals process in place, so that patients who challenge HMO decisions may take their case to an independent panel of medical experts. The External Reviewer must be independent from the plan, and they must be able to take valid medical evidence into account when deciding whether a treatment was inappropriately denied. The vast

majority of disputes can and will be resolved using this external review process.

I was pleased that during the course of this debate, the Senate adopted an amendment that further clarified the rules of the external review process. I shared the concerns of Wisconsin employers and insurers that the original version could have potentially allowed an external reviewer to order coverage of a medical service that the health plan specifically disallowed in its plan. I strongly support the creation of a strong, independent external review process to address disputes between a patient and their insurer over whether a service is medically necessary. At the same time, I believe employers who offer their employees health care coverage and enter into a contract with a health plan should have a level of certainty as to the specific services that are not covered under the plan.

That is why I voted for the McCain-Bayh-Carper amendment, which preserves the sanctity of the contract and makes it crystal clear that a reviewer may not order coverage of any treatment that is specifically excluded or limited under the plan. At the same time, it still allows reviewers to order coverage of medically necessary services that are in dispute. In addition, if a health plan felt that a reviewer had a pattern of ordering care of questionable medical benefit, the plan could appeal to the secretary to have that reviewer decertified.

I recognize that some preferred the approach offered by Senators NELSON and KYL in addressing this issue. However, I opposed the Nelson-Kyl amendment because it went a step too far. By attempting to have the Federal Government create a national definition of ''medical necessity,'' it would create a regulatory nightmare for patients and providers, and could potentially result in a definition that nobody supports and is too rigid to move with the advances in medical technology and treatment. The compromise amendment offered by Senator MCCAIN struck a more appropriate balance by protecting the sanctity of health plan contracts while allowing patients real recourse through an external appeal for medical necessity disputes.

Beyond the external review process, if a health plan's decision to deny or delay care results in death or injury to the patient, this bill ensures that the health plan can be held accountable for its actions. And this bill, as amended, includes clear protections for employers. I was pleased to support the amendment offered by Senators SNOWE and NELSON which further clarified the difficult issue of employer liability.

Let me make it clear that our main objective is to make sure that patients have access to the treatments they need and deserve, and that if a health plan wrongly delays or denies treatment that causes injury or death, that patients can hold their health plans accountable—just like they would hold their doctor accountable if their doctor's action caused injury or death. In other words, the patient should be able to hold accountable that entity who directly made the decision to deny care, and I think it's critical that we shield from liability all employers who had no hand in making that decision.

That is why I supported the amendment by Senators SNOWE and NELSON, which provides strong protections for employers from being sued by allowing them to choose a ''designated decisionmaker'' to be in charge of making medical decisions and to take on all liability risk. In the case of an employer who offers a fully insured health plan, the health insurance company which the employer contracts with is deemed to be that designated decisionmaker, and the employer is therefore protected from lawsuits. In the case of an employer that offers a self-insured health plan, that employer may contract with a third-party administrator to administer the benefits of the plan. That third party administrator would agree to be the designated decisionmaker and the employer is shielded from lawsuits. Only those employers that act as insurers and directly make medical decisions for their employees can be held accountable. This group accounts for only approximately 5 percent of all employers in the country.

This bill now makes it clear that employers—who voluntarily provide health coverage to their employees and the vast majority of which do not act as insurers by making medical decisions—are shielded from lawsuits. This is in total agreement with President Bush's stated principles of a Patients Bill of Rights he could sign, where he said, and I quote: ''Only employers who retain responsibility for and make final medical decisions should be subject to suit.'' That is exactly what this bill does. It is one of the main keys to making the rights in this bill enforceable, and I strongly urge that this right be retained in any bill that is sent to the President.

Most importantly, this bill gives all of these protections to ALL Americans in managed health care plans, not just a few. All 170 million Americans in managed health plans deserve the same protections—no matter what State they live in.

As someone who comes from a business background, I understand the concerns of employers. Some of my colleagues on the other side have claimed that our bill will increase health care costs so much that it will make it impossible for employers and families to afford coverage. But the Congressional Budget Office reported that the patient protections in our bill will only increase premiums by 4.2 percent over 5 years. This translates into only $1.19 per month for the average employee. CBO also found that the provision to hold health plans accountable—the provision the other side opposes the most and claim would cause health care costs to skyrocket—would only account for 40 cents of that amount. An independent study by Coopers and Lybrand indicates that the cost of the liability provisions is potentially less than that, estimating that premiums would increase between three and 13 cents a month per enrollee, or 0.03 percent. This is a small price to pay to make sure that health plans cover the health care services we all deserve.

I believe this bill meets the President's principles for a real Patients Bill of Rights, and I hope that when the House passes its bill, we can come together and send a bill to the President he will sign. The time has come to end this debate and finally act to protect patients. There is no reason whatsoever to continue to allow health plans to skimp on quality in the name of saving profits. Patients have been in the waiting room long enough. It is time for the Senate to act and make sure they receive the health care they need, deserve, and pay for.

Mr. FEINGOLD. Mr. President, the lobbying on this bill has been intensive. There's been a great deal of coverage in recent weeks about the wealthy interests that have collided over whether the nation should have a Patients' Bill of Rights, and what that bill should look like.

I think even the media has had a tough time figuring out which side of this debate has the power of the ''special interests'' on their side. Some have said the money is on the side of the McCain-Kennedy-Edwards bill, since interests supporting the bill include the American Association of Trial Lawyers, the American Medical Association, and labor unions like AFSCME.

Others say that the special interests are weighing in against the Patients Bill of Rights, because of the powerful business and insurance coalitions fighting to defeat this legislation.

So who is right. Where is the money in this debate? The answer is simple, there are donors on both sides. Wealthy interests aren't aligned exclusively on one side or the other. So for the information of my colleagues and the public, I thought I would take a moment to call the bankroll by examining the donations the interests on both sides have given in the last election cycle.

I will start with massive effort to defeat this legislation, brought to us by a coalition of insurance and business interests that represent some of the most powerful donors in the campaign finance system today.

Opposition to McCain-Edwards-Kennedy is being spearheaded by the Health Benefits Coalition. An analysis by the Center for Responsive Politics puts the cumulative donations of the members of the Health Benefits Coalition at $12.9 million in the last election cycle. That figure includes soft money, PAC money and individual contributions made by the members of the Coalition.

The Coalition includes corporate members such as Blue Cross/Blue

Shield, Aetna Inc., and Humana Inc. But perhaps more importantly, the Coalition also includes major business and insurance associations. These organizations include the Chamber of Commerce, the Business Roundtable, the American Association of Health Plans, the Health Insurance Association of America, the National Retail Federation, the National Restaurant Association, and the Food Marketing Institute, to name just a few. And of course whenever organizations like these join together in a legislative fight, they carry with them the collective clout of all the major political donors they represent.

The Health Insurance Association of America is an enormous coalition of the insurance industry. The insurance industry itself gave nearly $40.7 million in PAC, soft, and individual donations in the 2000 election cycle.

The American Association of Health Plans, the trade association for HMOs and PPOs, spent a total of nearly $2.5 million on lobbying in 1999 alone. According to a recent New York Times article, AAHP has budgeted $3 to $5 million to make their case against the Patients' Bill of Rights, and they are willing to spend, quote, ''whatever it takes,'' unquote, to get the job done.

The Business Roundtable also has spent money on an ad campaign against the bill, and so has the Health Benefits Coalition itself.

The cumulative clout of these expenditures, lobbying expenditures, soft money, PAC money and ad campaigns, from some of the biggest and most powerful organizations in Washington, hasn't gone unnoticed. This is an all-out blitz.

And this bankroll wouldn't be complete without a description of some of the interests giving their support to provisions in this bill: The American Medical Association, the Association of Trial Lawyers of America, and labor unions, including the American Federation of State, County and Municipal Employees.

According to the Center for Responsive Politics, AFSCME gave more than $8.5 million in soft, PAC and individual contributions in the last election cycle. The Association of Trial Lawyers of America gave more than $3.6 million in PAC, soft and individual contributions during that same period, and the AMA gave more than $2 million.

We don't know yet whether the will of the people will be heard above the din of lobbying calls, TV ad blitzes and the cutting of soft money checks to the political parties. I hope we pass a strong Patients' Bill of Rights. But whatever the outcome of this bill, we have to ask ourselves if this is the way we want to legislate, and the way we want our democracy to function. I think when the public hears that this debate pits wealthy interests against each other—in some kind of showdown at Gucci Gulch—they tune us out, because suddenly it's no longer about them, it's just another story about how big money rules American politics. And when that's the case, all of us lose, no matter which side of this debate we're on, because our legislative process is diminished, and the American people's faith in us is diminished along with it. I thank the chair and I yield the floor.

Mr. LEAHY. Mr. President, today's passage of the Bipartisan Patient Protection Act marks a major step forward in the struggle for a meaningful Patients' Bill of Rights. I am hopeful that with the adoption of this landmark legislation, patients throughout the country can feel a sense of relief knowing their rights will now be protected.

Over the past two decades, our Nation's healthcare delivery system has seen a seismic transformation. Rapidly rising healthcare costs have encouraged the development and expansion of managed care organizations, specifically health maintenance organizations. Unfortunately, the zealous efforts of HMOs to contain these costs have ended up compromising patient care and stripping away much of the authority of doctors to make decisions about the best care for their patients.

During the past several years, many Vermonters have let me know about the problems they face when seeking health care for themselves and their families. Like most Americans, they want: greater access to specialists; the freedom to continue to be treated by their own doctors, even if they switch health plans; health care providers, not accounting clerks at HMOs, to make decisions about their care and treatment; HMOs to be held accountable for their negligence.

The Bipartisan Patient Protection Act is the solution that Americans have called for—patient protections that cover all Americans in all health plans by ensuring the medical needs of patients are not secondary to the bottom line of their HMO.

Too many times, I have heard from Vermonters who have faced difficulty in accessing the most appropriate healthcare professional to meet their needs. This legislation will solve that problem by giving Vermonters—and all Americans who suffer from life-threatening, degenerative and disabling conditions—the right to access standing referrals to specialists, so they do not have to make unnecessary visits to their primary care physician for repeated referrals. These patients will also be able to designate a specialist as their primary care physician, if that person is best able to coordinate their care.

This legislation makes important strides in allowing patients access to a health care provider outside of their plan when their own plan's network of physicians does not include a specialist that can provide them the care they need. This provision is especially important for rural areas, like many parts of Vermont, which tend to not have an excess of health care providers. Women will now be able to have direct access to their OB/GYN and pediatricians can be designated as primary care providers for children.

If an individual gets hurt and needs unexpected emergency medical care, the Bipartisan Patient Protection Act takes important steps to ensure access to emergency room care without a referral. If a woman is suffering from breast cancer, this bill will protect her right to have the routine costs of participation in a potentially life-saving clinical trial covered by her plan. This bill puts into place a wide range of additional protections that are essential to allowing doctors to provide the best care they can and to allow patients to receive the services they deserve.

Many of our States have already adopted patient protection laws. My home State of Vermont is one state that currently has a comprehensive framework of protections in place. This Federal legislation will not prohibit Vermont or any other state from maintaining or further developing their own patient protections so long as the laws are comparable to the Federal standard. I am pleased that this bill will allow states like Vermont to maintain many of their innovative efforts, while also ensuring that patients in states that currently have no laws in place will receive the basic protections they deserve.

Each of the important protections I have highlighted will only be meaningful if HMOs are held accountable for their decisions. The key to enforcing these patient protections rests in strong liability provisions that complement an effective and responsive appeals process. The Bipartisan Patient Protection Act provides patients with the right to hold their HMO liable for decisions that result in irreparable harm or death. Managed care organizations are one of the very few parties in this country that are shielded from being held accountable for their bad decisions. The time has come for that to change. Opponents of patients' rights legislation have been vocal in suggesting that by allowing patients to hold HMOs liable in court, there will be an explosion of lawsuits, causing the costs of healthcare insurance to skyrocket. This has not been the case in states like Texas, that have already enacted strong patient protections. Rather, it has been shown that most cases are resolved through the external appeals process and that only a very small fraction of cases ever reach the court room. Under this legislation, a patient must exhaust all internal and external appeals before going to court.

I have heard from many Vermonters concerned about the potential impact of new HMO liability provisions on employers. I am disappointed that the opponents of this legislation have exploited and misrepresented this part of the bill. Rather than attempting to alleviate concerns by explaining the liability provisions, they have instead resorted to a scare tactic strategy. If you listen to some opponents of this

bill, you would think that any employer who offers health coverage will be sued. I would like to take this opportunity to clarify some of the facts.

The Bipartisan Patient Protection Act protects employers with a strong shield that only makes the employer accountable when he or she directly participates in health treatment decisions. The bill also clearly states that employers cannot be held responsible for the actions of managed care companies unless they actively make the decision to deny a health care service to a patient. This only occurs in about five percent of businesses —generally those employers large enough to run their own health plan. Those few companies that directly participate in the decision to deny a health care benefit to a patient, should accept legal responsibility for those decisions.

After nearly 5 years of debate in Congress, the American people are finally closing in on the patients' rights and protections they deserve. But there is still more work to be done. The House of Representatives must consider this important issue in a timely manner and I am hopeful their bill will include provisions similar to the bipartisan patient protection legislation passed in the Senate. Most importantly, I am hopeful that President Bush will hear the voices of Americans and not those of the special interests and their well-financed lobbyists, and sign this important legislation into law. The American people have spoken; the time for enacting strong patient protections is long overdue.

Mr. KERRY. Mr. President, I am proud to support the bipartisan McCain-Kennedy Patients Bill of Rights. It is legislation that is long overdue. Time and again, we have heard the 180 million Americans enrolled in managed care demand patient rights. Time and again, Members of this Senate have promised to provide them those rights. Finally, with the Patients Bill of Rights legislation before us, we stand ready to deliver.

The McCain-Kennedy Patients Bill of Rights ensures Americans that they can receive the very health care they pay for. In exchange for their monthly premiums, patients deserve a guarantee that they can see their own doctor, visit a specialist, and go to the closest emergency room; a guarantee that their doctor can discuss the best options for treatment, not just the cheapest; and a guarantee that their doctor's orders will be followed by their HMO. The McCain-Kennedy bill guarantees all of those rights.

When those rights are violated, and harm results from the delayed application or outright denial of treatment, the McCain-Kennedy bill guarantees patients that they can hold their health plan accountable. And, that is what all of the rights to access care hinge upon—the ability to hold a health plan liable if access to care is denied.

We have spent days on the floor of the Senate debating the issue of liability. But, the argument here is simple. In this country, if the decision of an individual or corporation results in harm or death to a consumer, the decision-maker is held accountable. That holds true for every individual, and for every company except an HMO. HMOs, businesses who make countless decisions daily that affect the health of millions of Americans, do not face this same accountability. The number of patients who are suffering as a result is staggering.

Every day, 35,000 patients in managed care plans have necessary care delayed. Too many of these patients pay the ultimate price for the callousness displayed by these managed care plans. I would like to share the story of one woman from my state of Massachusetts who lost her life after being denied care by her HMO.

Mrs. White was diagnosed with leukemia in October 1997, and was unable to find a bone marrow match for transplant. After 2 years of battling the disease she went into remission. She then learned that Massachusetts General Hospital was working with a newly-developed anti-rejection drug which would allow patients like herself, with less than perfectly-matched donors, to have bone marrow transplants. But, her HMO denied her care the day before she was due to be admitted to the hospital.

Six months later, Mrs. White enrolled in a new health plan which covered the costs of the transplant. However, during the 6-month impasse, Mrs. White fell out of remission, and her body was less able to sustain the new bone marrow. She died 3 months after the procedure was performed.

Real stories like these demonstrate why HMOs must be held accountable for their decisions. Real people like Mrs. White are the reasons why there are liability provisions in the McCain-Kennedy Patients Bill of Rights—liability protections that allow patients to sue their health plans in state court when an HMO's decision to withhold or limit care results in injury or death. My colleagues on the other side of the aisle seek to misconstrue that point. But, let's be clear: this bill establishes the right to sue an HMO as a protection for America's patients, not as a reward to America's trial lawyers.

Opponents of the Kennedy-McCain Patients Bill of Rights have predicted that the liability language in the bill will cause a future flood of frivolous lawsuits against managed care companies. But recent history paints a very different picture.

The President's home State of Texas enacted a patients bill of rights—which includes a provision to hold HMOs accountable—in 1997, albeit without the support of then-Governor Bush. Since that time, 17 lawsuits have been brought against managed care insurers in Texas. Let me repeat that—17 lawsuits in 4 years. That is a trickle, not a flood, of litigation.

Mr. President, no one wants to encourage unnecessary lawsuits that increase the cost of providing health care. That is why the McCain-Kennedy bill sets out a comprehensive internal and external review process that seeks to remedy complaints before they reach a courtroom. Except in cases of irreparable harm or death, patients must exhaust this review process before pursuing a legal remedy.

But we must establish a legal remedy. A right without legal recourse fails to exist. The liability provision in this legislation simply establishes a mechanism by which to enforce the very patient protections it provides. Managed care insurers can easily avoid any liability, as long as they act responsibly and ensure that their patients receive the quality medical care prescribed for them by their physicians.

Let's be clear about another issue.

As chairman of the Small Business Committee, I am well aware of the substantial challenges small businesses face in providing employee benefits while holding down costs. I understand the concerns small business owners have over the Kennedy-McCain bill's potential to expose them to liability for the sole, laudable initiative of offering health insurance coverage to their employees. But that is not the intent of this legislation.

The McCain-Kennedy bill only holds accountable those employers who directly participate in the medical decisions governing an employee's care if harm or injury occurs. The logic here is simple. If employers act like HMOs, it is only fair that they be held to the same accountability standards. For employers who do not directly participate in these medical decision there should be no liability.

I understand that many businesses remain weary of the safeguards against employer liability that are included in the Kennedy-McCain legislation. Negotiations are underway to strike a compromise and strengthen these safeguards so that we may arrive at a Patients Bill of Rights that we all can support. I join all of my colleagues in hoping that those negotiations bear fruit.

Another attack on this Patients Bill of Rights legislation that we have heard—not just in this chamber but across the television airwaves—is that this bill will cause insurance premiums to increase dramatically. Nothing could be further from the truth. According to the most recent estimate from the Congressional Budget Office, this legislation will cause premiums to increase an average of 4.2 percent a year. For the average employee, that equates to $1.19 per month in additional premiums, a small price to pay for meaningful patients rights extended in this bill.

Many of my colleagues across the aisle argue that this minor increase will cause large numbers of Americans to become uninsured when, in fact, no evidence exists to support this. Nevertheless, I am encouraged by their concern for the uninsured in our country,

the 43 million Americans—the 15 percent of our population—who have no health care coverage at all. I challenge my colleagues on both sides of the aisle to continue the discourse on this critical issue and look forward to working towards extending health coverage to every American once we have passed this bipartisan Patients Bill of Rights.

The McCain-Kennedy Patients' Bill of Rights legislation has widespread support from patients groups and health care providers—the two parties that we should really be focused on in this debate. To date, over 500 health care provider and patients' rights groups have endorsed our bill.

An April 2001 Kaiser Family Foundation poll found that 85 percent of Americans supported a comprehensive Patients' Bill of Rights that includes provisions to hold HMOs accountable. Mr. President, patients and health care providers have spoken loud and clear. They want expanded rights for patients now, rights that our legislation will provide. I urge all of my colleagues to pass the McCain-Kennedy Patients Bill of Rights.

Mr. CORZINE. Mr. President, I rise to talk specifically about how important the Patients' Bill of Rights is to improving the mental health care Americans receive.

For far too long, mental health consumers have been discriminated against in the health care system—subjected to discriminatory cost-sharing, limited access to specialists, and other barriers to needed services.

This is particularly true of the mental health care that children receive. More children suffer from psychiatric illness than from Leukemia, AIDS and diabetes combined. Yet, while we recognize the human costs of these physical illnesses, we often forget the cost of untreated psychiatric illness. For young people, these costs include lost occupational opportunities because of academic failure, increased substance abuse, more physical illness, and, unfortunately, increased likelihood of physical aggression to themselves or others.

That is why I am so pleased that McCain-Edwards-Kennedy goes a long way towards addressing the inequities in mental health care and ensuring access to needed mental health care services.

For example, the proposal ensures access to critical prescription drugs.

We have made tremendous progress in developing medication to treat mental illnesses. Although medication is often only one component of effective treatment for mental illnesses, access to the newest and most effective of these medications is crucial to successful treatment and recovery.

These new medications are more effective, have fewer side effects, and save money in the long run. Yet unfortunately, all too often managed care organizations prevent patients from accessing these life-saving drugs.

How? They use restrictive formularies that restrict access to preferred drugs—often the newer and more effective ones. The HMO's are, in effect, undermining our own drug regulations and approval processes.

Fortunately, the bipartisan McCain-Edwards-Kennedy Patients' Bill of Rights protects patients by providing exceptions from the formulary when medically indicated. So, when a doctor thinks a certain medication is the best treatment for a patient, that patient will get that medication.

Also—and this is a critical difference with the Breaux-Frist alternative—our bill requires that non-formulatory medication be subject to same cost-sharing requirements. Breaux-Frist does not—continuing the discriminatory treatment of mental health treatments.

The McCain-Edwards-Kennedy proposal is also superior for mental health care because it ensures access to specialists. The bill allows standing referrals—so that primary care providers do not have to continue authorizing visits. It also requires plans to allow patient access to non-participating providers if the plan's network is insufficient. So that patients can see the provider who can best meet their needs. The Breaux-Frist plan—in another contrast—does not allow access to out-of-network specialists.

In the end, this can result in more costly treatment. And for some illnesses, the longer the duration or the greater the number of significant episodes, the harder to treat and more intractable the disease becomes.

Finally, the McCain-Edwards-Kennedy proposal, unlike Breaux-Frist, provides the right to a speedy and genuinely independent external review process when care is denied.

Let me just tell the personal story of a constituent of mine to illustrate the importance of these protections. Earlier this year, a mother in Gloucester County, NJ wrote to me about problems she had encountered getting treatment for her daughter. Her teenage daughter had attempted suicide, and been hospitalized for 8 days. She was diagnosed with depression and borderline personality disorder, and both her physician and therapist recommended intensive outpatient therapy, called ''partial care'' therapy. But the managed behavioral care organization determined that this treatment was not ''medically necessary.'' Instead of the intensive five and a half hour, twice a week therapy program, the insurer wanted to send her for one hour a week of therapy. This, despite the recommendation of her physician and therapist.

Like any loving parent would, the mother fought back, calling the company many times. She was told to wait—even though, to quote her letter, her daughter ''was self-mutilating and her behavior was becoming dangerous to herself and possibly others.'' The mother finally enlisted the help of several people at the treatment program, who also wrangled with the company, and she even wrote to my office, and I wrote to the company on their behalf. Eventually, the company relented, and her daughter is now doing well in that intensive eleven hour a week program.

But it shouldn't have to be like that for families. Doctors, not insurers, should decide what treatment a patient receives. When a physician says that a certain therapy is necessary to help a suicidal teenager, an insurance company should cover it. As my constituent so poignantly wrote to me about her daughter, and I quote: ''This treatment is important and necessary [because] by learning the skills she needs to cope with her illness she can have a safe, normal, adolescence and adult life. If we address this illness now instead of waiting until the next time she hurts herself we have a better chance of her leading a happy and normal life.''

Unfortunately, a study by the National Alliance for the Mentally Ill found that less than half of surveyed managed behavioral health care companies define suicide attempt as a medical emergency.

This year, 2,500 teenagers will commit suicide in the United States. Over 10 million children and adolescents have a diagnosable psychiatric illness that results in a academic failure, social isolation and increased difficulty functioning in adulthood. Only one out of five will get any care and even less will get the appropriate level of care they need and deserve.

So unless we provide critical patient protections, including the right to a fair and independent appeals process for review of medical necessity decisions, more families like my constituent will have to wonder if an insurance company will cover critical care that a doctor has prescribed for a loved one.

In sum, the McCain-Edwards-Kennedy bill will provide people access to the mental health care they need to lead healthy, productive lives. I am pleased to support it.

HARKIN PEER-REVIEW AMENDMENT

Mr. HARKIN. Mr. President, for too long, American families have been left in the waiting room while HMOs refuse to provide the health care services that families need and deserve. The results have often been tragic.

Now we are on the verge of a big victory for the American people—passing a meaningful Patient's Bill of Rights. S. 1052 represents the culmination of five long years of bi-partisan work to ensure that patients in managed care get the medical services they need, deserve, and have paid for. We have debated this issue for years, negotiated differences of opinion to find common ground, and worked across party lines to develop the best bill possible.

S. 1052 truly represents the best of all our collective ideas and most importantly, meets the needs of the American people.

Let me say that again. This bill—the McCain-Edwards-Kennedy bill—meets

the needs of the American people. And when you cut through the rhetoric and political posturing, that is what this debate is all about—guaranteeing the American people basic and fundamental health care rights.

One of the cornerstones of a meaningful Patients' Bill of Rights is access to a swift internal review and a fair and independent external appeals process. Without a strong review system in place—where real medical experts make the decisions and not the HMO accountants—all the other protections would be compromised.

Our amendment would strengthen the review system to ensure the integrity of the appeals process and protect patients by requiring that the appropriate health care professional makes the medical decision. It ensures that health care professionals who can best assess the medical necessity, appropriateness, and standard of care, make determinations regarding coverage of a denied service.

As currently drafted, S. 1052 only requires that physicians participate in the review process. While the bill does not prohibit non-physician providers from participating in a review at a physicians discretion, it does not guarantee their involvement in relevant medical reviews.

I think we all agree that the intent of the appeals process is to put medical decisions in the hands of the best and most appropriate health care providers. In many cases, this will undoubtably be a physician. However, when the treatment denied is prescribed by a non-physician provider, it is critical that the case be reviewed by a provider with similar training and expertise.

For example, when a 59-year-old man fell in his home, he experienced increased swelling, decreased balance, decreased range of motion. decreased strength and increased pain in his right ankle and knee. A physical therapy treatment plan would have included specific exercises to increase strength, range of motion, and balance—enabling the patient to better perform activities of daily living and to prevent further deterioration of his health.

A reviewer who was not a licensed physical therapist, and did not have the expertise, background, or experience as a physical therapist, denied physical therapy coverage.

Without physical therapy intervention, the patient was severely limited in activity and spent significant time in bed. The time in bed resulted in further deterioration of the original problems and the development of wounds from the prolonged static position in bed.

A physical therapist reviewer would have recognized the importance of patient mobility while in bed to prevent bedsores and interventions to improve the patient's function with his right ankle and knee to enable him to independently walk.

Utilizing health care professionals with appropriate expertise and experience in the delivery of a service that has been denied by a health plan guarantees beneficiaries the best possible review of their appeal.

My amendment is supported by a wide range of health care professionals, including:

The American Association of Nurse Anesthetists, The American Chiropractic Association, The American College of Nurse Midwives, The American College of Nurse Practitioners, The American Occupational Therapy Association, The American Optometric Association, The American Pharmaceutical Association, The American Physical Therapy Association, The American Podiatric Medical Association, The American Society for Clinical Laboratory Science, The American Speech-Language-Hearing Association, The National Association of Orthopaedic Nurses, The National Association of Pediatric Nurse Practitioners, The National Association of Social Workers, and The Center for Patient Advocacy.

I do not believe that non-physician providers were deliberately excluded from the review process. In fact, just the opposite is true—I believe it was the intent of the bill's authors to develop the best possible review process. However, unless my amendment is adopted, I worry that we will fall short of our shared goal of giving patient's access to the best and most appropriate health care services in every instance.

Mr. MCCONNELL. Mr. President, I rise today to discuss the patient protection legislation currently before the Senate. Over the past decade, as private health coverage has shifted from traditional insurance towards managed care, many consumers have expressed the fear they might be denied the health care they need by a health plan that focuses more on cost than on quality.

In response to these concerns, the Senate has considered several bills to provide sensible patient protections to Americans in managed care plans. During the last Congress, the Senate took at least 19 rollcall votes and passed two pieces of comprehensive patient protection legislation. Like many of my colleagues, I found these debates quite instructive, in that they called the Senate's attention to the numerous areas where there already exists a great deal of bipartisan agreement.

I believe that every American ought to have access to an emergency room. No parent should ever be forced to consider bypassing the nearest hospital for a desperately ill child in favor of one that is in their health plan's provider network. If you have what any normal person would consider an emergency, you should be able to go to the nearest hospital for treatment, period.

I believe that every American ought to be able to designate a pediatrician as their child's primary care physician. This common-sense reform would allow parents to take their child to one of their plan's pediatricians without having to get a referral from their family's primary care physician.

I believe a doctor should be free to discuss treatment alternatives with a patient and provide them with their best medical advice, regardless of whether or not those treatment options are covered by the health plan. Gag clauses are contractual agreements between a doctor and an HMO that restrict the doctor's ability to discuss freely with the patient information about the patient's diagnosis, medical care, and treatment options. We all agree that this practice is wrong and have voted repeatedly to prohibit it.

I believe that consumers have a right to know important information about the products they are purchasing, and health insurance is no different. Health plans ought to provide their enrollees with plainly written descriptions of the plan's benefits, cost sharing requirements, and definition of medical necessity. This will ensure that informed consumers can make the health care choices that are in their best interests and hopefully prevent disputes between patients and their plans.

In addition, the following examples highlight areas of bi-partisan agreement: Cancer Clinical Trials—Health plans ought to cover the routine costs of participating in clinical trials for patients with cancer; Point of Service Options—Health plans for large employers ought to offer a point of service option so that patient's can go to a doctor outside their plan's network, even if it means paying a little more; Continuity of Care—We ought to ensure that pregnant and terminally ill patients aren't forced to switch doctor's in the middle of their treatment; Formulary Reform—Health plans ought to include the participation of doctors and pharmacists when developing their prescription drug plans, commonly known as formularies; and Self-Pay for Behavioral Health Services—Individuals who want to pay for mental health services out of their own pockets ought to be allowed to do so.

These are items for which there is broad support among Democrats, Republicans, the White House, and most importantly, the American people. While their may not be unanimous agreement on every detail, I believe these disagreements could be resolved in relatively short order.

This may lead one to ask one very important question , ''If these ideas are so popular, why haven't they already been enacted?''

The answer is very simple, lawsuits. The Kennedy-McCain bill insists on vast new powers to sue. Leafing with abandon through the yellow pages under the word ''attorney'' is not what most Americans would call health care reform.

Simply put, I believe that when you are sick, you need to go to a doctor, not a lawyer. I am opposed to increasing litigation for the simple reasons that it will drive up premiums, force

21,000 Kentuckians out of the health insurance market, prevent millions more uninsured from being able to purchase insurance, and aggravate an already seriously flawed medical malpractice system. I am opposed to exposing employers to onerous lawsuits, simply for doing what's right by their employees and providing them with health insurance. We ought to herald these employers, not sue them. While I am pleased the Senate adopted Ms. SNOWE's additional employer protections, I am still concerned that millions of Americans may lose access to the quality health care that their employers provide.

The proponents of these costly new liability provisions contend that you can't hold plans accountable without expanding the right to sue employers and insurers. I couldn't disagree more. The proper way to ensure that plans are held accountable is to provide strong, independent external appeals procedures to ensure that patients receive the care they need. Far too many Americans are concerned that their health plan can deny them care. I believe that if a health plan denies a treatment on the basis that it is experimental or not medically necessary, a patient needs the ability to appeal that decision. The reviewer must be an independent, medical expert with expertise in the diagnosis and treatment of the condition under review. In routine reviews, the independent reviewer must make a decision within 30 days, but in urgent cases, they must do so in 72 hours. After all, when you are sick, don't you really need an appointment with your doctor, not your lawyer.

As if driving 1.26 million Americans out of the health insurance market wasn't reason enough to oppose the Kennedy-McCain bill, I am also strongly opposed to expanding liability because it exacerbates the problems in our already flawed medical malpractice system. I might not be so passionate in my opposition to new medical malpractice lawsuits, if lawsuits were an efficient mechanism for compensating patients who were truly harmed by negligent actions. Unfortunately, the data shows just the opposite. In 1996, researchers at the Harvard School of Public Health performed a study of 51 malpractice cases, which was published in the New England Journal of Medicine. In approximately half of those cases, the patient had not even been harmed, yet in many instances the doctor settled the matter out of court, presumably just to rid themselves of the nuisance and avoid lawyer's fees and litigation costs. In the report's conclusion, the researchers found that ''there was no association between the occurrence of an adverse event due to negligence or an adverse event of any type and payment.'' In everyday terms, this means that the patient's injury had no relation to the amount of payment recieved or even whether or not payment was awarded.

These lawsuits drag on for an average of 64 months—that is more than 5 years. Even if at the end of this 64 months, only 43 cents of every dollar spent on medical liability actually reaches the victims of malpractice, source: RAND Corporation, 1985. Most of the rest of the judgement goes to the lawyers. That is right, over half of the injured person's damages are grabbed by the lawyers. Why would anyone want to expand this flawed system, which is so heavily skewed in favor of the personal injury lawyers?

Prior to the first extensive debate on this legislation in the Senate in 1999, The Washington Post said that ''the threat of litigation is the wrong way to enforce the rational decision making that everyone claims to have as a goal'', source: The Washington Post 3/16/99, and that the Senate should enact an external appeals process ''before subjecting an even greater share of medical practice to the vagaries of litigation'', source: The Washington Post 7/13/99. More recently, the Post said that: ''Our instinct has been, and remains, that increasing access to the courts should be a last resort that Congress should first try in this bill to create a credible and mainly medical appellate system short of the courts for adjudicating the denial of care'', The Washington Post, 5/20/01. The Post is not alone in this view. My hometown paper, the Louisville Courier-Journal agreed when it stated that ''there is good reason to be wary of giving patients a broad right to sue.''

Over the past two weeks, the Senate has had numerous opportunities to improve this legislation. Unfortunately, the Senate missed far too many of them. In particular, we missed an opportunity to improve Kennedy-McCain bill when the Senate rejected Mr. FRIST's Amendment, which would have established a more responsible mechanism for holding HMO's accountable in court and ensuring that patient's receive the care they need.

As I noted earlier, I support a majority of the patient protections included in this bill. That is why I take no joy in voting against this legislation. However, my concern for the 21,000 Kentuckians who will lose insurance because of the vast expansion of liability included in this bill prevents me from being able to support it. My colleague from Kentucky, Dr. ERNIE FLETCHER, has developed a compromise proposal in the House of Representatives which represents an improvement over the bill the Senate just passed. Therefore, I am hopeful that the House of Representatives will improve this product and that the Conference Committee will return to the Senate a bill that I can support, and that the President can sign into law.

Mr. HATCH. Mr. President, this is an important bill.

I want to see a Patients' Bill of Rights signed into law, but I am afraid some of my colleagues here, on the other side of the aisle, have rejected any efforts to move the reasonable Frist-Breaux-Jeffords bipartisan, or I should say tri-partisan bill. They have put lawyers and litigation ahead of patients and medical care.

I would like to say a few words on the liability provisions of this legislation.

We all recognize that the liability provisions of this legislation are critical. These elements are key to providing patients with quality health care instead of extended court time.

When I refer to the liability provisions, of course I am talking about a family of issues, including: exhaustion of appeals, employer liability, caps on damages, and class action lawsuits. Each of these is important, and indeed critical to patient care and health care delivery, and needs to be addressed and corrected before the President can sign a bill.

With regard to the provision on exhaustion of appeals, I believe the Thompson amendment, which we just approved is certainly a big improvement over the McCain-Kennedy language. The amendment will make certain that no judicial proceedings commence prior to patients exhausting all of the internal and external review mechanisms. This is purely a common sense amendment, which properly maintains emphasis on speedy resolution of patient problems without lengthy and costly court proceedings.

I want to emphasize that nothing in the amendment prohibits patients from having their day in court. Nor does this amendment prevent them from receiving immediate, needed care. It just requires them to go through the internal and external review process before going to court for damages. The amendment still allows for those patients who really need immediate care to get that care while they go through the administrative appeal process.

It is important to underscore that no one will suffer irreparable harm under the amendment.

To reiterate, this amendment does not prohibit patients from going to court for care; it simply asks them to go through internal and external review before going to court to seek liability and damages. What is wrong with that?

If we go down the route of the McCain-Kennedy bill, we are not helping the patient get care. What we are doing is rendering both the internal and new external appeal process pointless. Why are we bothering to establish stricter standards for internal reviews and set up an external appeal process if the work of the appeals panel doesn't matter and can be bypassed through a judicial process? Unfortunately, that is exactly what McCain-Kennedy does—allows patients to bypass the administrative appeal process and go directly to court.

The main difference between the McCain-Kennedy bill and the Thompson amendment is this—with Thompson, we emphasize care over court. The Thompson amendment places the emphasis where it should be—on guaranteeing that people get the health care that they need, when they need it.

I believe the Thompson amendment is important in a number of ways. It will help curb unnecessary lawsuits. It provides patients with a fair review process. And most importantly, it codifies current law by allowing patients to file injunctive relief when they need immediate care.

The Thompson amendment will not only protect the rights of patients but will also improve the McCain-Kennedy legislation.

As far as employer liability is concerned, the language of the McCain-Kennedy legislation was completely unacceptable. The bill claimed to limit federal or state causes of action against a group health plan, employer, or plan sponsor, but it specifically authorizes a cause of action against an employer if such person or persons directly participated in the consideration of a claim for benefits and in doing so failed to exercise ordinary care. But, at the same time, the McCain-Kennedy bill specifically excluded any cause of action against a doctor or hospital.

I think the Snowe-DeWine amendment adopted yesterday starts to address these concerns. The Snowe-DeWine language includes protections for employers who delegate plan decision making to a third party. It helps strengthen the definition of the designated decision maker so that some employers will not be unfairly exposed to liability. However, other employers would not be protected. I am serious when I say this could result in employees losing health coverage. Employers will not want to chose between offering health insurance to their employees and opening themselves up to liability and huge court costs.

I find it ironic that my colleagues on the other side of the aisle, who always claim they are trying to find ways to lower the uninsured population, are actually pressing for legislation that will dramatically increase the uninsured population.

And if you don't believe me, talk to any expert who is not a trial lawyer because the message is loud and clear that unless the bill is improved, health coverage will be severely jeopardized, and employees will lose their insurance. Is this the result that we want, especially in legislation that claims to be a Patients' Bill of Rights? I think not.

As far as damage caps are concerned, the Frist-Breaux-Jeffords legislation is a step in the right direction. The McCain-Kennedy language is not.

The problem with the current McCain-Kennedy legislation is that it allows patients to go both to federal and state court to collect damages. For federal causes of action, economic and non-economic damages are unlimited. And even though the bill's proponents claim there are no punitive damages provisions, as a former medical malpractice attorney, I know punitive damages when I see them.

Supporters of the McCain-Kennedy approach claim their bill doesn't allow punitive damages in federal court. That is absolutely not true. Under their bill, a defendant in federal court can be hit with up to $5 million in ''civil assessment'' damages. Let's call it like it is. The purpose of the civil assessment is to punish providers, plain and simple. The bill includes no limits on state law damages. It is very apparent to everyone in this chamber that the trial lawyers have been principally involved in drafting these liability provisions and they have done so with their own interests in mind. This provision is simply not in the best interest of the American people.

The McCain-Kennedy language allowing for unlimited damages is unworkable. Economic and non-economic damages are uncapped. In my opinion, non-economic damages should be capped.

Another issue that is extremely important is class action. The McCain-Kennedy language had no restrictions on class actions on its newly permitted state causes of action nor for its newly created federal causes of action for damages. Fortunately, the DeWine language attempts to restrict the litigation nightmare that would have resulted from the McCain-Kennedy language.

Finding common ground on these issues—exhaustion of appeals, employer liability, caps on damages and class action is crucial to the success of the Patients' Bill of Rights legislation. It is incumbent upon us to do this right and to do what is in the best interest of patients, not trial attorneys. I am confident that if we are all willing, we can make these provisions legally sound. We have spent far too many years on this issue not to do it right. We have a real opportunity to pass meaningful patients' rights legislation. Let's not squander this opportunity by acting expeditiously.

Mr. CORZINE. Mr. President, I rise to speak about an issue that has been touched upon by many people during this debate on the Patients' Bill of rights, the problem of the uninsured.

Let me first say that I am very pleased that today we are passing a strong, enforceable Patients' Bill of Rights.

I commend the bill's authors, Senators MCCAIN, EDWARDS and KENNEDY, for the tremendous job they have done in crafting a bipartisan bill that will provide strong patient protections and curb insurance company abuses.

This legislation is an example of how, working together, we can improve the health care Americans receive. But it is just the first of many steps we should be taking to ensure that all Americans receive quality health care.

During the debate on the Patients' Bill of Rights I have heard many Senators argue that this legislation will lead to more uninsured Americans. Indeed, some of my colleagues have faulted supporters of the bill for not doing anything to help the uninsured.

As someone who have been talking about this issue for several years, I am thrilled to hear that my colleagues are concerned about the problem of the uninsured.

It is a national disgrace that 42 million Americans do not have health insurance.

Who are the uninsured? They are 17.5 percent of our nonelderly population. A shameful 25 percent are children. The majority—83 percent—are in working families.

The consequences of our Nation's significant uninsured population are devastating. The uninsured are significantly more likely to delay or forego needed care. The uninsured are less likely to receive preventive care. Delaying or not receiving treatment can lead to more serious illness and avoidable health problems. This in turn results in unnecessary and costly hospitalizations. Indeed, my own state of New Jersey struggles to deal with the costs of charity care provided to the uninsured.

In 1999, for the first time in a decade we saw a slight decrease in the uninsured. But we still have so far to go.

I believe that health care is a fundamental right, and neither the Government nor the private sector is doing enough to secure that right for everyone.

We ignore the issue of the uninsured at our peril and at a great cost to the quality of life—and to the very life—of our citizens.

That is why I am developing legislation that will provide universal access to health care for all Americans.

My legislation will have several main components:

Large employers would be required to provide health coverage for all their workers. The private sector must do its part—a minimum wage in America should include with it minimum benefits, among them health insurance. But unfortunately, the current system puts the responsible employer who provides health insurance at a disadvantage relative to the employers who do not.

Small businesses, the self-employed and unemployed would be able to buy coverage in the Federal Employee Health Benefit Program. If it is good enough for Senators, it is good enough for America.

Those who are between the ages of 55 and 64 would be able to buy-in to the Medicare program.

And we would provide help to small businesses and to low-income workers.

But although I am passionate about universal access to health care, I realize we can't get there yet. Not because the popular will is not there, but because the political will isn't.

So I support incremental changes, starting with the most vulnerable populations, and building on Medicaid and CHIP, success public programs.

I am working on a proposal that would expand Medicaid to cover all persons up to 200 percent of the Federal poverty level—an efficient way to reach nearly two-thirds of the uninsured.

I am also a strong supporter of the Family Care proposal, which would cover the parents of children already enrolled in the CHIP program. My own state of New Jersey is in fact leading the way on the issue of enrolling parents with their kids.

Finally, I was pleased to be an original cosponsor of Senator BINGAMAN's bipartisan legislation, the Start Healthy, Stay Healthy Act, which would expand coverage for children and pregnant women. It is based on the common sense principal that children deserve to start healthy and stay healthy.

I often say that we are not a nation of equal outcomes, but we should be a nation of equal beginnings.

Until we give all Americans access to health care, however, we cannot live up to that promise.

But although we cannot get to universal access this year, I believe we can and should be doing all that we can to make incremental progress.

In conclusion, I am heartened that in this debate on the Patient's Bill of Rights so many of my colleagues have expressed concern about the problem of the uninsured. Indeed, I am hopeful that we have turned a corner on this critical issue.

As we move forward, I welcome the opportunity to work with any of my colleagues, on either side of the aisle, to find ways to significantly address the problem of the uninsured. There can be no greater purpose to our work in the Senate.

Mr. LIEBERMAN. Mr. President, I rise to speak about the McCain-Edwards-Kennedy Patients' Bill of Rights. It has been 4 years since the first managed care reform bill was introduced in Congress. After years of unyielding and unproductive debate, we came together this week to find common ground for the common good, and pass a bill that will significantly improve the quality of medical treatment for millions of American families. We have worked very hard to get to this day, and with the unfailing commitment of my colleagues on both sides, we have produced a bill that I am very proud to support.

This bill does more than just provide new assurances to patients. It will provide a whole new framework for the delivery of health care in this country, helping to transform our managed care system from one in which health plans are immune for the life and death decisions they make every day to a more fair and accountable system for America's families.

The purpose of this legislation has broad—and I emphasize broad—bipartisan support. According to a CBS news poll from 6/20/01, 90 percent of Americans support a Patients' Bill of Rights.

Two years ago, 68 Republicans in the House of Representatives voted for the Norwood-Dingell Patients' Bill of Rights legislation that allowed patients to sue HMOs if they are denied a medical benefit that they need. The Ganske-Dingell bill in the House of Representatives currently has strong support from both Democrats and Republicans. I urge my colleagues in the House to take up the Ganske-Dingell Patients' Bill of Rights and pass it without delay so that we can send a bill to the president for signature.

We need to enact a patients' bill of rights now. Every day that goes by, nearly 50,000 American people with private insurance have benefits delayed or denied by their health plans. These critical decisions made by health plans impact thousands of families at times of great stress and worry. Our most fundamental well-being depends on our health. Anyone who has had a sick family member can tell you of the anxiety they experience during a medical emergency or prolonged illness. It is our obligation and within our ability to make it easier for these families. This bill will do just that.

Opponents of this legislation express concern that if this bill is signed into law, we will see a flood of lawsuits. I would like to point out that in the 4 years since Texas enacted legislation allowing patients to hold their health insurer liable for denying care, there have been very few lawsuits filed. Four million people in Texas are covered by that State's patient protection law. Only 17 lawsuits have been filed.

The appeals process in this bill is fair and binding. With a strong and swift appeals process, patients should be able to receive the care they need, when they need it. The need for recourse in court should be minimal.

It was never the intent of this legislation to encourage more lawsuits. The sole purpose for this bill is to deliver health care to the people who need it. I remain hopeful that as it is the case in Texas, there will be very few lawsuits once this bill becomes law.

Rather, under this Patients' Bill of Rights, patients will get the care they need and deserve with less delay and less dispute. No longer will a cancer patient have to worry about access to clinical trials for new treatments. No longer will a family with a sick child have to worry about access to a pediatric specialist. No longer will a pregnant woman have to worry about switching doctors mid-pregnancy if her doctor is dropped from a plan.

Doctors will be able to prescribe the care they feel is necessary without feeling pressured to make cost-efficient decisions. And managed care companies will be held responsible when their denials of care threaten the lives of patients.

In sum, under this legislation, our health care system will better reflect and respect our values, putting patients first and the power to make medical decisions back in the hands of doctors and other health care professionals.

We can all be proud of this outcome and the path we followed to get here. The Senate worked through a lot of complicated issues and problems, reconciled legitimate policy differences, and reached principled compromise where we could. The result is real reform, and a bill of rights that is right for America.

Mr. LEVIN. Mr. President, I support the strong, enforceable Patients' Bill of Rights which the Senate is finally going to vote on today. After years of consideration, and a hard legislative battle over the last few weeks, the bipartisan vote which this bill is about to receive on final passage reflects the overwhelming support the bill has from the American people.

The Patients' Bill of Rights assures that medical decisions will be made by doctors, nurses and hospitals, not by someone in an insurance office somewhere with no personal knowledge of the patient and no professional background to make medical judgments. It guarantees access to needed health care specialists. It requires continuity of care protections so that patients will not have to change doctors in the middle of their treatment. And, the bill provides access to a fair, unbiased and timely internal and independent external appeals process to address denials of needed health care. This legislation will hold HMOs accountable for their decisions like everyone else in the United States. The Patients' Bill of Rights also assures that doctors and patients can openly discuss treatment options and includes an enforcement mechanism that ensures these rights are real.

We have taken a big step forward today on comprehensive managed care reform for 190 million Americans. I am hopeful that the House of Representatives will again pass a real Patients' Bill of Rights and that the President will reconsider his stated intention to veto the legislation.

Mr. MCCAIN. Mr. President, I thank all my colleagues, both supporters and opponents of our legislation, for their patience, their courtesy, and their commitment to a full and fair debate on the many difficult issues involved in restoring to doctors and HMO patients the right to make the critical decisions that will determine the length and quality of their lives.

I think we are all agreed on this one premise, that the care provided by HMOs has been inadequate in far too many instances. This failure is attributable to the fact that virtually all the authority to make life and death decisions has been transferred from the people most capable of making medical decisions to those people most capable of making business decisions. I do not begrudge a corporation maximizing its profits, exercising due diligence regarding its fiduciary responsibility to its shareholders. The corporate bottom line is their primary responsibility, and I respect that. But that is why, we should not grant them another, competing responsibility, especially when that secondary responsibility is the life and health of our constituents. I know

that even the opponents of our legislation are agreed on returning more authority to doctors and their patients, and addressing many of the most distressing failures of managed health care.

Where we differ, and differ significantly, is over the questions of remedies for negligence on the part of the insurers, and though we have tried to find common ground we are not there yet. But the Senate, seldom acts in perfect unison, and the majority has spoken in support of our legislation. I am grateful for that, for I come to appreciate just how important this matter is to the American people, and I am proud of the Senate for taking this step in addressing the people just concerns.

We have made considerable progress in reconciling differences of opinion on several issues, from employer liability to class action suits to establishing a reasonable cap on attorney fees, and exhausting all other remedies before going to court. We have addressed small, but important issues like protecting from litigation doctors who volunteer their time and skill to underprivileged Americans. I want to thank all senators involved in reaching those compromises, Senators DEWINE, SNOWE, LINCOLN, THOMPSON, and NELSON especially, for their diligence and good faith. I know they want to pass a bill that the President will sign, as do I, and they have worked effectively toward that end.

I know that we have outstanding differences remaining. I know that the President is not persuaded that the legislation that we have adopted today is the best remedy for the urgent national problem we all recognize. I pledge to continue working with the administration and with our friends on the other side of the Capitol to see if we might yet reach common ground on all the important elements of this legislation. I am convinced that we can get there, and I appreciate the President's dedication to that same end.

I thank the sponsors of this legislation, Senator EDWARDS, the always formidable Senator KENNEDY, Senators SPECTER and CHAFEE, and all the other cosponsors for their skill, hard work, and dedication. I thank them also for their patience. We are not always on the same side of a debate, and I suspect that working at close quarters with me can prove challenging even when we are in agreement.

I thank Senators FRIST, BREAUX, and JEFFORDS and all those who supported their alternative legislation. Throughout this debate they have been motivated by their convictions about what is in the best interests of the American people, as have Senator NICKLES, the Republican manager, Senator GREGG, and all Senators who have disagreed with the majority over some provisions in this legislation. I commend them all for their principled opposition.

I am grateful for the leadership of Senators LOTT and DASCHLE, and the assistant majority leader, Senator REID, for their skill, courtesy, and fairness in managing this debate.

Finally, let me thank those who do most of the work around here but get the smallest share of the credit for our accomplishments, our staffs. I want to thank the minority staff director of the Commerce Committee, Mark Buse, committee counsel Jeanne Bumpus, and most particularly, my health care legislative assistant, Sonya Sotak for their extraordinary hard work, and talented counsel to me and other members. I thank the staffs of Senators EDWARDS, and KENNEDY, leadership staff for the majority and minority, and all staff who have made our work easier and more effective.

This has been a good, long, open, and interesting debate, distinguished by good faith on all sides. It has been privilege to have been part of it. We have achieved an important success today in addressing the health care needs of our constituents. We have much work to do, and I want to continue working with other Members, our colleagues in the other body, and with the President and his associates to make sure that we will enact into law these important protections for so many Americans who have waited for too long for them. We have been negligent in addressing this problem, but today we have taken an important step forward in correcting our past mistake. With a little more good faith and hard work, we will give the American people reason to be as proud of their government as I am proud of the Senate today.

Mr. DASCHLE. Mr. President, it has been more than 5 years since we began this effort to make sure that Americans who have health insurance get the medical care they have paid for.

It has been more than three years since the first bipartisan Patients' Bill of Rights was introduced in the House . . . and nearly 2 years since the last time we debated a real Patients' Bill of Rights in the Senate.

Today—at long last—the Senate is doing what the American people want us to do. Today—at long last—we are standing up for America's families.

Today—at long last—we are telling HMOs they are going to have to keep their promises and provide their policyholders with the health care they've paid for.

The bill we are about to vote on provides comprehensive protections to all Americans in all health plans.

It is a good bill—and a remarkable example of what we can achieve in this Senate when we search together in good faith for a principled, workable compromise.

Over the last 10 days, we have stood together—Republicans and Democrats—and rejected amendments that would have made this bill unworkable. And we have accepted amendments that made it better.

Thanks to the hard work of Senators SNOWE, DEWINE, LINCOLN and NELSON, we provided additional protections for employers who offer health insurance.

With help from Senators BREAUX and JEFFORDS, we agreed that states can continue to use their own standards for patient protection.

With Senator BAYH and Senator CARPER's help, we strengthened the external review process to ensure the sanctity of health plan contracts.

At the same time, we turned back an array of destructive amendments designed to weaken the protections in this bill.

We live in an amazing time. Some of the most remarkable advances in health care in all of human history are occurring right now. Polio and other once-feared childhood diseases have been all but wiped out in our lifetimes because of increased immunization rates. We are seeing organ transplants, bio-engineered drugs, and promising new therapies for repairing human genes.

But medical advances are useless if your health plan arbitrarily refuses to pay for them—or even to let your doctor tell you about them.

This bill guarantees that people who have health insurance can get the care their doctors say they need and deserve.

It ensures that doctors, not insurance companies, make medical decisions.

It guarantees patients the right to hear of all their treatment options, not just the cheapest ones.

It says you have the right to go to the closest emergency room, and the right to see a specialist.

This bill says that women have the right to see an OB/GYN—without having to see another doctor first to get permission.

It guarantees that parents can choose a pediatrician as their child's primary care provider.

It allows families and individuals to challenge an HMO's treatment decisions if they disagree with them.

And, it gives families a way to hold HMO's accountable if their decisions cause serious injury or death—because rights without remedies are no rights at all.

This bill achieves every goal we set for it over the past 5 years, and we owe that to the stewardship and commitment of Senators MCCAIN, EDWARDS, and KENNEDY.

During these last 10 days, they have shown a seemingly limitless ability to find the workable middle ground without sacrificing people's basic rights. They have put the Nation's interests ahead of their own partisan interests. I thank them for their service to this Senate, and to our Nation.

I also want to thank Senators NICKLES and GREGG for being honest with us about their disagreements with this bill, and fair in the way they handled those disagreements.

This is the way the Senate should work. A Senate that brings up important bills and allows meaningful debate on them is a tribute to us all.

One final reason I found this debate so encouraging is the great concern we

heard expressed by many opponents of this bill for the growing number of Americans who have no health insurance. We agree that this is a serious problem, and look forward to working with those Senators to address it as soon as possible.

The effort to pass a Patients' Bill of Rights now returns to the House.

Last year, 68 House Republicans joined Democrats to pass a strong patient protection bill very much like this one. We urge our colleagues in the House to resist the special interests one more time. Together, we can send a strong, enforceable Patients' Bill of Rights to President Bush.

We hope that when that happens, the President will reconsider his threatened veto. We hope he will remember the promise he made last fall to the American people to pass a national Patients' Bill of Rights.

Texas has proven that we can protect patients' rights—without dramatically increasing premiums. It is time—it is past time—to pass a Patients' Bill of Rights to protect all insured Americans.

The PRESIDING OFFICER. The bill having been read the third time, the question is, Shall the bill, as amended, pass?

Mr. STEVENS. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. NICKLES. I announce that the Senator from Colorado (Mr. CAMPBELL), the Senator from New Mexico (Mr. DOMENICI), the Senator from Texas (Mr. GRAMM), the Senator from Alaska (Mr. MURKOWSKI), the Senator from Mississippi (Mr. LOTT) are necessarily absent.

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

The result was announced—yeas 59, nays 36, as follows:

[Rollcall Vote No. 220 Leg.]

YEAS—59

| | | |
|---|---|---|
| Akaka | Dodd | McCain |
| Baucus | Dorgan | Mikulski |
| Bayh | Durbin | Miller |
| Biden | Edwards | Murray |
| Bingaman | Feingold | Nelson (FL) |
| Boxer | Feinstein | Nelson (NE) |
| Breaux | Fitzgerald | Reed |
| Byrd | Graham | Reid |
| Cantwell | Harkin | Rockefeller |
| Carnahan | Hollings | Sarbanes |
| Carper | Inouye | Schumer |
| Chafee | Johnson | Smith (OR) |
| Cleland | Kennedy | Snowe |
| Clinton | Kerry | Specter |
| Collins | Kohl | Stabenow |
| Conrad | Landrieu | Torricelli |
| Corzine | Leahy | Warner |
| Daschle | Levin | Wellstone |
| Dayton | Lieberman | Wyden |
| DeWine | Lincoln | |

NAYS—36

| | | |
|---|---|---|
| Allard | Burns | Frist |
| Allen | Cochran | Grassley |
| Bennett | Craig | Gregg |
| Bond | Crapo | Hagel |
| Brownback | Ensign | Hatch |
| Bunning | Enzi | Helms |
| Hutchinson | McConnell | Smith (NH) |
| Hutchison | Nickles | Stevens |
| Inhofe | Roberts | Thomas |
| Jeffords | Santorum | Thompson |
| Kyl | Sessions | Thurmond |
| Lugar | Shelby | Voinovich |

NOT VOTING—5

| | | |
|---|---|---|
| Campbell | Gramm | Murkowski |
| Domenici | Lott | |

The bill (S. 1052), as amended, was passed.

(The bill will be printed in a future edition of the RECORD).

AMENDMENT NO. 860

Mr. REID. Mr. President, on behalf of Senator KENNEDY and Senator GREGG, the managers of this bill, and me, I send this managers' amendment to the desk and ask unanimous consent it be agreed to.

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

The amendment (No. 860) was agreed to.

(The text of the amendment is located in today's RECORD under ''Amendments Submitted.'')

## UNANIMOUS CONSENT REQUEST—H.R. 1668

Mr. REID. I ask unanimous consent the Senate proceed to the consideration of H.R. 1668, which is now at the desk; that the bill be read three times, passed; and the motion to reconsider be laid upon the table with no intervening action.

Mr. NICKLES. Mr. President, I object.

The PRESIDING OFFICER. Objection is heard.

Mr. NICKLES. Reserving the right to object, I will object on behalf of other Members. This bill has not yet been referred to committee. I personally have no objection to the bill, and I expect I will be supportive of it, but it should be referred to the committee so interested Members who have an interest in this particular issue can vet it, maybe improve it, maybe we can pass it. I hope we can pass it as expeditiously as possible.

At this time I object.

Mr. REID. I say to my friend, the distinguished Republican whip, I regret this, especially in that I have just completed reading John Adams, the new book out. It is a wonderful book. I recommend it to my friend.

I regret there is an objection to clearing this legislation. This bill, as my friend indicated, authorizes the Adams Memorial Foundation to establish a commemorative work on Federal land in the District of Columbia and its environs to honor former President John Adams and his legacy.

The PRESIDING OFFICER. The Senator from Oklahoma.

Mr. NICKLES. Mr. President, I share my colleague's enthusiasm, both for President Adams and also for David McCullough's book. He is a great historian. I have not finished it. I started it. I look forward to completing it and learning a little bit more about the history of one of America's great Presidents, one of our real founding patriots.

Again, this is going to be referred to the Energy Committee where I and others, I think, will try to be very supportive in a very quick and timely fashion so the entire Senate can, hopefully, vote on this resolution.

The PRESIDING OFFICER. The Senator from Nevada.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mrs. FEINSTEIN. Madam President, I ask unanimous consent the order for the quorum call be dispensed with, and I ask unanimous consent to speak for 10 minutes in morning business.

The PRESIDING OFFICER (Ms. STABENOW). Without objection, it is so ordered.

## SHINE SOME LIGHT ON THE BLUE SLIP PROCESS

Mrs. FEINSTEIN. Madam President, we are all waiting for the majority leader to come to the floor and deliver the reorganization message. As part of that, I believe he is going to announce that Senator LEAHY, the chairman of the Judiciary Committee, is going to make public the blue slip process.

As a member of that committee, I would like to take a few moments and make a few comments about my experience with the blue slip—in essence, what I think about it.

For those who do not know what the blue slip is, it is a process by which a Member can essentially blackball a judge from his or her State when that Member has some reason to do so.

Why would I object so much? I object so much because there is a history of this kind of thing. Historically, many private clubs and organizations have enabled their board of directors to deliver what is called a blackball to keep out someone they don't want in their club or organization. We all know it has happened. For some of us, it has even happened to us.

The usual practice was, and still is in instances, to prevent someone of a different race or religion from gaining access to that organization or club. This is essentially what the blue slip process is all about.

The U.S. Senate is not a private institution. We are a public democracy. I have come to believe the blue slip should hold no place in this body. At the very least, the use of a blue slip to stop a nominee, to prevent a hearing and therefore prevent a confirmation, should be made public. I am pleased to support my chairman, PAT LEAHY, and the Judiciary Committee in that regard.

Under our current procedure, though, any Member of this Senate, by returning a negative blue slip on a home State nominee, or simply by not returning the blue slip at all, can stop a