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Senate

The Senate met at 9:30 a.m. and was called to order by the President pro tempore [Mr. THURMOND].

PRAYER

Almighty God, we commit ourselves to cherish each unfolding moment of this day You have given us, to enjoy You and the precious hours filled with opportunities to serve You.

Thank You for Your presence. Guide our thinking, so that we may know Your will. Abide in our hearts, so that we may be filled with love and sensitivity for the people around us; bless our conversations, so that we may glorify You; linger on our lips, so that we may speak truth in love; and rest on our countenances, so that no grimness may hide the grace You have given us so lavishly.

Grant that, all through this day, everyone with whom we work and everyone we meet may see the reflection of Your joy in us. Make us a blessing for those laden with burdens, a lift for those bogged down with worries, and a source of hope for those who don't know where to turn. Lord, help us to care as You have cared for us. Through our Lord and Saviour, Amen.

RECOGNITION OF THE ACTING MAJORITY LEADER

The PRESIDENT pro tempore. The able acting majority leader, Senator MCCAIN, is recognized.

Mr. MCCAIN. Mr. President, thank you.

THE PRESIDENT PRO TEMPORE

Mr. MCCAIN. Mr. President, may I say the President looks very well this morning, and we are certainly glad that he is with us to open the Senate, as he is on every day that the Senate is in session.

SCHEDULE

Mr. MCCAIN. Mr. President, for the information of all Senators, this morning the Senate will resume consideration of the Gregg-Leahy amendment pending to the tobacco legislation. It is the chairman's intention to move to table the Gregg-Leahy amendment at approximately 11 a.m.

I want to point out that that vote may be a little later, because I had a large number of Senators who have asked to speak before that vote. So that may be delayed past 11 a.m. All Senators will be notified when that vote occurs.

Following that vote, it is believed that the Democrats will be prepared to offer an amendment under a short time agreement. Following disposition of the Democrat amendment, it is hoped that the Senate could then consider the farmers' protection issue.

Therefore, the first vote of today's session is expected sometime after 11 a.m., and Members should expect rollcall votes throughout today's session in order to make good progress on this important tobacco legislation.

Also at the end of this week, it is hoped that the Senate will be able to complete action on the ISTEA conference report, if available, and the Iran sanctions bill under a previous consent agreement.

Once again, the cooperation of all Senators will be necessary for the Senate to complete its work prior to the Memorial Day recess.

RESERVATION OF LEADER TIME

The PRESIDING OFFICER (Mr. THOMAS). Under the previous order, leadership time is now reserved.

NATIONAL TOBACCO POLICY AND YOUTH SMOKING REDUCTION ACT

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to S. 1415, which the clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 1415) to reform and restructure the processes by which tobacco products are manufactured, marketed, and distributed, to prevent the use of tobacco products by minors, to redress the adverse health effects of tobacco use, and for other purposes.

The Senate resumed consideration of the bill.

Pending:

Gregg/Leahy amendment No. 2433 (to amendment No. 2420), to modify the provisions relating to civil liability for tobacco manufacturers.

Gregg/Leahy amendment No. 2434 (to amendment No. 2420), in the nature of a substitute.

Mr. MCCAIN. Mr. President, I note the presence of the Senator from Massachusetts who wishes to speak. I will yield the floor in just a minute, because I don't want to have him delayed, because I know he has a schedule. Of course, I note the presence on the floor of the sponsor of the pending amendment, Senator GREGG of New Hampshire.

Mr. President, I thought yesterday we made good progress. We have addressed the issue of attorneys' fees, although I don't believe that will be the final consideration of that issue since there are some very strongly held views on it. But we did have good and vigorous debate on that issue.

Yesterday, also, I think the parameters of this legislation were determined to a significant degree when the Ashcroft amendment was tabled. Then the majority of the Senate decided that we would not remove these fees that will be imposed on the tobacco industry as part of this legislation and settlement.

On the other side, when the Kennedy amendment was rejected, also the majority of the Senate declared its position at $1.10, which was approximately where the price of a pack of cigarettes would be.

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

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Today, we will address the Gregg amendment, which will have to do with another important part of the bill. And that is the cap on the amount of payments that the tobacco companies would make on an annual basis, which I intend to discuss at more length, because I am not sure that this Senate understands, one, the exact meaning of that and the implications of removing it, because, very frankly, the implications of removing it will mean much higher costs to the taxpayers and to the consumers at the end of the day.

Finally, after that issue is resolved, we intend to take up one of the other major portions of this proposed legislation. And that is the agriculture portions of the bill, and, of course, there are extremely strongly held views on that particular issue.

Mr. President, I believe at the end of today we would have addressed—the Senate—admittedly from time to time in somewhat prolonged fashion, the major issues pertaining to this legislation.

I am pleased with the progress we have made so far. Apparently, we may not be able to complete action on this legislation before going into recess. But hopefully the realization will set in that we have addressed by the end of the day the major portions of this bill. And we could then conclude consideration of this legislation upon return.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Massachusetts is recognized.

Mr. KENNEDY. Mr. President, did my friend and colleague want to make a statement? I know the floor manager is on his feet.

Mr. KERRY. No. I thank our colleague. I will reserve my comments.

AMENDMENT NO. 2433

Mr. KENNEDY. Mr. President, the Gregg-Leahy amendment raises very fundamental questions:

Why would we consider giving a group of the worst corporate villains in America special protection?

Why would we want to make it more difficult for those who have been injured by the tobacco industry's wrongdoing to collect damages?

Why should Congress impose a liability cap which will have the effect of redirecting dollars away from smoking victims and into industry coffers?

I have heard no convincing answers to these questions from the bill's proponents.

More than one year ago, when news of the settlement negotiations between the state attorneys general and the tobacco industry first became public, I expressed my opposition to restricting the liability of tobacco companies. On April 25, 1997, I came to this floor and spoke out against giving the tobacco industry any special protection:

> It would be unconscionable to deny people poisoned by tobacco their day in court. Each year, millions of Americans learn that they have a disease caused by smoking. In too many cases, it is beyond our power to restore their health. We must never permit the tobacco industry to extinguish their right to justice as well.

We have come a long way in the last year. The deal with the industry that was announced on June 20th would have given tobacco companies de facto immunity from suit. In fact, its provisions were designed by the industry to erect enormous barriers in the path of smoking victims seeking compensation. It would have banned all class action suits, which are often the only effective way individuals can litigate against corporate giants. In fact, it prohibited any aggregation of claims. It would have also banned all punitive damages. If ever we have seen an industry against which punitive damages are warranted, it is the tobacco industry. It would have prohibited all litigation by health insurers, such as Blue Cross and Employee Health and Welfare Funds, which incur enormous costs treating tobacco induced illnesses. It would have prevented the introduction of crucial evidence by tobacco victims suing the industry. It would have given absolute immunity to the parent companies of cigarette manufacturers even though those companies are where most of the profits go and the real decisions are made. It would have extinguished all future governmental suits against the industry. And, it would have imposed an annual ceiling on the liability of the tobacco industry. It was truly a draconian litany.

Fortunately, these liability restrictions were so extreme that they produced a great public outcry. Public health experts and victims' rights advocates expressed their outrage at this enormous injustice.

During the past year, there has truly been a national awakening on this issue. The American people focused on what the tobacco industry has done as never before. The dramatic revelations of corporate misconduct which have emerged from the industry's own files have truly shocked the national conscience. The harshest indictments of the tobacco companies are written in their won words, long kept secret, but now revealed for all to hear. From a 1981 Phillip Morris strategic planning document:

> Today's teenager is tomorrow's potential regular customer, and the overwhelming majority of smokers first begin to smoke while still in their teens . . . Because of our high share of the market among the youngest smokers, Phillip Morris will suffer more than the other companies from the decline in the number of teenage smokers

From an R.J. Reynolds Tobacco Company document entitled ''Planning Assumptions for the Period 1978 to 1987''.

> Evidence is now available to indicate that the 14 to 18 year old group is an increasing segment of the smoking population. RJR–T must soon establish a successful new brand in this market if our position in the industry is to be maintained over the long term.

Company records also detail elaborate efforts to chemically treat the nicotine in cigarettes to make it even more addictive than it naturally would be. All the while, these same companies were telling the American people that smoking is just a matter of free choice.

All of the special industry protections contained in the settlement were included in the Commerce Committee bill when it was first introduced. To the Committee's credit, in the final days before the markup, the prohibitions on class actions and punitive damages were removed. In the negotiations which produced the Manager's Amendment, the provisions granting immunity to corporate parents and affiliates was finally deleted and many of the evidentiary restrictions were removed. It is now time for the Senate to strip this legislation of the remaining vestiges of these special protections for Big Tobacco. While the remaining special protections may be less extreme, the principle is the same. This industry should not in any way be shielded from the long overdue rendezvous with accountability which awaits it in courthouses across America.

Title XIV of the Manager's Amendment provides the industry with an $8 billion per year liability cap limiting the companies financial exposure for both past and future misconduct. I object to any special protection for the industry. I believe the tobacco industry is not entitled to any liability cap. But, I especially object to this particular cap which applies to liability for future as well as past wrongdoing. One of the most important purposes of the civil law is to deter misconduct.

Capping liability for future wrongdoing reduces that deterrent and encourages tobacco companies to continue their misconduct. This industry of all industries, based upon its unparalleled record of corporate irresponsibility, should be subject to tougher standards, certainly not more lenient standards, than other companies. Yet, a more lenient standard is exactly what Title XIV will provide for the tobacco industry.

Consider the significance of the protection which a liability cap will give the tobacco companies. It provides them with an absolute ceiling on the amount of money they will have to spend each year to compensate their victims. This industry which conspired for decades to conceal the enormous health damages inherent in smoking. This industry which manipulated the nicotine in its products to make them even more addictive. This industry which targeted generations of our children for a lifetime of addiction and early death. There can be no justification for sheltering this industry from the legitimate claims of those who have been injured by its deadly product.

To the extent that the proposed liability ceiling is ever reached, it will have the effect of transferring dollars which rightfully belong to victims into the industry's corporate coffers. We are giving preference to CEOs and shareholders above the victims of tobacco

induced illness. That cannot be justified. It is ironic to hear some proponents argue that the ceiling is so high it will never be reached. If that is true, it is unnecessary. If it is reached, it will inflict a second injury on those already injured by this industry's gross misconduct.

There is another serious problem created by the current Title XIV. The language it uses to settle the state cases is far too broad. It does for more than resolve current claims arising from state expenditures for the treatment of citizens suffering from tobacco induced illness. As written, it could prohibit state and local government from bringing future actions to enforce public health standards and consumer protection laws. It could prevent state and local government from effectively policing future tobacco industry conduct. If this provision is not revised, it will tie the hands of state and local government, and allow the tobacco industry to escape effective regulation.

The Gregg-Leahy amendment will remove all of these special limits on industry liability from pending legislation. Congress does not need the consent of the tobacco industry to legislate meaningful protection for America's children. Our sole concern must be what the public health requires, not what the industry desires. The deal with the industry which Title XIV contemplates would set an appalling precedent. It will undermine the moral authority of the federal government as protector of the public health. Today the Senate should declare that it will not allow the tobacco industry to escape its long overdue rendezvous with accountability.

Mr. President, I yield the floor.

Mr. KERRY addressed the Chair.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KERRY. Mr. President, I will speak at greater length at a later time, but let me just say with respect to two of the concerns that were expressed by my colleague from Massachusetts, the Senator expressed the notion that the managers' amendment has left an ambiguity with respect to preserving addiction claims and also preserving the ability of States to bring future enforcement actions against the tobacco companies.

I would assure the Senator that it is neither the intention of the Senator from Arizona nor myself that that be the case. It is our understanding that the language in the managers' amendment is clear with respect to the fact that we do preserve addiction claims, and we also preserve the right of the States to bring future enforcement actions. If there is any ambiguity about that, I know the Senator from Arizona and I would be only too happy to accept an amendment of clarification to make it clear that neither of those are in fact the intent. So I think that that is an issue that can be dealt with exceedingly easily. The larger issue, sort of the question of whether there is a shield or not, is something that I will address a little bit later.

At this moment I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. KERRY. 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. KERRY. Mr. President, let me say, for the benefit of colleagues who were anxious to speak on this issue, that this is a good time. There is nobody here at this time seeking recognition, so we invite Senators who were particularly anxious to try to address this question to come to the floor and do so.

I want to try to clarify, if I can, what this amendment does and what it doesn't do, because I think there is a misunderstanding here. I think it is absolutely vital that when the Senate votes on this, we vote with clarity as to what the impact will be.

Some people have come to the floor suggesting that this is a shield for tobacco companies and that it is an unwarranted shield for tobacco companies. I think the Senator from Arizona and I would stress, as strongly as either of us knows how, that there is no shield here for tobacco companies. Tobacco companies will be liable. They will be liable under any circumstances under this bill. There is only one circumstance in this bill by which they might be limited in the amount of a 1-year payment. That is not a limit on liability. That is a limit on how much of their liability they would pay in any 1 year. But if the liability were more than that payment for 1 year, the payment carries over into the next year. So, in effect, there is no limit on liability. There is simply a rollover process by which a fixed amount, on an annual basis, is arrived at.

Why does that component of the bill exist?

Let me emphasize, there are two parts of this bill. If the opponents of the so-called cap, of an annual cap, if they were to prevail here today, what they would succeed in doing is stripping this bill of the one invitation that it offers to tobacco companies to come into the tent, if you will, and be part of the solution of how we are going to reduce smoking among teenagers. If you strip out that cap, what will happen is we will return to the status quo. We stay in the position where tobacco companies are merely being sued. We get no cooperation with respect to any of the advertising restrictions, any of the document depository, any of the health programs that will help our kids reduce smoking. We get none of that cooperation, and we guarantee that there will be a challenge on the look-back provisions. We guarantee it.

If people think stripping that out creates a stronger bill, to leave us in a situation that we have been in for all the last years—which is simply endless lawsuits that produce no cooperative effort and ultimately result, at least to this date, in no winnings in court—I would have a hard time understanding how that is a better situation. The fact is that all of the concerns that people expressed about immunity have been addressed between the time of the tobacco company settlements and the time the Commerce Committee brought a bill out of committee.

Let me clear up that understanding as strongly as I can. When the settlement was agreed to, back in June of 1997, it contained sweeping immunities for the tobacco companies. Those are gone. There is no longer any elimination of class actions. Tobacco companies will continue to be subject to class actions. There is no longer an elimination of punitive damages. Tobacco companies will be subject to punitive damages. There are no longer any restrictions on the aggregation of claims, which means different individuals could come together, one lawyer representing them—you can aggregate the claims and come in with a larger claim. That is now permitted. And there are no restrictions on third party claims. They are now permitted.

So, as reported by the Commerce Committee, the bill contained certain other immunities. Those are gone, too. Parent companies and affiliates are no longer shielded from liability. Advertisers, attorneys, and PR firms are no longer shielded from liability. Addiction and dependency claims against the tobacco industry are preserved, including claims where addiction is the only injury alleged and claims where addiction is the basis of a broader claim relating to the manifestation of a tobacco-related disease.

There are no longer any restrictions on the type of evidence that is discoverable or admissible, and all limits on the industry's obligations to produce documents have been removed. The ability of plaintiffs to maintain actions in State courts and grounded in State law is preserved. And, finally, there is no longer any exemption for tobacco companies from the Nation's antitrust laws.

All of that is gone, Mr. President—gone. They have been totally exposed. And that is one of the reasons, I might add—you know, when you look at the price of $1.10, and you look at the settlement in Minnesota, if you extrapolate the settlement in Minnesota and the settlement in Mississippi, if you add up the potential of all the settlements in the country, you come out with an amount of money that is exactly or almost exactly where we are with respect to the $1.10. The fact is the tobacco companies are settling cases now at a rate that basically accepts the $1.10. They are not fighting about price because they know ultimately that is a price they can bear. What they are fighting about is the liability. That is the reason these millions of dollars are really being spent.

That is the real bone of contention here.

The fact is, they are offered two choices in this bill. They don't have to participate, in which case the situation the Senator from New Hampshire wants is exactly what will exist. They will be subject to suits, endless suits. That can happen. But, if they choose to try to come into the tent, as we have said —and we have no way to force them into the tent. There is no way we can do that. So my fellow Senators have a choice. You can either leave them out there subject to lawsuits, subject to all of this litigation without any cooperation. Or you can decide maybe there is something sufficiently good that we, the Government, can get in exchange for their participation, for which we are willing to tell them only one thing: You are not going to pay more than $8 billion in any 1 year. It doesn't let them off the hook. It doesn't say they don't have to pay. It doesn't say they are not liable. It doesn't give them immunity. It simply restricts the amount of money in any 1 year.

What is it worth getting for that restriction for not having any more money in 1 year? We settle the State actions and we give them that $8 billion cap. That cap is importantly indexed to inflation, so there is not some sort of reduction in the purchasing power or in the value of that. It will rise with inflation and it will increase according to—at least 3 percent we have had each year and perhaps more, if the CPI is higher than 3 percent.

I think it is important to make it clear—there is no concession in this bill unless the tobacco companies decide to be involved. And that is a critical component. The tobacco companies would have to come in and sign a protocol, sign a consent decree, and they would agree to abide by the provision of the payments. Most important, they would agree to abide by the look-back assessments.

I would like to just run through the look-back assessments, because I heard the Senator from Utah yesterday on the floor—the Senator from Utah was pointing out to everybody how unconstitutional are the look-back assessments. The look-back assessments are a dramatic way of engaging the tobacco industry into compliance with the things we want them to do.

The tobacco industry accepted, they are the ones who helped come up with the look-back agreement. The look-back agreement was in the original settlement with the attorneys general. So they have accepted it once already. They have shown their willingness to come in and live by the standard of the look-back agreement.

What the look-back agreement says is that they must meet a target for the reduction of underage tobacco use. These targets are the same as those they agreed to in the June 20 agreement.

The targets are as follows: In 3 years, there must be a 15-percent reduction. In 5 years, there must be a 30-percent reduction. That is for cigarettes. For smokeless tobacco, it is 25 percent. There is a 50 percent reduction over 7 years and 35 percent for smokeless.

Over 10 years, the tobacco companies are agreeing that they must reduce teenage smoking by 60 percent. That is what this bill is about. This bill is an effort to reduce teenage smoking, and here we are trying to get the tobacco industry to specifically accept responsibility to be part of the process of doing that. You can't order them to do it. They are certainly not going to do it if all we do is leave them out there subject to endless lawsuits.

There ought to be some incentive that says to those companies, ''Come on in and be part of the solution,'' and the look-back provisions are that. But the look-back provisions also say that if the industry doesn't meet the target, they will pay $80 million for each percentage point missed between 1 and 5. They will pay $160 million for each percentage point missed between 6 and 10 percent, and $240 million for each percentage point missed above 10 percent. That is not a bad penalty. That is not a bad assessment. That is an assessment based on a target that they agree to meet, and if they don't meet the target, they pay a regulatory fee accordingly.

Mr. President, you can't get them to do that unless they agree. If you don't want them to challenge it and to tie us up for years in a court challenge that would not do what we want to do to reduce smoking, then, Mr. President, you have to find some way to bring them in.

I say to all of my colleagues, yesterday on the floor of the U.S. Senate, there was a lot of hue and cry about how kids are going to lose out per 10 cents that we didn't raise the price, and if we had raised the price by 40 cents, we were going to save another 240,000 lives and people were deeply concerned about that and are deeply concerned about that.

Those people who were concerned about that should not come in and vote to leave the tobacco companies in a position where all they are going to do is litigate lawsuits over the next 10 or 15 years, because during those intervening years, those numbers of kids are the kids who are going to be the victims. It is much more intelligent, it seems to me, to get the tobacco companies to be part of the solution in a way that reduces the level of smoking so those kids are, in fact, saved. I think that is a critical choice here.

What we do in this bill is ask the tobacco companies to come in and do things that we have absolutely no right to get them to do without their cooperation. Let me be specific.

A participating company, if they consented, would come in and make a significant up-front payment. They would abide by far broader advertising restrictions than those that were contained in the 1997 settlement. They would be required to create a document depository, where all those people who are going to sue in the future would have access to the documents that have come out of all of the tobacco litigation or out of their existing files. And they would agree—and this is the most important thing, Mr. President—they would agree not to challenge the provisions in the bill. They would agree to abide by these provisions, notwithstanding any future court decision on their constitutionality.

I ask my colleagues to, again, measure that. If the tobacco companies sign an agreement not to sue in the future, not to challenge any of the advertising restrictions that we can't achieve unless they agree, that is an enormous step forward.

Those advertising restrictions are as follows: There would be a complete ban on human images, on animal images and cartoon characters. There would be a ban on outdoor advertising, including stadia and mass transit. There would be a ban on advertising over the Internet. And there would be a ban on payments to glamorize tobacco use in media when such use would be appealing to minors.

There would be a ban on payments for tobacco products placement in movies, TV programs and video games, and there would be severe restrictions on point of sale advertising of tobacco products.

All of those things—all of those things—none of which could be achieved without the consent of the tobacco companies, we would gain as a result of just one thing: allowing them to know the level of their exposure and liability on an annual basis. It seems to me that is an enormous gain for the children, it is a gain for us putting together a responsible approach to reduction of smoking, and it is certainly a gain for the Congress, which would then have constructed a piece of legislation that had a chance of passing.

It seems to me what we have here is a fundamental choice: If we want to put together a piece of legislation that can pass or whether we are going to come out here and put ourselves in the position of simply bashing tobacco because that is the feel-good position.

I might add that in addition to the advertising restrictions, they would also abide by the look-back provisions. The look-back provisions will almost certainly be challenged. They won't be challenged, and even if they were challenged by someone else yet found unconstitutional, if the tobacco companies come in and sign a consent decree and a protocol, they must abide by that. If the tobacco companies at any time in the future were to violate that protocol, violate any component of this act, they would lose the cap on the annual liability payment. They would suffer the full exposure, just as they would if they don't participate.

The final comment I make to my colleagues is very simple. This is a clear, clear choice. Under the managers'

amendment, no tobacco company gets any liability restriction, any cap, any restraint whatsoever unless they decide to give up their rights on the first amendment, unless they give up their rights to challenge, unless they agree to abide by every component of the act.

We have a fundamental choice here, whether we are going to be reasonable in the approach to try to bring them into the tent, or whether we are going to try to abide by something I think most people would feel would be destructive to this legislation as a whole.

I reserve the remainder of my time. I know others want to speak at this time.

Mr. MCCAIN addressed the Chair.

The PRESIDING OFFICER (Mr. SMITH of Oregon). The Senator from Arizona.

Mr. MCCAIN. Mr. President, I note the presence of the Senator from Washington, as well as the Senator from Oklahoma, who have very strong and important views—especially the Senator from Oklahoma has very strong views on this issue. I will not, then, make my remarks in order that they may be heard. I, again, encourage other Senators who would like to speak on this amendment and the bill to come over. I yield the floor.

Mr. GORTON addressed the Chair.

The PRESIDING OFFICER. The Senator from Washington is recognized.

Mr. GORTON. Mr. President, perhaps a brief review of history as to how and why we find ourselves in the position we are in in this debate is an appropriate point at which to begin.

Over the years, the Congress has delicately paced around the outer edges of the controversy over tobacco, encouraging certain voluntary limitations on advertising, particularly by television, requiring certain warnings to be included on packages of cigarettes and on advertising, but never getting to the heart of the issue of the desirability or the lack of a desirability of tobacco.

Those limitations can be looked at as either a glass partly full or one largely empty. It is clear the major tobacco companies have attempted to remain profitable by creating, through advertising and peer pressure and in any other method that they could, a constantly increasing supply of new smokers, almost all of whom have begun smoking with the conscious knowledge of its adverse impact on their life expectancy and on their health, although when they began young this was not something that was at the forefront of the thoughts of youth.

Nevertheless, in the United States of America, over the course of the last 20 or 30 years, we have seen a dramatic reduction in the number of men and women who smoke. We, as Americans, probably smoke less than almost any other country in the world.

Various individuals and groups have sued tobacco companies as a result of the adverse impacts of smoking on health. Almost without exception, those individuals have lost those in connection with that litigation.

All of this had us in a situation that was almost stable until a group of State attorneys general and private lawyers came along with a new theory, that damage was caused not just to individual smokers but to the treasuries of our States and, by extension, to our own Treasury, through Medicaid primarily, through Medicare, and through the expenses of taking care of tobacco-related health problems, that these damages totaled in the billions of dollars. And, as a consequence, most of the States of the United States brought actions against tobacco companies to recover those losses to their States.

Some, as you know, Mr. President, acting independently, have already won that litigation by settlement or otherwise. The bulk of them, almost a year ago, reached an agreement with the tobacco companies for what is almost certainly the most massive judgment or change in practices that has ever taken place in this country—close to $400 billion in payments, dramatic and voluntary restrictions not only on advertising but on various other forms of promotion, a set of goals for lessened teen smoking, and a myriad of other ideas.

A part of that settlement is involved in the amendment before us right now, because that settlement purported to protect the tobacco companies against some forms of litigation, although not all forms of litigation. Those protections have been abandoned or rejected by this bill in return for certain other, less significant limitations on the annual liability of tobacco companies to individual litigation.

But, Mr. President, the centerpiece of the agreement with the State attorneys general, without whose work we clearly would not be debating this issue here today any more than we have for the last 10 or 20 years, the centerpiece of that agreement was its voluntary nature. As the eloquent Senator from Massachusetts, who is managing this bill on the other side of the aisle, pointed out, advertising restrictions, upfront payments, document collections, and probably the look-back provisions, are all provisions of that agreement that cannot constitutionally be imposed on the tobacco companies by law.

As a consequence, we are faced with a delicious challenge. We can make all the heroic antitobacco statements and speeches that we wish, we can pile on to a greater extent than even the most radical bills that have been introduced into this body, but we cannot force tobacco companies, as long as they are engaged in a legal business—so far, we do not have a bill that would absolutely prohibit the use of tobacco—we can pass whatever legislation we wish, but we cannot force them to abandon their first amendment rights; we cannot violate the Constitution of the United States.

So in the ultimate analysis, we are either going to pass a bill that, however reluctantly, with however much grumbling, the basic tobacco-product manufacturers will accept and follow, or we are simply going to create another bonanza for lawyers in challenging some of the basic provisions of this legislation, in challenges that, by and large, are almost certain to be successful. We may have voted ''antitobacco,'' but we will not have succeeded in a truly antitobacco result.

At this point, the tobacco companies have rejected the acceptance of the so-called McCain bill. Perhaps more narrowly, they have rejected the McCain bill as it was reported from the Commerce Committee. Many of the changes that have been made in the bill that is before us are designed, it might well be, as a result of gaining their acquiescence. This amendment, if it is passed, will clearly and necessarily result in their rejection of the entire package.

Personally, Mr. President, I believe what we ought to do is in effect to ratify, with some toughening, the agreement that the attorneys general of the various States made after long and careful negotiation and litigation. And we will have the opportunity to do that, or come as close as we can to doing that, when we deal with the amendment that will be proposed by my colleague from Utah, Senator HATCH.

But this bill, the McCain bill in its present form, is, in my opinion, a responsible approach toward this problem. I believe that we must deal with the agricultural elements of it, the payments to tobacco farmers, payments that I think are infinitely too high, with the total preservation of the present tobacco program that is included in the Ford provisions, but we will be dealing with that next.

I believe a significant portion of the money that the Federal Treasury is going to get from this ought to go to tax relief for the American people rather than into other Government-run programs.

But these are elements of this bill that we will debate at some point in the future. They are not elements that will result in the rejection of the bill by those at whom it is aimed on the grounds of the Constitution. This amendment is. Personally, as I say, I would prefer the provisions on litigation that are contained in the attorneys general bill. It may be that at some point or other we will move back in that direction.

I am convinced, however, that the amendment that is before us now will destroy any chance of our passing successful antitobacco legislation. Legislation that balances the constitutional rights of those organizations with which we disagree must significantly increase the cost of a pack of cigarettes but not beyond the point where we create a huge black market of contraband cigarettes, a point that I believe would have been passed, exceeded, by the Kennedy amendment yesterday, and a package that can result in something ultimately acceptable to the

American people, to the courts, to those who manufacture cigarettes, with the net result that we will reduce, though we will never eliminate, cigarette smoking.

I believe that the Senator from Arizona, Senator MCCAIN, who did not seek but was given this assignment, has carried it on in a highly credible fashion with a far greater degree of success than I would have predicted when he started. I think he deserves the thanks, the gratitude of all Members of this body, and to a large extent, at least, our support. I am convinced that he deserves our support on this amendment because this amendment will destroy any chance of being truly successful in getting antitobacco legislation through the Congress, and through the President's signature, in a way that will meet the goals that all of us share.

The PRESIDING OFFICER. The Senator from Oklahoma.

Mr. NICKLES. Mr. President, I am going to make fairly lengthy remarks dealing with the contents of the bill. First, let me just state my respect and admiration for Chairman MCCAIN. He is a very good friend of mine in the Senate. One of the things we have a pleasure of doing in the Senate—we are not a very big body—so we get a chance to know each other sometimes pretty well. I have had the pleasure of working and knowing Senator MCCAIN since he came to the Senate. He is a very good friend of mine. He will still be a good friend of mine.

I don't like his bill. I don't like the procedure by which the bill is being considered, and I was involved in the procedure. Senator LOTT asked me to head up the task force to try to put this bill together. Senator MCCAIN, and the Commerce Committee, had a lot of jurisdiction over the bill, probably more than any other committee. Also, he had to deal with the issue of whether or not we are going to have a limitation on liability for tobacco companies.

Probably the most important issue is whether the attorneys general package will either pass or not pass, it is very pertinent to the amendment that the Senator from New Hampshire has pending before the Senate today. Are we going to give a limitation on liability to tobacco companies? We don't do it for other companies, with very, very few exceptions. I think we did it for the airline industry for a small, targeted area, but, by and large, we don't do this for any industry in America. We don't do it for pharmaceuticals. We don't do it for people who make heart valves, and so on. A liability limitation was in the attorneys general's package that they dumped on Congress, that they signed off with the administration. The administration agreed with that package, the so-called $368 billion 25-year package. That was handed to Congress and they said, ''Here, go pass it.''

I told some of my colleagues from the outset I don't think we will pass legislation—nor do I think we should—that will put a total limitation on class action lawsuits. If you are using in tobacco, you can't have a class action lawsuit against tobacco companies? That is what the attorneys general's package was going to do. In exchange for that, tobacco companies were going to pay about $15 billion a year. That was the so-called deal.

They didn't consult very many people in Congress, and I thought at the time they are going to have a hard time passing that restriction on liability. If they don't have that, they don't have a deal. Frankly, as this process evolved and the Commerce Committee marked up the bill, they struck some of the liability protections on exemption from class action suits, and instead came up with a cap—which is kind of a back end way of trying to do somewhat the same thing. The tobacco companies said, wait a minute, you have increased the price, you have increased the penalties, you have increased everything, and you gave us very little legal protection—this cap. Anyway, the tobacco companies said that is not good enough, there is no deal, we are not going to abide by it.

The only way this could conceivably be in the Commerce Committee instead of the Finance Committee is we say there will be payments of fees in lieu of protection for liability. But it didn't work out that way. So then we had a referral to the Finance Committee. The Finance Committee struck out this fee structure, which I think is a disaster. I see my friend and colleague from Nebraska here is also on the Finance Committee. I will go through, and it will take some time, but I will go through how the tax is computed or the fees are computed in this bill, and just say that it won't work very well.

I also want to say I concur with the objectives of trying to reduce teen smoking. I don't want teenagers to smoke. I have four kids. One out of my four smokes, and he happens to be 28 years old. He started when he was in high school. I really wish that he didn't smoke. I grew up in a family—both my parents and all my brothers and sisters—all of them smoked. My mother has had lung cancer and emphysema, very critical. She still is a survivor, but it is a very serious problem. A couple of my brothers and sisters had a hard time quitting. They did quit. They were able to do it. One in my family didn't have that hard of a time of quitting. I am trying to get my son to quit and I have not been successful. I wish that he would. I really wish that he would.

When you look at the use of tobacco products, you can see that it is pretty significant. This chart shows anybody who has ever used cigarettes in their lifetime, kind of an unusual statistic. I guess I would fall into it because I know I smoked one or two cigarettes when I was in junior high—probably never a full pack. But I guess, if somebody said, did you ever smoke a cigarette, I would have to say, yes, sometime in the 8th grade. So I would be in the 70 percent category—you might notice from this chart that usage went down a little bit in the last few years. Frankly, under the Clinton administration it started going up.

Marijuana use has also gone up—and I am more concerned about drugs than I am smoking. I will make that evident in a moment. But marijuana use, which was up to 60 percent and has fallen down to about 33 percent, fell almost every year through the 1980s until, frankly, President Clinton was elected. Then it has gone up and it has gone up in a skyrocketing fashion. As a matter of fact, I will insert in the RECORD this chart. I tell my friend and colleague from Nebraska that marijuana use in 1992 among 12th graders was 11.9 percent. Last year, it was 23.78 percent —100 percent increase of marijuana use among high school seniors. That is a staggering statistic.

This is marijuana use by people categorized as ''frequent users'' who have used it in the last 30 days. You can see on the chart that this has jumped up. You also see tobacco use has gone up. Cigarette use has gone up. In 1992, cigarette consumption among seniors in high schools was 27.8 percent. In 1997, it was 36.5 percent, an increase of about a third. That is a big increase. You could go all the way back to the 1960s as to who uses cigarettes on a frequent basis or in the last 30 days, and it was very constant for decades, until frankly, the Clinton administration. And during these 5 or 6 years, it has gone up a third, the biggest increase that we have seen.

You might also note, and this is more troubling to me, that marijuana use had gone down for frequent users, down to only about 11 or 12 percent in the early 1990s. And now it is more than double and is up to about 24 percent. Now, that bothers me. And I cannot help but think a lot of people, when they are just going after tobacco and how terrible it is, are fairly silent about drug use, drug use that is habitual, drug use that is illegal, drug use that is deadly, drug use that leads to lots of other crimes, lots of other problems.

Why only the attention on cigarettes? Why only the attention on cigarettes? We are going to have some amendments which will have significant attention on drugs. I had a town meeting during the Easter break in Oklahoma—I had several—but I had one in Shawnee, OK, a middle-class town. This town meeting happened to have a lot of high school students, a lot. I told them we were debating the cigarette tax issue and I just asked how many smoked, and hardly any hands went up.

I said, ''Well, let me ask you a question. Congress is contemplating raising tobacco prices by $1.10, maybe $1.50. Would that make any difference for those of you that raised your hands?'' The answer was, ''No, we don't smoke that much.'' Maybe they would smoke

on a weekend or at a party. They said it would make no difference. That is an informal survey; it is not scientific. But some claim that scientists say if we raise this tax, we are going to reduce teen smoking. I am not sure that is the case. I think when you ask the question if somebody smoked in the last 30 days, that means one cigarette or two cigarettes. I am not sure you are going to have an appreciable reduction because you raise prices a dollar. Maybe there would be some. Maybe it would be a component in reducing teen smoking, but some people are acting like it is the whole battle. I disagree with that. I don't think it would work.

As a matter of fact, I am kind of amused because now we hear everybody say our objective is that if we raise these prices, these taxes, spend all this money and run this massive campaign, we will be successful and we can reduce teen smoking by 60 percent. If you are against this, you are for tobacco companies and you are against kids. I reject that outright. I don't like smoking. I don't like teen smoking, especially. I don't like to see kids smoke. But that doesn't mean you have to sign onto a program that spends hundreds of billions of dollars.

I looked at a statement of Secretary Shalala when she announced new FDA regulations with David Kessler in August of 1995. They came up with a lot of new regulations. I don't agree with a lot of them. I think they are overly intrusive. But whether I agree with them or not, they stated in those regulations they thought they could reduce children and adolescent smoking by 50 percent within 7 years. Wait a minute. We are talking about spending hundreds of billions of dollars in addition to these FDA regulations to it to 60 percent? So these massive price and tax increases might decrease smoking another 10 percent in addition to what they are already doing in FDA? I am not so sure.

That tells me that people are sometimes pretty loose with statistics. Maybe these surveys don't mean as much as some people think. Maybe this question of, ''Did you smoke in the last 30 days?''—maybe that is one cigarette. I am not sure. That is one of the questions.

My point is that I don't want kids to get addicted to smoking. We want to do some things to discourage that. I am concerned when I see that drug use has doubled; marijuana use has doubled under this administration amongst high school seniors. That bothers me a whole lot more than the 33 percent increase in teen consumption tobacco. I happen to be a parent; I have four kids. If you tell me that maybe they smoked a cigarette once, or if they were using marijuana on a regular basis, I would be a lot more concerned about the marijuana. I don't want them to do either, and we should discourage both. But to have a campaign and have this massive effort to attack tobacco and be silent on drugs, I think, is absurd and it should not happen.

We should have a campaign against teen smoking, but we should not raid taxpayers in the process. We should not spend hundreds of billions of dollars. If you ask people, ''Do you want to reduce teen smoking?'' you are going to get a favorable poll that says 90 percent say yes. If you say, ''We are going to reduce teen smoking, and we are going to spend hundreds of billions of dollars and pass the largest tax increase in years. Do you still think we should do it?'' They are going to say, ''What?''

I think there was a poll that said 70 percent of the people thought Congress is doing this more to spend money than to help kids. They know this is more about a money grab, a big ''cookie jar,'' than about reducing teen smoking. Look at the costs. I happen to be kind of a numbers cruncher. I am on the Budget Committee and the Finance Committee and I think numbers are important.

I am going to talk about this bill quite a lot this morning. I looked through this bill, and in this bill there is no mention anywhere of a $1.10 tax increase. I am going to tell the press there is no mention of a $1.10 per pack tax increase in this bill. They mention it in the committee report, but the committee report is not the law. So how much does this bill cost? I stated repeatedly that it costs more than a $1.10; and it does cost a lot more than $1.10. People will say, wait a minute, where did you get the figures? I got the figures from the bill, not from Senators' statements or from reading The Washington Post or The New York Times, where the headline was ''Senate to Stay With $1.10 Tax Increase.'' There is not a $1.10 tax increase in this bill; there is a lot more. It is going to cost consumers a lot more. Is it going to cost tobacco companies a lot more? I don't think so.

As a matter of fact, I put on this chart the gross tax increase on consumers in billions of nominal dollars. These new taxes cost consumers, but do they cost tobacco companies? Not a dime. Let me go through a couple of the provisions, Mr. President. Before I do, I will submit the chart I have already discussed about the increase in use of marijuana and also cigarettes into the RECORD.

I ask unanimous consent to have the chart printed in the RECORD at this point, along with another chart regarding the national tobacco settlement trust fund.

There being no objection, the charts were ordered to be printed in the RECORD, as follows:

12TH GRADERS USE OVER 30 DAYS

Class of	Marijuana	Cigarettes
1980	33.7	30.5
1981	31.6	29.4
1982	28.5	30
1983	27	30.3
1984	25.2	29.3
1985	25.7	30.1
1986	23.4	29.6
1987	21	29.4
1988	18	28.7

12TH GRADERS USE OVER 30 DAYS—Continued

Class of	Marijuana	Cigarettes
1989	16.7	28.6
1990	14	29.4
1991	13.8	28.3
1992	11.9	27.8
1993	15.5	29.9
1994	19	31.2
1995	21.2	33.5
1996	21.9	34
1997	23.7	36.5

NATIONAL TOBACCO SETTLEMENT TRUST FUND

[Gross tax increase on consumers in billions of nominal dollars]

Year	Initial payment	Annual industry payments	Maximum potential lookback assessments	Grand total
1999	10.00	14.40		24.40
2000		15.40		15.40
2001		17.70		17.70
2002		21.40	4.40	25.80
2003		23.60	4.52	28.12
2004		24.31	4.64	28.95
2005		25.04	4.77	29.80
2006		25.79	4.89	30.68
2007		26.56	5.03	31.59
2008		27.36	5.16	32.52
2009		28.18	5.30	33.48
2010		29.03	5.45	34.47
2011		29.90	5.59	35.49
2012		30.79	5.74	36.54
2013		31.72	5.90	37.61
2014		32.67	6.06	38.73
2015		33.65	6.22	39.87
2016		34.66	6.39	41.05
2017		35.70	6.56	42.26
2018		36.77	6.74	43.51
2019		37.87	6.92	44.79
2020		39.01	7.11	46.11
2021		40.18	7.30	47.48
2022		41.38	7.50	48.88
2023		42.62	7.70	50.32
Total, 25 years	10.00	745.67	129.88	885.55
Total, 5 years	10.00	92.50	8.92	111.42
Total, 10 years	10.00	221.55	33.41	264.96

Annual industry payments are adjusted for the greater of 3% or CPI–U beginning in year 6. This estimate does not include potential increases or reductions in industry payments resulting from changes in the volume of tobacco sales.

Lookback assessments would be initiated after year 3 if underage tobacco use is not reduced by specified percentages. The maximum lookback assessment of $4.4 billion is adjusted for inflation. Does not include an estimate for brand-specific lookback assessment.

Source: S. 1415 as modified on the Senate floor.

Mr. NICKLES. Mr. President, I am also going to insert a table that shows new tax assessments and penalties that are in this bill. The national tobacco settlement trust fund is what I am going to talk about now. This is the trust fund, the big kahuna. There are a lot of other taxes, penalties, but this is the bulk of the money. If a person was interested, they could look at this provision in the bill. If you go to page 179, it talks about the trust fund. You can see on page 181 that it says tobacco companies, in the first year, pay $10 billion. Then on page 182, it says—in the first year, you also pay $14.4 billion. That is the reason why the first year payments are $24.4 billion on my chart. It doesn't say anything about a $1.10 tax, or any other tax. It says, industry, you pay $24.4 billion. I have heard some people say, well, we are going to raise the tax gradually to $1.10. It starts out at 65 cents. The only mention of a per pack tax is in the committee report. It starts at 65 cents and ends with $1.10.

I am just telling you that those numbers don't add up. I have told this to my colleague from North Dakota, and maybe he will believe me by the time I finish this presentation. The bill

doesn't mention $1.10. We are passing a bill, not a committee report. We are passing a bill. The bill says in the second year the companies will pay $15.4 billion. The third year is $17.7 billion, then $21.4 billion, and then $23.6 the fifth year. Thereafter, it is adjusted for inflation. That is where these numbers come from. These numbers are adjusted for inflation. At a minimum of 3 percent, regardless of whether there is any inflation or CPI, whichever is greater. The bill says a minimum, so I put in the 3 percent.

Now, some of my colleagues and the administration said this bill raised $516 billion. That number is in the committee report. The committee report embarrasses me. I am embarrassed by the work that the Commerce Committee put together, but frankly I shouldn't really blame them. I want to blame the administration because, frankly, they wrote the bill. It wasn't the Commerce Committee; it was the administration. The administration-drafted report even has a section that says payments will be no greater than $516 billion. That is hogwash. As a matter of fact, I have a letter from OMB that says you only compute $516 billion if you deflate the industry payments to constant 1999 dollars. That is where they get $516 billion. Those are constant 1999 dollars. They make it look a lot smaller than it is.

Frankly, that is not the way we do accounting in the Senate. The bill says, here are the payments and they are adjusted for inflation, and, frankly, these are conservative because I will tell you that sometime in the next 25 years, you are going to have more than a 3 percent inflation rate. We know that. So I am going to tell you that the $755 billion in industry payments over the next 25 years is conservative. It is much more conservative than what will actually happen. I will also mention that I didn't add look-back assessments. The administration, when they said $516 billion also didn't add the look-back. Then, they increased the look-back to $4.4 billion when they rewrote the bill over the weekend. The administration rewrote the bill over the weekend, not the Commerce Committee or the Finance Committee. The Finance Committee reported out a bill and some amendments and said, let's scrap this industry payment nonsense and come up with a tax increase. I didn't support it—a $1.50 tax increase—but at least it was honest.

This bill is very misleading. These industry payments are very deceiving. We ought to be ashamed of ourselves. I will talk about the look-back provisions in a minute. I didn't even add the look-back, yet, but if you add the look-back at another $130 billion the total tax increase is $885 billion. These are just the facts. These are the facts that you get if you read the bill—if you read the bill on page 182, page 183 and page 184.

Then you find out that they did a lot of other silly things in this bill. I guess silly things maybe to protect certain constituents or certain parts of the industry. But, if you think you are passing a $1.10 tax on all tobacco, you will find out that they exempted some companies. They exempted some companies. I thought excise taxes were excise taxes, like excise taxes on gasoline—the Federal excise tax is on all gasoline, made in North Dakota and Oklahoma. Except perhaps for gasohol. I don't think we should exempt gasohol. But we do. But this bill exempts certain companies from the tax. If their sales are less than 1 percent, they pay no tax. What does that mean? You already have a 24-cent Federal excise tax on cigarettes. Everybody pays it. There is no exemption on that. Congress has already increased that in the future to go up to another 15 cents. That is going to be 39 cents. Everybody pays that. But this committee said for this additional tax or fee some companies need not pay. Think about that.

Everybody else is going to have to pay this. Let's say the tax is $1.10. I think it is much more than that. But most companies will have $1.10 additional cost put on their products, and some companies won't. That makes sense, doesn't it?

I also looked at the tax increases on other products. I would love to have a sponsor of the bill explain to me how they did this. Take a product like snuff. I calculated the tax increase on snuff, that little round package, you know, you put a pinch between your check and your gum. The tax increase on snuff is over 3,000 percent. That is a significant tax increase. Right now it is 2.7 cents per little can, and it goes up to 85 cents. That is a pretty good increase. Maybe 85 cents is the right amount. But I will venture to say nobody in here knows that. That little can costs about $3 and something. That is a pretty good hit.

We at least ought to know what we are doing. I don't think anybody here knows what they are doing.

Then we find in the bill that some smokeless tobacco companies, small manufacturers, are getting a smaller tax increase, 60 cents. For most of the snuff people, the people who make these little round things, we are going to increase their tax by 82.5 cents. But for some people we are only going to increase it 60 cents, because they are small, or maybe because their Senator said, ''Hey, they are not part of the problem, they are not very big. They sell less than 150 million units.'' I thought we were interested in children's addiction. So we are going to give this company a 20-some-cent advantage over other companies? That is in the bill. That is on page 185, if anybody cares to look at it. I wonder how many of us really looked at this bill.

Excise taxes, if they are going to be on snuff, should apply to everybody. But we didn't do that in this bill. I say ''we,'' the Commerce Committee. The Finance Committee did tax everyone, and in proportion to the tax on cigarettes. Finance said, ''Let's scrap all this industry payment nonsense and have an excise tax.''

I am going to show you that this tax is a lot more than one dollar and a dime. And I don't think there is any question it is more than a dollar and a dime. Yet, people are still under the facade that this is $1.10. Why? Because OMB said it is, and Treasury said it is. I don't think that is the truth. The bill says, here is the amount of the industry payment, pay it. Not everybody has to pay. One company made a deal, and said, ''Hey, we have already settled. So we are not part of the problem. So we don't have to pay the excise tax.'' They have a much better deal. It is worth hundreds of millions of dollars. We are getting ready to pass it. I don't think that makes sense. I think we ought to be ashamed of ourselves the way we are legislating.

There is a reason why we have committees of jurisdiction. And we violated it grossly. I thought maybe we fixed it when the Finance Committee took this bill. But, obviously, the Commerce Committee and the administration said, ''No, we don't want to do that. We like what we have.'' I will tell you why. Because they are going to get more money, in my opinion, than they would get at $1.50.

I was halfway tempted to vote for the amendment of the Senator from Massachusetts amendment to raise the tax to $1.50. If you had a real tax at $1.50, I think it raises less money than the figures we are talking about. Maybe I am wrong. The press is going to report $1.10 and $1.50. That is what the press reports. I think this payment scheme equates to more than $1.50. This chart shows $40 billion or $50 billion per year in the future. Guess how many packs are sold a year? About 24 billion packs a year. If you have a $1 tax, assuming you had no reduction in consumption, you are talking about $24 billion. This bill is in that neighborhood already in the first year—not just the fifth year. We are talking about the first year. That is going to be about a $1 tax paid for 1999. You have the $10 billion initial payment. That equates to about $1 a pack. The tax on snuff and smokeless, and so on, doesn't raise a lot of money cumulatively, but it is a huge tax increase.

On chewing tobacco, the tax goes from a very small two-and -a-quarter cents per 3 ounce pack of chewing tobacco to over 40 cents—almost 41 cents. That is a 1,711-percent increase in one fell swoop. That is a big hit. I think it is a nasty habit. If you want to tax it and eliminate it, maybe that is what some people are trying to do. But we at least ought to know what we are doing. I would venture to say that maybe a lot of people in the Senate don't.

I want to talk a little bit about the look-back provisions. I think I heard Senator HATCH, and others, say that the look-back is unconstitutional. I think he is right. I will tell you, I am not a constitutional scholar. I will not

enter that debate. I will tell you, it is unworkable. I heard somebody say the industry has signed off on the look-back provisions. I have not been talking to the industry, but I am pretty sure they are planning on contesting them on constitutional grounds. And they are pretty confident—at least that is what my staff tells me—that they would win.

What does the look-back do? It could raise a lot of money. And evidently the administration thinks this is real money and it is going to happen because they increased the amount to $4.4 billion over the weekend. The look-back grew by over 10 percent over the weekend. It is much higher now than when it passed out of the Commerce Committee.

That is interesting. How does it work? If a person was interested, they could look on page 106 of the bill and find the look-back section. This is kind of interesting. How does this work? Is this going to be a real incentive for companies to curtail smoking? I found out these provisions are very interesting. They start on page 103 of the bill and go through to page 109. I will just talk about this for a second.

The look-back says the Secretary—talking about the Secretary of Treasury—shall conduct a survey to determine methodology and the percentage of all young people who use a type of tobacco product within the last 30 days. It says ''a type of tobacco product within 30 days.'' He is going to take a survey, a poll.

A lot of us are in the political business. All of us in the Senate take polls. The Secretary of the Treasury is going to take a poll. Keep in mind that of all tobacco consumption, only 3 percent of it is done by teenagers. Keep in mind that it is against the law for teenagers to smoke in every State. It is against the law to smoke if you are less than 18 years old. He is going to take a poll and find out how many are trying tobacco. These numbers are going up. Maybe they did it once, or more. They are going to take a poll. The poll is going to also specify: ''Did you use tobacco?'' and ''What brand did you use?''

Then there is a complicated formula. But if a tobacco company's numbers don't come down, then we are going to be subject to special assessments.

I should mention more about the poll—this is interesting. Every poll that I have ever seen has pluses and minuses. There is a range of plus or minus 4 percent. This cannot be entirely accurate, because they are not going to ask every teenager age 11 through 17, ''Did you smoke?'' That wouldn't be too cost effective. They might do it maybe for that reason.

On page 106, it says, the survey is deemed conclusively to be proper, correct, and accurate for purposes of this act. They deem their poll whenever they happen to take it to be accurate.

That is interesting. I just think of the games that could be played with that.

Let's see, if they took their poll around the Fourth of July, there may be a greater instance of tobacco use on the 4th of July, or maybe the Memorial Day weekend, or maybe the Labor Day weekend when people are going to the beach. If they want to jack the penalties up, ''Let's take the poll then.''

I just fail to see that this is a good way to do business. If the company doesn't meet the underage tobacco use goals as outlined by this bill, then there would be significant penalties—very significant penalties, up to about $4.4 billion, and indexed for inflation. So on my chart the totals increase rather significantly to $130 billion. Those aren't tax deductible.

Is that really workable?

Then there is another section.

There is an additional look-back assessment on brand-specific underage tobacco problems. If you look on page 112, which talks about if they miss their percentage share, tobacco companies could have an additional surcharge of $1,000 per teenager.

The amount of the manufacturer-specific surcharge for a type of tobacco product for a year under this paragraph is $1,000 multiplied by the number of individuals for which such firm is in noncompliance with respect to its target level reduction.

So we have target-level reductions. It starts out at 15 percent. It gradually increases to 60 percent. They are going to take a survey and find out what brand of cigarettes this youngster is smoking. So in this random survey, if a bunch of kids say, ''Yes, I had a Marlboro,'' mark them down, and for every child they determine smoked that brand of cigarette, they are going to assess the company another $1,000.

Now, I find that to be ludicrous. There are hundreds of brands of cigarettes—hundreds, and so we are going to have the Department of Treasury conducting this poll asking teenagers did you smoke. And if you did, what brand? And it may be they can remember the brand, maybe they can't. Maybe they smoked one cigarette; maybe they bummed a cigarette; maybe they don't tell the truth; maybe they don't respond; or maybe whatever. We are going to be assessing penalties to the tune of $1,000 for every teenager deemed by this poll to have used this particular product.

That is ludicrous. I want to warn my colleagues. I may not have the votes, but I am going to probably try and strike that. If we don't strike that, it is going to come back to haunt you. You are going to be embarrassed because we put language in here that says this poll was deemed to be accurate and therefore whatever the Secretary says is law and as a result here is your penalty. We have determined that there are 10,000 youngsters in the age category who are using your brand and they are age 17 or less, and therefore we are going to sock it to you.

This doesn't make sense. If you want to figure out ways to punish tobacco, to fine tobacco, do it. But this is not the right way. This is not workable. You should trash this whole thing and say, if you want to increase tobacco tax $1.10, do it. Do it tomorrow. This thing phases it in over five years.

My point being, if you are going to try to reduce consumption, you want to have a sticker price shock. You don't phase it in over 5 years. They will never see it. They won't know it. It won't make the reduction in use. It won't get consumption down. It won't be effective.

Wow, what did we do. We raised hundreds of billions of dollars, but did we achieve our objective? I don't think so. What did we do? Maybe the objective was to raise billions of dollars so we would have a lot of money to spend. Maybe that's the case. I don't know. I hope not.

Mr. CONRAD. Will the Senator yield for a question?

Mr. NICKLES. I have a lot to say.

Mr. CONRAD. I understand. I don't want to interrupt the Senator. I just want, if I could for the purposes of the RECORD, if nothing else, and maybe for the education of both of us, to ask just one question.

Has the Senator, in the numbers that he has displayed on the chart, made any volume adjustment?

Mr. NICKLES. Let me go to that, and I appreciate the Senator's comments because I knew the bill's proponents would say my numbers don't assume a volume adjustment.

The administration, when they did their projection to come up with a $516 billion price tag for this bill, they did no volume adjustment. When the AGs came up with their price tag for the settlement, they didn't do a volume adjustment. And finally, we discovered that the White House changed the volume adjustment threshold in this legislation over the weekend. That bothers me a lot. That was changed Sunday or Monday night. And that bothers me a lot.

Let me conclude. I know what my colleague is going to say. Let me take you through this a little bit further.

The volume adjustments, the formula that passed out of the Commerce Committee says the industry payments will be reduced by the volume. If there is a reduction in sales, we will reduce the tax. Again, in calculating the costs of their own bills, both the $516 billion current dollar estimate and the $755 billion nominal dollar estimate, they didn't calculate the volume adjustment.

Now, what happened Sunday and Monday night was a humongous tax increase that nobody knows about because the volume adjustment was triggered not when sales dropped below 100 percent of 1997; it is triggered when sales drop below 80 percent of 1997. So you get no volume reduction unless you reduce total consumption to below 80 percent where we are today. So I am not sure there will be a volume adjustment ever.

Now, I do not know if my colleague caught that. In the original Commerce bill, it says we will take these figures on my chart and we will reduce them, if there is a reduction in volume of sales. We will have a CPI increase, and we will have a volume decrease, and so maybe the figure will stay close to $23 billion. If volume went down 3 percent and CPI went up 3 percent, maybe you could take this figure, $23 billion, for all future years.

Well, what they did in the stealth of the night of Sunday or Monday, they said, oh, we are going to change that. We are not going to give a volume adjustment unless they reduce total consumption to below 80 percent of where it was in 1997. Wow.

Now, this is getting too complicated. Most of our colleagues aren't going to follow it, and I don't want to get too bogged down in the minutia, but that is a big tax increase. That means you are not going to have reductions. You may never have a reduction.

My point being, that the way you do volume adjustment, the real way is to have a direct excise tax on the product—very clean, very simple. You don't have to argue about whether or not you are talking about constant dollars, inflated dollars, whether you are talking about volume adjusted. If you have an excise tax per pack, if you sell less packs, so what. You have accomplished your objective. You have done it.

This is the worst method to tax we have ever imposed in the Federal Government that I can find. This is so convoluted, so distorted, so deceptive, so contrived say we are raising taxes $1.10 and not do it. If our colleagues want to be honest, they would say let's scrap all this and let's make the tax $1.10, and then you have an automatic volume adjustment. You have an automatic volume adjustment. Because if you purchase less, then that will happen.

Let me just mention, too, the volume adjustment section, just for my colleagues'——

Mr. CONRAD. Will the Senator—

Mr. NICKLES. I really don't want to. I have a lot to go through and I want to finish this. I am this far and I have a lot more to go. So I will be happy to talk to you in just a minute. But I want to run through several things, and I don't want to get too bogged down on that one particular thing.

Mr. President, let me just touch on a few other things. And I mention that, Mr. President, and I will guarantee you that not one Member, maybe not any Member, certainly not more than two members of the Commerce Committee or the Finance Committee knew anything about that change in the volume adjustment, and it is a big change. It is different than the committee reported bill. And, again, I am troubled by these games. I am troubled by people saying, oh, here is what the bill says and then to play games maybe late at night, Sunday night, Monday night, and have this bill written by the administration. This is not a Commerce Committee bill. This is an administration bill.

I think it cries out for change, and the change should be this, I tell my colleagues. The change should be to call a tax a tax. Senator LAUTENBERG introduced a bill that said let's have a $1.50 tax. That is what the Finance Committee passed. Whatever the tax is, whether it is a $1.10 or $1.50, whatever, we should pass the tax increase per pack plain, simple, clean, and not play this game of, industry, you pay in all these hundreds of billions of dollars, and maybe we will give you some reductions if consumption comes down, but we are going to have penalties if X, Y, Z brand doesn't go down as much as we think it should go down among certain people. That is absurd, and that is what we have, all based on polling that they deem to be accurate. That makes no sense, no sense whatsoever.

Let me go on through a few other points. I am going to try to speed the pace up. There are tobacco distributor licensing fees, brand new; there are nonpayment penalties, there are document good-faith payment penalties; there are antismuggling penalties; and then we get into new spending. So all this is on the revenue side. This is on the tax side. This humongous tax bill, I don't care what period you are looking at, this is a bigger tax bill—gross, net, any figure you want to use—a bigger tax increase than the tax cut we passed last year. Maybe that will help put it in perspective.

Last year, in a bipartisan manner, we passed $500 tax credit per child. This year, for 1997 it is $400. We passed that. We reduced capital gains from 28 percent to 20 percent. That is one of the reasons you have seen Federal revenues grow by over 10 percent this year. It is because we cut capital gains. People like that. People have more financial transactions, and you are not taxing those transactions so much. It raised a lot of money for the Government. We reduced estate taxes by increasing the exemption. We provided IRAs. We did a lot of good things in the tax bill, a lot of good things.

Guess what, this tax increase overshadows it. This tax increase overshadows it, and it is paid for, the strong majority of this is paid for, by individuals making less than $30,000, $40,000 a year. This is a tax increase on low-income people. It is a humongous tax increase. It is bigger than all the tax cuts we gave last year, than all the tax cuts. So that should concern people.

My colleague, Senator GORTON of Washington, said we should have some tax relief. We are going to have a humongous tax increase; we should have some relief.

We are getting to the spending side now. This is one of the problems that bothered me. I told my colleagues from the outset, I will work to pass a good bill to reduce teenage consumption of drugs and tobacco. I will. I will not support passing a bill that spends hundreds of billions of dollars so government can grow. We grow government in this bill like there is no tomorrow. This bill has government growing from the State level, government growing from the Federal level, government growing at almost any excuse. And the administration wrote every bit of it.

Did they consult the Appropriations Committee? Did they consult the Budget Committee? No way. We made a little improvement. In the bill that passed the Commerce Committee, this was all off budget and it wasn't subject to an appropriation. All of that was an entitlement. We changed it. Now, only half of it is entitlement. The States are entitled to 40 percent. That is an entitlement. We can't touch that. And then the farmers are entitled—under the bill from the administration and Commerce Committee, farmers are entitled to $28 billion.

I know Senator LUGAR is going to have an amendment to reduce that, but in both cases those are entitlements. In both cases we are spending billions of dollars. I have a problem with that. I don't know how I can go to my farmers and say those tobacco farmers are going to be entitled to get maybe $18,000 an acre on this buy-out, and of course they can continue producing tobacco after we buy them out. We will buy their quota, but, yes, they can continue producing tobacco forever. I have trouble with that.

I have trouble with, Who is going to get most of this money? Let's see; let's figure out who is going to get the money. I mentioned my mother had emphysema and lung cancer. Does she get any money? No. Do victims get any money? No. Government gets money. Who gets money? Do victims of cancer and smoking-related disease and problems get money of out of this? No. Who gets the money? States get the money. The Government gets the money.

Where are they going to use the money? The bill says the States get 40 percent of the money, and they are going to get at least $196 billion so they don't sue the tobacco companies. Four have done it and settled. More power to them. Congratulations.

Who is going to benefit from that? I guess the States do. They get some money. In the State of Florida, out of an $11.3 billion, the trial attorneys get $2.8 billion. That is 24.7 percent. In Texas, they had a $15.3 billion deal; the trial attorneys get $2.2 billion.

We had an amendment the other day to limit it. Maybe it was too low. I am going to tell my colleagues, you are going to have another chance. But we are going to give a few individuals, maybe 50 individuals or something, we are going to make them multimillionaires, maybe billionaires? We have had some of these people working the halls of Congress. These guys, some of them have chances to become billionaires, with a ''b.''

And I am all for people making money, I think that is great, but we should not do it raising taxes on consumers making under $25,000. We are

getting ready to do it, and I will tell my colleagues, if we pass this and if somehow you are successful—and I don't think you will be—but if some forsaken way you are successful getting this through conference the way you have it set up right now, you will be more than embarrassed. You will be reading about individuals making hundreds of millions of dollars, trial attorneys making hundreds of millions of dollars off this deal. And you had your hands on it? I would be embarrassed, and I think that you would. I think we are going to fix it.

I noticed the Senator from North Carolina was here, and he tried to fix it with one amendment. It didn't pass, but my guess is we have some other ideas. I think we will fix it before it leaves the Senate. If we don't fix it before it leaves the Senate, we will fix it in conference. If we don't fix it in conference, I hope we don't have a bill. I hope we don't have a bill anything like this. And, again, I reiterate my position, I think we can come up with a bill that will be good to curb teenage smoking and consumption of drugs and tobacco. But I do not think we have to come up with a scheme that spends either $500 billion or $755 billion or $885 billion. I don't think we have to do it. I know we don't have to do it.

Some people are saying, ''I am reading a poll and''—I don't care what the poll says. Let's do what is right. Let us try to curb teen smoking. You don't have to do all of this.

The FDA came up with their regulations 2 years ago, and they said their regs alone were going to reduce consumption by 50 percent. There is not a lot of difference between 50 percent and 60 percent, except I see hundreds of billions of dollars being spent in the process. So, let me talk about that. I talked a little bit about the money going in. I am telling you, there is a lot more money going in than people have mentioned. If they say there is only a dollar and a dime, let's pass an amendment and say here's a dollar and a dime, and I guarantee these figures will shrink. They will shrink.

Mr. CONRAD. Will the Senator just yield on that point?

Mr. NICKLES. No, I won't yield. I am going to continue or I will never get done, and then I will be happy to yield for a question.

The spending side of this equation, I mentioned it has a couple of entitlements. The States get 40 percent of revenues. We tell the States: You have to spend half of it as the Clinton administration decreed. You have to spend half as they said. It must be on children's health, child care, child welfare, substance abuse, education, children's health insurance—any of their little social programs that they like. Granted, the Clinton administration wants to expand the welfare state. So they say, here, States, we know that you initiated these lawsuits and you were winning some of them, but, since now we are going to take this over and federalize it, you have to spend the money the way we want.

So the bill restricts half of the state money and says: States, you spend it in a welfare-acceptable or child-acceptable manner as the Clinton administration dictates that it be spent. And then they say: States, you can spend the other half any way you want to. So that is the way we are going to increase government in the States. States, congratulations, here's your money. In exchange for that, we are going to limit your ability to sue the tobacco companies.

I can see why the companies walked away from this deal. They made a deal with the Clinton administration and the administration broke it, and they can still be sued in lots of areas. Oh, well, there is an $8 billion cap. I can see a race to the courthouse.

I am going to support the amendment of the Senator from New Hampshire to strike protections for the tobacco companies. Some people say, if you are opposed to this bill, Senator NICKLES, you must be in favor of the tobacco companies. This bill does the tobacco companies a big favor by limiting their liability to $8 billion a year. The tobacco companies are saying they are not even part of it. Why should we give them an $8 billion limit of liability? Why?

I don't see any reason to do that. I agree with the Senator from New Hampshire. So I am not going to give the tobacco companies the protection they really want. Why give it to them? It is the proponents of the bill who are trying to do the tobacco companies a big favor, not some of the opponents.

(Mr. FAIRCLOTH assumed the Chair.)

Mr. NICKLES. Mr. President, what about the money? Now we are talking about money. The States are going to get 40 percent of this amount, and they can spend half as they want, and the other half is spent as the Clinton administration wants.

They can spend it on public health—and we are all for public health. That is going to get 22 percent. So we are going to grow a lot of government in that area. Health-related research, we are all for that. Farmers' assistance, we are going to make farmers millionaires. Maybe these farmers were thinking about selling their property last week. Now, they hear Congress is getting ready to pass a bill and they say, ''I might get 4, 5, 10 times what the property is worth if I hang around.'' It would be interesting to see what is happening on tobacco farm prices right now in North Carolina, Kentucky, Virginia and other places, because Congress is going to pay them billions of dollars.

We are going to pay them so much—not per acre—per pound of quota, and we are going to make a lot of them a lot wealthier than they have ever been.

Guess what? When we are done paying them they can still grow tobacco. We can buy their farms cheaper than what will be paid under these two proposals right now. We can buy the land, have the Government take over the land and turn it into a park. I shouldn't say that out loud, because somebody is going to propose it.

We are going to make people very, very wealthy because they hold a document called an allotment. It goes back to the New Deal. If you believe in free markets, it is just totally wrong. Yet, we are going to compensate them; we are going to buy them out.

Let me go through some other new spending provisions.

There is a Medicare preservation account. Frankly, that is important, but I tell my colleagues, it wasn't in the Commerce Committee bill. It wasn't in the Finance Committee bill. It appeared Sunday or Monday night, and I object to that. I object to the administration coming in and saying, ''Oh, we have some new ideas here,'' as they did with their volume adjustment.

We have child care development block grants. This is very interesting. This was put in the Commerce Committee bill, and I objected to it. One, they don't have jurisdiction over child care development block grants, but they were putting it in anyway. They are not the committee of jurisdiction on that. I don't know if they know anything about it. They put the money in. The Finance Committee took it out. Guess what? The Clinton administration put it back in. I am troubled by that.

Then, I find they did some other things. They changed formulas for child care programs. I wonder if my colleague from North Dakota knows that. They changed the formula. We have a State match formula for Medicaid. The match in most States is 50–50. In some States, it is 70–30. This bill now reduces that State match for child care to 20 percent, because they want more child care money spent and more individuals to qualify for it. The States actually have more money now in this program than they know what to do with. People were not taking advantage of it, so they reduced the State participation down to 20 percent.

The Federal Government for child care, with this increase, is going to pay four times as much as the State pays for it. That is an entitlement. That is a change, and the Commerce Committee has no jurisdiction over that. They did it. They also have report language that says, ''Hey, let's spend about $4 billion per year on this program.'' This is a 25-year bill. That is $100 billion. It was just added. Does anybody know it? Like I said, it was in, it was out, now it is back in.

They changed the Medicaid provision, which is wrong. They put in a brand new children's health care provision, which basically reopened the welfare bill. The bill would add $25 billion for States to do Medicaid outreach on children's care. We debated welfare. We passed the welfare reform bill. Now, the administration is coming through

the backdoor on the tobacco bill saying, ''Let's expand the welfare bill.''

They did it in the middle of the night. It did not pass the Commerce Committee. They didn't ask anybody in the Finance Committee who worked on welfare reform—not one person, not staff, not anybody. They just put it in.

They also put in a provision that allows for presumptive eligibility outside the cap funding for children's health care. Last year, we passed children's health care, a $24 billion. We increased cigarette taxes to do it. I thought it was too much. I didn't support it, but we passed it. It is now the law of the land.

Guess what they did in this bill? They just put in this new language. It was not in the Commerce Committee bill. It was not in the Finance Committee bill. The administration put it in. It sickens me to know that the administration thinks they have the ability to rewrite this bill. It may have Senator MCCAIN's name on it, but it is the administration's bill. Now, they are opening up the welfare bill, and they are opening up the kid care bill we passed last year for a massive expansion. These new provisions are estimated to cost $400 million per year. They open up the balanced budget agreement. That was part of our balanced budget agreement package that we negotiated and fought so hard for. Again, they cannot find enough people to qualify for the money under the language that we already have, so they are trying to figure out new ways to spend more money.

We have new programs for cessation and other treatments, Indian Health Service, education prevention, counterads, which incidentally, I will support. This paltry bill is spending hundreds of billions of dollars. Do you know what it spends for countereducational ads to discourage the consumption of tobacco? Mr. President, $500 million a year. Big deal.

Everybody says, ''Hey, we need to pass this bill so we can reduce teen consumption of tobacco.'' So $500 million out of a total of about $20 billion dollars almost every year. All the rest is for other Government spending; in some cases, any Government spending.

The national educational effort to convince people that smoking can bring about cancer is pretty small out of this total package.

It has an Institute of Medicine study, National Institutes of Health—all of these are getting pro rata shares of money that would be authorized—Centers for Disease Control, National Science Foundation, National Cancer Clinical Trials. That program wasn't in anybody's bill. The administration put that in either Sunday or Monday. They have money in here for a State retail licensing program, State grants, of $200 million a year. It is on page 118 of the bill.

I will just tell my colleagues what this does. I am embarrassed that we would put language in that allows this to happen. But I want my colleagues at least to know it so that maybe they will agree with me. I will have an amendment at some point to strike some of this language.

The State retail licensing program codifies that portion of the FDA regulations. It provides for $200 million a year and, basically, it codifies the FDA regulations dealing with selling tobacco. That is on page 119. It says:

> Shall prohibit retailers from selling or otherwise distributing tobacco products to individuals under 18 years of age, in accordance with the Youth Access Restrictions regulations promulgated by the Secretary.

Let me mention what that one little paragraph does. That paragraph says we are going to set up a whole mechanism to find out whether or not retail establishments are selling tobacco to teenagers. Maybe you say, ''Hey, I don't want retail establishments selling to teenagers.'' So how are they going to do it? There is $200 million which they give to the States in block grants. The States have to contract to set up inspection teams to do random inspections across the country to find out whether or not they are complying.

What if they don't comply? The fines and penalties are very, very significant. I looked it up. The fifth noncompliance the penalty is $10,000. For the sixth there is an even greater penalty; it is not just monetary.

So the Federal Government is going to train these inspectors. They are going to go out and do random audits. And I just have to think, what are we doing? How far are we going in this Government police business? In the committee reported bill there would have been so many inspections per State. Each individual State had a list of how many inspections. I will talk about this later, because I plan on having an amendment on it. But I say on the floor today, I believe, there have to be 4,000 inspections—smaller States less, bigger States more.

The bill was mandating thousands of inspections where these people would be going by and seeing if somebody is purchasing cigarettes. Guess what? It is not just purchasing under age 18; they are checking to see if the establishment is checking IDs for people up to age 27. So you are in noncompliance if you are a gas station and you sell cigarettes to somebody who is 26 years old. That is a violation if you do not check their ID. You are in violation of these Federal regulations if you do not check their ID.

Now, I am going to have a different speech talking about FDA regulations. But my point is, this bill sets up a $200 million new program to give money to the States. The States monitor this as we deem appropriate on the Federal level. I find that to be absurd. And the Federal Government, with its wisdom, says, ''We believe you should check everybody aged 27 or less. If you don't check them, you are subject to fines of up to $10,000.''

Wow. Now, think of that. You have some burly Marine who is 25 years old from the Marine camp in North Carolina who comes in, and he says he wants a pack of cigarettes, and you can tell he is more than 18 years old. And you are going to ask this guy, ''Oh, I can tell you're a sergeant major, but we want to check your ID''? I don't want to ask him to do that. But you could be fined up to $10,000. That is in the FDA reg.

We are getting ready to codify the FDA regs. We are getting ready to deem the FDA regs as law, which is a very bad idea. The FDA can come up with regs. They cannot write law. They cannot write law. Their regs, in my opinion, are unconstitutional. We just cannot deem something unconstitutional as law, as this bill would propose to do, whether it be in advertising or otherwise. Just to give you an example, the FDA regs said it was unlawful for tobacco companies to develop advertising gimmicks such as a hat. I have a staff member who has a hat that says ''Marlboro'' on it. Heaven forbid, what outlandish behavior. We have the Federal Government saying, ''You can't have a hat that has 'Marlboro' on it or 'Winston' ''? Give me a break. And there are penalties for noncompliance with that.

The FDA came up with some outlandish regulations. We are just going to deem those regulations as law? We are the legislative body. I think we should clarify what FDA can do. I don't mind regulating nicotine. I do not mind giving FDA some additional authority if we clearly define it, but Congress should define it. We should not just take their regs and say, ''Here. Whatever you've said is fine. It's law, no matter what court cases are already decided.'' Wait a minute. If they went too far, they breached the Constitution, we are just going to deem it as law? That is not good legislation. That is just doing whatever FDA wants.

Again, this administration wrote the bill. But we should not adopt those provisions. We are the legislative branch. We are the equal branch of the administration. Why let them write this bill? Why help them pass a bill which has no tax relief, spends hundreds of billions of dollars, and its impact on smoking is very questionable?

Mr. President, there is a lot of new spending. I am going to submit for the RECORD several specific references. I have heard people say this bill has 17 new agencies. It has a lot more than that.

Mr. President, I think I have mentioned all these. I will run through this other list in a minute. It has Indian tribe enforcement grants, Indian tribe public health grants, tobacco farmer quota payments, tobacco community grants, farmer opportunity grants, tobacco worker transition program, USDA operation of tobacco program, international tobacco control awareness effort—brand new; it was not in either bill, was not in the Commerce Committee, and was put in by the administration Sunday or Monday.

Compensation to tobacco vending owners: That was in the Commerce Committee bill. Let me just touch on that for a second. Everybody knows the FDA regs say we are going to ban vending machines. Well, if Congress wants to ban vending machines, Congress should do it. And then you say, ''Well, wait a minute. Shouldn't we compensate the vending machine owner?'' It is logical. As a matter of fact, the Constitution says you should not confiscate somebody's property without just compensation.

What do we do in this bill? We set up a corporation. And the corporation is to deem what is just compensation. I have had people come in and lobby me—some of them are very good friends —and say, ''Boy, we need this in there.'' I say, ''What kind of compensation are you talking about? How much do those machines cost?'' ''Well, they might cost $1,500, $2,000, $2,500, something like that.'' ''How much do you envision taxpayers paying you for that machine?'' ''Well, we're kind of thinking maybe $8,000 or $10,000, something along those lines.''

That troubles me. ''Well, we were going to make money off that machine for the next several years, and we would like to have the present value of the future earnings of that machine since you're taking it away from us.'' Maybe they have a legitimate argument, but that bothers me. It is the same argument that we are going to be making on tobacco farmers. Are we going to be giving them the future value of the earnings potential of that farm for a long number of years? I do not want to do it. And I love my friends from the tobacco States, but I do not want to do that. I do not want to do it on vending machines either. I just think that is a mistake.

We are getting ready to pay—if we allow this legislation to go forward,''such sums as necessary.'' We are going to be spending lots and lots of money.

This bill has a section in it, Mr. President, called ''asbestos trust fund.'' Now, I raised this with my colleague, the Senator from Arizona. The bill that was reported out of the Commerce Committee contained a $21.5 billion asbestos trust fund, originally funded separately by the tobacco companies. I objected to that, and so they agreed to fund it out of the larger trust fund. Then the Finance Committee struck it altogether and said if we are going to set up a new compensation program, we should look at it more closely. And if we do it for asbestos, shouldn't we also do it for black lung? Shouldn't we do it for brown lung? And shouldn't we do it for textile mills? Shouldn't we do it for any other number of lung diseases related to occupation?

I do not think you can stop just with asbestos. I think you have to look at black lung, you have to look at brown lung, you have to look at all of them. So the cost of this, the $21 billion, could grow like cancer, and would. I made these points in the Finance Committee. We struck it in the Finance Committee. This was never a request by the administration, and never a request by the Commerce Committee. Then it was put back in by the Commerce Committee anyway; it is back in.

They delete the authorization language and so on, but they authorize Congress to spend tobacco money whenever Congress passes an asbestos bill. You can tap into the fund an unlimited amount of money. It does not say $21.5 billion, it just opens the door. I think that is grossly irresponsible.

Does that mean I am not sympathetic to somebody who had asbestos problems and also is a smoker and had lung cancer and has a problem? No. I am very sympathetic. But I am also looking at what we are doing here. And we are in the process of expanding a program greatly out of control.

It has money in it for the Veterans Affairs' tobacco recovery fund—not specified; wide open; no limit to how much it could cost.

Is has an attorney fee arbitration panel. I touched on this before. This arbitration panel is a three-member panel, with no limit as to how much this would cost. I heard some people say, ''We can't do that.'' Now, wait a minute. Everything else has limits. I am going to submit this list of programs for the RECORD, but we have about 30-some-odd guidelines on how this money should be spent.

But we are going to leave a blank check in here for attorney fees? Now, give me a break. Congress is in the process of raising these taxes, putting this money in the fund. Congress is also responsible for spending the money: ''Here, States, here is how you spend it. Here is how you must spend it. Here is how we're going to spend it. And we can place restrictions on what attorney fees should be.

Right now if we pass this bill, the clear winners are trial attorneys. The clear losers are consumers, low-income smokers. They are the losers. The trial attorneys are the victors. They are the winners. They win big time. They become millionaires—billionaires, maybe in some instances. And the losers are the people who see their total Federal tax liability increase by 44 percent if they make less than $10,000. They are the losers. They are big-time losers. Are we going to fix it? I hope we will fix it.

Mr. President, I ask unanimous consent to print in the RECORD attorney fees from the States of Mississippi, Florida, Texas, and Minnesota.

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

STATE SETTLEMENT TOTALS/ATTORNEY FEES

State	Total (dollars in billions)	Fees
Mississippi	$3.4	$250 million (7.3%)
Florida	11.3	2.8 billion (24.7%)
Texas	15.3	2.2 (14.4%)
Minnesota	6.6	450 million (6.8%)

Mr. NICKLES. There is a Scientific Advisory Committee, there is a National Tobacco Free Education Advisory Board. That concludes this list. And we haven't found them all yet. Since we also added the Lugar amendment, there are several provisions, some of which are similar but not near as extensive or as expensive as that provided in the Commerce Committee bill. It adds a tobacco community's revitalization trust fund, it adds a tobacco quota buyout, block grants, tobacco farmer assessment, and so on.

I want to be fair on both sides of the tobacco argument. You add all that together, you have 30-some new programs funded in this bill. You have hundreds of billions of dollars funded in this bill. You have trial attorneys who, in all likelihood, will make over $100 billion out of this bill—$100 billion out of this bill.

I ask unanimous consent to have printed in the RECORD new taxes, assessments, penalties, and new spending authorizations.

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

What's New in the White House tobacco bill

NEW TAXES, ASSESSMENTS, & PENALTIES

National Tobacco Settlement Trust Fund	Funded by the net revenue from $102 billion in deductible industry payments over 5 years, ($885 billion over 25 years), increased for inflation, increased/decreased for volume, subject to appropriation except state share and farmer money, Section 401, 402, and 403, page 179.
Lookback assessments—industry wide	Up to $4.4 billion per year beginning in 3rd year, increased for inflation, not deductible, Section 204(e), page 106.
Lookback assessments—brand specific	$1,000 per underage user above specified reduction targets beginning in 3rd year, increased for inflation, not deductible, Section 204(f), page 109.
Tobacco distributor licensing fees	Secretary may set fee level to cover costs of registering tobacco manufacturers and distributors, Section 1139, page 384.

What's New in the White House tobacco bill—Continued

Non-payment penalties	Prime interest rate plus 10% of unpaid balance after 60 days late, Section 406, page 190.
Document good faith penalties	$50,000 per violation, Section 908, page 258.
Anti-smuggling penalties	$10,000 per violation, Section 1137, page 377.
NEW SPENDING AUTHORIZATIONS—GENERAL ALLOCATION OF FUNDS	
State Litigation Settlement Account	40% of net revenues, adjusted after 10 years to equal $196.5 billion over 25 years, sent to states without appropriation, distribution formula to be determined by states, 50% may be spent on anything, 50% must be spent on children's health, child care, child welfare, substance abuse, education, and children's health insurance, Section 451(a), page 192 and Section 452(b), page 200.
Public Health Account	22% of net revenues plus all of lookback assessments, subject to appropriation, Section 451(b), page 194.
Health & Health-Related Research Account	22% of net revenues, subject to appropriation, Section 451(c), page 197.
Farmer Assistance Account	16% of net revenues for 10 years, then 4% until $28.5 billion cap, Section 451(d), page 198.
Medicare Preservation Account	Excess industry payments for 10 years, then 12% of net revenues, Section 451(e), page 199.
NEW SPENDING AUTHORIZATIONS—SPECIFIC PROGRAMS	
Child Care Development Block Grants	Such sums as may be necessary, committee report recommends $4 billion per year, state-match reduced to 20%, Section 1161, page 385, and Section 452(d) page 202.
Children's health care	$25 million for states to do Medicaid outreach for children's health care, and allows funding for presumptive eligibility outside of capped funding for children's health care, Section 452(f), page 203.
Cessation and other treatments	25%–35% of the public health account, 90% of which is block granted to the states, Section 451(b)(2)(A), page 194 and Section 221, page 129.
Indian Health Service	3%–7% of the public health account, Section 451(b)(2)(B), page 194.
Education, prevention, counter-ads, international.	50%–65% of the public health account, Section 451(b)(2)(C), page 195.
FDA enforcement, state licensing, smuggling.	17.5%–22.5% of the public health account. Of that amount, FDA receives 15% in 1st year, 35% in 2nd year, and 50% in 3rd year, Section 451(b)(2)(D), page 195.
Institute of Medicine study	$750,000, Section 451(c)(2)(A), page 197.
National Institutes of Health	75%–80% of health research account, Section 451(c)(2)(B), page 197.
Centers for Disease Control	12%–18% of health research account, Section 451(c)(2)(C), page 198.
National Science Foundation	1% of health research account, Section 451(c)(2)(D), page 198.
Medicare Cancer Clinical Trials	$750 million over 3 years from health research account, Section 451(c)(2)(E), page 198.
State retail licensing program—state grants.	$200 million each year, Section 231, page 118.
Compliance Bonuses for States/Retailers	$100 million each year, Section 232, page 128.
National Medal of Science	CDC funding to be used to establish a National Medal of Science, Section 454, page 207.
Indian tribe enforcement grants	Amount not specified, Section 603(d)(3), page 222.
Indian tribe public health grants	Amount not specified, Section 603(e), page 223.
Tobacco farmer quota payments	$1.65 billion entitlement per year for 25 years, Section 1011(d)(1), page 491.
Tobacco community grants	$10.5 billion entitlement over 25 years, Section 1011(d)(3), page 491.
Farmer opportunity grants	$1.44 billion entitlement over 25 years, Section 1011(d)(5), page 491.
Tobacco worker transition program	$25 million entitlement per year, Section 1011(d)(4), page 491.
USDA operation of tobacco program	Such sums as may be necessary, Section 1011(d)(2), page 491.
International tobacco control awareness effort.	$350 million through 2004 and such sums as necessary thereafter for grants to individuals, corporations, or other entities, Section 1107, page 361.
Compensation to tobacco vending owners	Such sums as may be necessary from general fund or tobacco fund, Section 1162, page 386.
Tobacco vending reimbursable corporation	Section 1162(b)(2), page 387.
Asbestos trust fund	Authorizes such sums as necessary for future enactment of an asbestos trust fund, Section 1201, page 402.
Veterans affairs tobacco recovery fund	Not specified, Section 1301, page 403.
Attorney fee arbitration panel	Section 1403, page 438.
Scientific advisory committee	Section 906(e)(2)(B), page 49.
National Tobacco Free Education Advisory Board.	Section 221 of the bill, new section 1982(b), page 148.
ADDITIONAL ITEMS IN THE LUGAR AMENDMENT	
Tobacco Community Revitalization Trust Fund.	Funded with such sums as necessary from the National Tobacco Settlement Trust Fund, Section 1511, page 450.
Tobacco quota buy-out	Payments of $8 per pound of quota owned, or $4 per pound of quota leased for production, paid over 3 years, Section 1515 & 1515, page 452.
Rural economic assistance block grants	$200 million per year for 4 years in block grants to states, Section 1521(a), page 454.
Tobacco farmer assessment	Marketing assessment set by the Secretary to cover the annual costs for federal administration of extension, inspection, and crop insurance related to tobacco.

Source: S. 1416 as modified in the Senate (5/18/98).

Mr. NICKLES. Now, are we going to pass that? I know I saw an ad by Dr. Koop saying we need to. I love Dr. Koop. I know he is very sincere. But I don't think you have to spend hundreds of billions of dollars to go after teenage consumption of tobacco or of drugs. And I think we should go after both. I think we would be grossly irresponsible if we don't go after both.

I am concerned about the cost of this bill. I told my friend and colleague from Arizona that I have the greatest respect for him but I don't have great respect for this bill. I think this bill is one of the worst pieces of legislation that Congress has considered since the health care dictates of the President and Mrs. Clinton several years ago. That bothers me. I don't think we should pass it in the Senate. I told my colleagues I am not going to just stand back and throw rocks at it. I will try to make some improvements.

I read a list of the sections, and I don't think there should be an asbestos section. I may have an amendment to delete it. I don't think we should have the massive industry payment system. I am going to try to talk my colleagues into replacing it with a simple excise tax. Raise it $1.10, so you know exactly the amount. I am not comfortable with the fact that some people are saying it is $1.10, but it raises more money than that, so maybe they will have more money to spend. There is no doubt in my mind that these payments, and you divide that out by the number of cigarettes sold, if you are selling 24 billion cigarettes, you realize this will raise a lot more money than $1.10. We are talking about big money. We are talking about it every year.

The tobacco settlement was originally, when fully implemented, about $15 billion a year. This bill starts at $24 billion, and by the year 2002, assuming the kickback comes in, $30 billion. That is a lot of money—3,000 percent

increase in the tax on smokeless tobacco and so on.

Maybe people don't care. I care. I care about the procedure. I think some of my colleagues from the tobacco areas were upset about the procedure. I think when you are dealing with the agriculture section, that should have come out of the Agriculture Committee. Commerce Committee is not supposed to write the agriculture section. And Commerce Committee is not supposed to write the tax section. And they did both and they did a crummy job on the tax section. This is the worst tax law I've seen. If we pass it, it would be the worst tax bill Congress has passed. With all due respect, it wasn't even done by the Commerce Committee. It was done by the administration. President Clinton didn't want to use the word ''tax'' so he thinks they hide it by using the word ''fee,'' but it is not a voluntary fee.

If tobacco companies were in agreement with this, this would be voluntary, it would be a fee, and in return they get some liability protection, and that is what they negotiated with the attorneys general. Maybe that would work. This is not voluntary. There is no provision that says if the tobacco companies don't like the fee, they don't have to pay it. There is no provision like that. So it is a tax. Congress has the power to tax, but if we are going to tax, let's tax right.

The cigarette excise tax right now is 24 cents per pack. It is going to 39 cents by 2002. This bill purports to raise it another $1.10, so that goes to $1.49.

So for my colleagues who are trying to push the tax to $1.50, it will be $1.10 by the year 2002 under this bill, plus indexed for inflation. So maybe you have a lot more than you really realized.

Let me take you through the numbers again. The tax on cigarettes today is 24 cents per pack. Congress, last year, I believe, increased that tax 15 cents—24 and 15 is 39 cents. That is already law. This bill adds to that, purportedly, another $1.10. A $1.10 on top of the 39 cents is $1.49. So the Federal excise tax on tobacco, at a minimum, will be $1.49 in the year 2002, plus it is indexed for inflation forever. This is indexed at inflation, or 3 percent—whichever is greater. Never had an index that I know like that. I don't know that that makes sense, but we have it in there. Why do we have it in there? So we put more money in the pot so we have more money to spend. I don't think we should do that.

What should we do? We should work together to come up with a responsible package. I am willing to do that. I think this bill goes way too far.

I haven't touched the regulatory side of the bill. I will save that for another speech, and hopefully maybe the FDA section will have some common sense come into it. We don't want to give this unbridled authority to the administration. Don't we want to preserve for ourselves, the legislative branch, the authority to write law? Or are we going to take a massive menu of FDA regs and say they are deemed to be law, although a court said part of them is unconstitutional. I don't think we should do that. I will save the FDA section for another comment and another time.

Now I am talking primarily about the financial impact of this bill. Let's work on a bill that will do a couple of things. Let s work on a bill that will try to educate youngsters that using drugs or using tobacco is a very serious problem. Let's try to reverse this trend that happened, frankly, in the last 6 years, during the Clinton administration, where marijuana use doubled among high school seniors, where tobacco use is up 35 percent among high school seniors. Let's try to reverse that through some public education. Let's try to get some workable restrictions that are constitutional. Let's try to put some responsibility back on young people. Let's try to maybe give the States the encouragement to enforce the law.

It is against the law in every State in the Nation for people under the age of 18 to smoke. So if they enforce the law, we don't have this problem. Now, maybe they are not enforcing the law. But certainly this little operation we have here where we are going to have the Federal Government spend $200 million a year to go around and have all these people inspecting to see if the convenience stores are checking IDs up to people age 27 is absurd. That is not going to work. It will build resentment. We need to say, States, what can you do to enforce the law? Maybe all the enforcement should go not to just the person selling the tobacco product. I am all for the States, if they find somebody selling tobacco or alcohol, frankly, to that minor, there should be significant penalties. That is the reason the laws are on the book. They should enforce the law. The penalties should not be just on the person selling but on the person buying or the person consuming. There are laws if you are driving under the influence, you get a DUI, they can take your license away. Maybe we should have restrictions and penalties on the consumer if they are breaking the tobacco consumption laws. Maybe it would be a financial penalty, maybe it would be that they have to do community service. Maybe they have to clean up a park. Give the States some flexibility to put some penalties on the consumer.

One of the reasons I didn't smoke is because I had a football coach who said, you smoke, you are out of here. Everybody else in our group understood that there was a penalty, there would be a price to be paid. So let's put it back on the individual. Let's turn it around. We can do some things like that.

What I see here is a massive effort to conceal, disguise, slide in under the radar screen, a very big tax price increase. And the way it is done is going to have minimal impact on reducing consumption among teenagers because we slide it in stealthily. It starts at 65 cents and over 5 years it is $1.10, according to this nonsense. Are we going to do it so gradually there is no sticker shock, so there won't be any impact anyway? The Finance Committee said, if you are going to increase the tax, put it up front, that, to me, is at least more honest. Do a tax, do away with the nonsense of hundreds of billions of dollars in industry payments. The tax is 24 cents now, so it's going to 39 cents. If Congress has the votes to do it, make it another dollar, add it on, vote on it. I probably won't vote for it. But do it honestly. The way we have here is so misleading and deceptive.

Instead we are going to talk about volume reductions, and we are going to talk about inflation adjustment and about these payments, and I am going to bring up the point that some companies don't have to pay. If smokeless companies produce less than 1 percent, they are exempt. So what are we going to do? We are going to put penalties, big assessments on some companies; but a new startup company doesn't have to pay this $1.10 assessment. That is a big advantage. I have a feeling that this bill is going to cause new companies to crop up all over the place.

I think the arguments made by the Senator from Utah and others about having a black market are very real. These commodities aren't that hard to smuggle or hide. I think if you put in this kind of incentive, you will have the same thing happen as it did in Canada and in other countries in Europe. You are going to find a lot of contraband, a lot of hidden stuff, and people smuggling tobacco like they used to be smuggling liquor. There is a lot of money to be made in the process. If they are smuggling tobacco tax free, there is money to be made. And there is money to be made in drugs. Smuggling under this bill is illegal. But the financial rewards will be very lucrative. If a person figures out the value of a truckload of cigarettes, you will realize that there is a real incentive if a person can get around the law and paying these taxes. The taxes are going to be greater, certainly, than the product.

I stopped in a gas station last weekend just to see what tobacco prices were. I didn't know; I don't buy tobacco. There were some cigarettes selling for $1.24 a pack, and another for $1.84, and another for $2.02. People say most of them are about $2. The more popular brands were the higher-priced ones, closer to $2. That is with the tobacco tax of 24 cents. If it goes up another 15 cents—this bill purports to take it up to $1.10, and that is without the look-back penalties. If you add that back in, you are looking at probably close to a $2-per-pack tax that is in this bill. So taking a product right now that sells from $1.24 to $2, you are going to add $1.50 to $2 in taxes very shortly on consumers. Is that going to be an incentive for people to smuggle cigarettes and get around the law? I believe it is. Certainly, there is incentive.

I hope they won't be successful. I don't want to set up a black market or encourage that type of activity, but I am afraid we will be doing it.

Finally, Mr. President, let me just say that I am disgusted about the procedure. I don't say that very often. I am part of the leadership, but I am disgusted by the fact that you have one committee, the Commerce Committee, writing the finance portion, writing the agriculture portion, and they didn't do a very good job. I am disgusted by the fact that the bill changed and the administration rewrote the bill over the weekend. They didn't consult the Commerce Committee, or the Finance Committee, or the committees of jurisdiction dealing with welfare, child care, the committees that wrote those laws, people that had the staff and the experts who knew what they were talking about. The administration put in a lot of their wish lists. I am disgusted by the fact that we would set up a whole new trust fund and say it is limited to $1.10 tax, when it is not.

Let's be honest with people. This is not the way to pass legislation. The Commerce Committee is not a tax-writing committee. They did a crummy job. I am disgusted. The tax on one can of Skoal will be one level, and on a competitor it would be 30 percent less. I am disgusted by the fact that one cigarette company is not going to have the excise tax that another cigarette company is going to have. Wait a minute, this is a national excise tax, but some companies don't have to pay it and some companies do. That is not the way you do business. I don't care if you are small or large. Excise taxes are supposed to be across the board. They didn't do that.

I am also disgusted by the fact that we would end up passing a bill to allow trial attorneys to make $100 billion over the life of this bill—probably $4 billion a year over the course of this bill. That bothers me a lot. That reminds me of what motivates this bill and it reminds me of the movie ''Jerry McGuire,'' where someone is screaming, ''Show me the money.'' That is what is driving this thing. It is not just about curbing teenage smoking. That is a great public relations campaign, and I will stand with anybody to try to curb teenage smoking and drug use. I emphasize ''drug use,'' because there is silence in this bill about that. We are not going to pass a bill, if I have anything to do with it, unless we have a significant effort to combat not just cigarettes but also marijuana and other illegal drugs that are much more hazardous, dangerous, and deadly.

I think this bill needs a lot of work. My guess is that it is probably not fixable with just a few amendments. I don't think we should be in a real rush to pass it. I have spent the last three nights staying up past 1 o'clock reading this bill, trying to understand how it works. I still have a lot to learn about this bill. Before we pass the biggest tax increase, the biggest spending program considered by Congress in years, I think we ought to know a little bit more about it. So I urge colleagues to do their homework, consider serious amendments, not frivolous amendments to string this bill out for a long time, but to make it better.

We are legislators. We are trying to pass law. My opinion is that this is a bad bill that needs to be improved significantly before we let it become law. I will reiterate my statement that I will work with any colleague, Democrat or Republican, to try to fashion a bill that will reduce teenage consumption of drugs and tobacco. But I don't think we have to spend hundreds of billions of dollars to do it. I don't think we have to turn over massive amounts of power to bureaucrats to do it. So I look forward to working with my colleagues to try to make that happen in the next few weeks as we consider this legislation.

Mr. President, I yield the floor and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

The PRESIDING OFFICER (Mr. ROBERTS). Without objection, it is so ordered.

Mr. CONRAD. Mr. President, I was seeking to ask the Senator from Oklahoma some questions about the numbers he was displaying about the revenue generated by this bill, because the numbers he was displaying are not the official forecasts by the Joint Tax Committee of what this bill will raise. His numbers that he was displaying here are much higher than the numbers that are in the official forecast. Generally, when we debate a bill on the floor of the Senate, we debate based on common numbers. We debate based on the official forecasts. The Senator from Oklahoma has chosen not to do that. He has chosen to take other numbers that are much higher and different. The major difference between those numbers is that the bill calls for a volume adjustment that is not contained in the Senator's figures.

The volume adjustment appears very clearly in the bill at page 189, No. 2, ''Volume Adjustment.'' I will not go through the technical details. But the volume adjustment provides for, if volumes of cigarettes consumed declined because of an increase in price, the price increase will be adjusted downward. The numbers of the Senator from Oklahoma do not contain that volume adjustment. The fact is both Joint Tax and the Congressional Budget Office assume there will be a reduction in volume of about one-third, and any volume reduction beyond a 40-percent volume reduction will result in a lowering of the price increase.

Again, the Senator's numbers did not include those figures. The numbers he was using are not the official forecasts for this bill. They are at great variance from what has been provided by the Senator and are the official forecasts of what this bill will raise made by the Joint Tax Committee.

I want to point that out because I think it is important to set the Record straight.

At this point in the record, I ask unanimous consent to have printed in the RECORD the Joint Tax Committee's estimates of what this bill will raise.

I also would like to enter into the RECORD at this point page 189 from the bill that points out the volume adjustment provisions which the Senator from Oklahoma neglected to advise the Senate are not contained in the numbers which he displayed for our colleagues.

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

CONGRESS OF THE UNITED STATES,
JOINT COMMITTEE ON TAXATION,
Washington, DC, May 19, 1998.

Hon. DANIEL PATRICK MOYNIHAN,
U.S. Senate, Washington, DC.

DEAR SENATOR MOYNIHAN: This letter is in response to your request for a revenue estimate of the manager's amendment to S. 1415 offered May 18, 1998.

In order to complete the estimate of the manager's amendment to S. 1415, we assumed that the base payment for years beginning in 2003 and thereafter is $23.6 billion before the volume and inflation adjustments.

Our estimate presents the net revenue effects of the manager's amendment to S. 1415. These net amounts differ from the gross payments required under the manager's amendment for several reasons. First, the general tobacco industry payments are converted to fiscal year payments. Second, the general tobacco industry payments are reduced by an income and payroll tax offset in the same way that net receipts from an excise tax are calculated. Third, the higher price for tobacco products resulting from the proposal reduces net receipts generated from present-law tobacco excise taxes because of reduced tobacco consumption. Finally, because the proposal is expected to supercede most of the State-by-State settlements that are implicit in the Congressional Budget Office baseline receipts forecast, much of the negative indirect effect of the anticipated State-by-State settlements on receipts is reversed.

We estimate that the manager's amendment to S. 1415 will have the following effects on Federal fiscal year budget receipts:

[In billions of dollars]

	Fiscal year—										
	1999	2000	2001	2002	2003	2004	2005	2006	2007	1999–02	2003–07
1. General industry payments	15.4	11.0	12.5	12.7	13.2	13.8	14.3	14.8	15.4	51.5	71.5
2. Look-back assessment [1]	.....	.....	.....	.....	.....	1.0	0.6	4.0	3.1	.....	8.7

[In billions of dollars]

	Fiscal year—										
	1999	2000	2001	2002	2003	2004	2005	2006	2007	1999–02	2003–07
3. Total of S. 1415 as amended	15.4	11.0	12.5	12.7	13.2	14.8	14.9	18.8	18.5	51.5	80.2
General industry payments per pack[2]	$0.76	$0.89	$1.06	$1.11	$1.24	$1.28	$1.32	$1.36	$1.40	.....	.....

[1] This net revenue reflects the effect of reduced excise tax receipts because of the assumption that the penalty excise tax payments are passed through in the price of tobacco products.
[2] Presented on a calendar year basis and without regard to look-back assessments.

Note: Details may not add to totals due to rounding.

I hope this information is helpful to you. If we can be of further assistance, please let me know.

Sincerely,

LINDY L. PAULL.

VOLUME ADJUSTMENT PROVISION

(2) VOLUME ADJUSTMENT.—Beginning with calendar year 2002, the applicable base amount (as adjusted for inflation under paragraph (1)) shall be adjusted for changes in volume of domestic sales by multiplying the applicable base amount by the ratio of the actual volume for the calendar year to the base volume. For purposes of this paragraph, the term ''base volume'' means 80 percent of the number of units of taxable domestic removals and taxed imports of cigarettes in calendar year 1997, as reported to the Secretary of the Treasury. For purposes of this subsection, the term ''actual volume'' means the number of adjusted units as defined in section 402(d)(3)(A).

Mr. NICKLES addressed the Chair.

The PRESIDING OFFICER. The Senator from Oklahoma.

Mr. NICKLES. Mr. President, my colleague is making my argument for me.

In the first place, I am consistent. The administration, and Senator MCCAIN, said this bill would only cost $516 billion. Guess what? They don't make a volume adjustment on that estimate. Instead, they used constant 1999 dollars.

I have a letter from OMB that was trying to refute my argument, but basically they made it for me. OMB says inflated nominal dollar industry payments would equal $755 billion over 25 years. That is without the look-back penalty. By way of comparison, the equivalent estimate which the State attorneys general are proposing is $539 billion in nominal dollars. Like the private analysis, these estimates do not included volume adjustments. There is a reason they do not include volume adjustments. It is because it is hard to figure.

My point is that everybody here has heard the attorneys general group discussing the $368 billion figure that the administration signed off on. When they use the $368 billion, they do not take into account any volume adjustment. No one knows what the volume adjustment is going to be.

I will show my colleague a table from the Joint Tax Committee. I have been trying to figure out what these industry payments really are. How much of a tax increase is it? I have hounded Joint Tax for an estimate, and we have a letter and report from them dated yesterday. If this is not the one the Senator printed in the RECORD, I will insert it in the RECORD at the conclusion of my statement.

In the first place, they show the total revenues on the top line which, frankly, are consistent with the revenues that I showed on my chart. It is shown in calendar years, according to the bill on certain pages which provided for a payment of $24.4 billion, $15.4 billion, $17.7 billion, and so on.

Mr. MCCAIN. Mr. President, will the Senator yield for an administrative question, not a substantive one?

Mr. NICKLES. The Senator is throwing me off track.

Mr. MCCAIN. About the schedule.

Mr. NICKLES. I will be finished shortly.

Mr. MCCAIN. I thank the Senator.

Mr. NICKLES. I want to make sure people understand. I am not sure my colleague from Arizona knows what was done.

Mr. MCCAIN. I was not trying to interfere.

Mr. NICKLES. I understand; no problem. I bragged on the Senator before.

But I want to talk a little bit about the volume adjustment. I am very familiar with the volume adjustment because I have been trying to figure out what they are doing with it.

Also the Senator from North Dakota tried to repudiate my number of $755 billion. I am telling you that is the same number OMB came up with, and they didn't volume adjust it, and they didn't volume adjust the $368 billion.

I want people to know that I am consistent with what was done before.

In addition to inflation, the bill that was reported out of the Commerce Committee was to have a volume adjustment. If you sell less, there would be less tax. So you have some reduction. But they do not know exactly what that would be.

What was rewritten by the administration on Sunday or Monday is that there will be a volume adjustment if and when volume gets less than 80 percent of last year's level. That is a big change.

Under the bill as originally written, the volume adjustments don't kick in until the sixth year. Then you would have some reduction. They say you will get a reduction if and when you reduce consumption below 80 percent down here.

My point is there is no volume reduction for the first several years, and after that you are guessing. But the volume reduction must be lower than 80 percent. To get any volume reduction whatsoever, you must reduce consumption total by more than 20 percent. It used to be that you only had to reduce it 1 percent to get a 1-percent reduction. Now, you have to reduce 21 percent to get a 1-percent reduction. It may be that they will never get a volume reduction as a result of that change. I don't know.

But my point being is that, one, we are being consistent in our analysis of the cost of the bill, as it pertains to OMB, as it pertains to the Attorney General.

I want people to know what the facts are. The fact is the bill says it has a CPI adjustment. The facts are that OMB said they used constant 1999 dollars to get $516 billion. I read it in the committee report. This is absurd. It said total payments shall not exceed $516 billion. That is not in the bill. It doesn't fit. It doesn't work.

If you use nominal dollars, as we use in every other budget projection, and you put a 3-percent kicker in, that is how you get up to $755 billion.

Then you can add the look-back assessment. One could say there will not be a look-back. Why was all this effort to add a look-back. I heard colleagues say on the floor that look-back is almost maybe 50 cents. I will tell you the look-back is a disaster. If anybody wants to raise tobacco prices another 50 cents, do it honestly. The look-back rests on the Secretary of Treasury taking a poll and saying, ''Did we meet our objectives? We want to reduce consumption by teenagers by a certain percentage. Did we make it? If we didn't make it, what happens then?'' If they miss it by a certain percent, there is a fine. If they miss it by a bigger percent, there is a bigger fine. That raises about $4 billion.

Then, they go to brand specific look-back assessments. This is absurd. They say they are going to, in the same poll, find out whether these youngsters buy X, Y, or Z brand. And if they smoke that brand, and that brand does not meet that target, there is a $1,000 penalty. For every teenager they identify that smoked more cigarettes in that particular percentage, then there is a $1,000 fine.

That is not really workable, and it needs to be fixed. It needs to be cleaned up. It needs to be deleted and then raise the tax whatever you want to raise it. Be honest. Tell people we want to raise taxes. The first year it is going to a dollar a pack. Just raise it a dollar a pack. Say next year, instead of 24 cents, it is going to be $1.24. Just do it. That would be the honest way. This thing is more than deceptive and, in my opinion, probably won't work.

Mr. President, I yield the floor.

Mr. CONRAD addressed the Chair.

The PRESIDING OFFICER. The Senator from North Dakota is recognized.

Mr. CONRAD. Mr. President, I am just going to repeat the point. I am

sorry to have set off my colleague from Oklahoma.

The simple fact is the numbers he has displayed here are not the official forecast for what this bill will raise. They just are not. They are dramatically higher than the official forecast before this body by the Joint Tax Committee, which is the forecasting service we all use. And so the numbers that he has presented to our colleagues, to anybody else who is listening, are numbers that are not the official forecast of what this bill is going to raise.

Mr. NICKLES. Will the Senator yield?

Mr. CONRAD. No. I asked repeatedly for the Senator to yield to me. He repeatedly refused, so I refuse.

The point is very simple. The reason his numbers are at dramatic variance with the official estimate of what this bill that is before this body will raise is because he takes no account of the volume adjustment that is contained clearly in the bill. And that volume adjustment calls for lower payments from the companies as the use of the product falls. Now, any economist and anybody with common sense understands that as you increase the price of something, you sell less of it. That is just basic. And so the legislation acknowledges that economic fact of life.

I yield the floor.

Mr. NICKLES addressed the Chair.

The PRESIDING OFFICER. The Senator from Oklahoma is recognized.

Mr. NICKLES. I ask unanimous consent to have printed in the RECORD a Joint Tax report.

Now, first I want to reply to my colleague. This joint tax report, which I have been asking for every day, is dated May 20, yesterday. They didn't have this information before. No one has had a chart on what they thought the industry adjustment would be, but let me just give the facts according to Joint Tax if you worship at that altar.

In the first place, they say the figures I have on the gross industry payments, are accurate. They have the exact same figures that I have. They happen to be accurate. They estimate these for the first time. We don't have a CBO study. We don't have a GAO study. We don't have anything from the administration showing what they think the volume adjustment would be. No one has had volume adjustments in any of their charts, because it is a guess. But let me just repeat what the Joint Tax Committee has said. They say the gross figures that I have are identical. They say the total tax on consumers over the first 5 years is $102 billion. They say volume adjustment is $8.7 billion. So the net over the 5 years is $93.4 billion.

So this massive change in numbers that you are talking about is not that massive. The total amount of tax on tobacco consumers, according to joint tax, over five years is $93.4 billion. That is pretty significant.

So, Mr. President, I just got this yesterday, or maybe we got it today. We got it today. And I am happy to have it submitted for the RECORD. I am happy to debate facts all day long, and I want to debate facts.

I see my colleague from Vermont who supports, I believe, a straight excise tax. I just think you ought to do a tax. I think this scheme of having industry payments and having look-backs and surveys and polls, and those polls are deemed to be accurate—that is absurd, but that is what is in this bill.

You have an automatic volume reduction if you have an honest excise tax. Isn't that the truth? If you have an honest excise tax of $1.10 and there is less cigarettes sold, there will be less money going in to the trust fund. It is self-fulfilling if you do it right.

This bill does it wrong. This bill says we are going to have this formula for this money to go in, and it is indexed and there is additional formulas if we determine a certain number of people are using the wrong product. And so we will put that in. And then, oh, yes, we will reduce it by volume if we determine that.

Why not just have a tax per pack, and if there is less volume, there will be less money going into the pot. And no one will have to argue about volume adjustment that will be determined by the Secretary to send to these various companies, and, oh, he is going to forget to send that assessment to some companies.

That doesn't make sense. If somebody makes a different size of Skoal or a different size of snuff, he has a little different tax. You should put the same tax on every pack of cigarettes, the same tax on every brand of moist tobacco or every brand of smokeless tobacco and just do it. And then you have an automatic volume adjustment.

Mr. LEAHY. Mr. President, will the Senator from Oklahoma yield?

Mr. NICKLES. Sure.

Mr. LEAHY. I won't take but a couple minutes.

Mr. NICKLES. I did ask unanimous consent to print this chart in the RECORD.

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

RECONCILIATION OF GENERAL TOBACCO INDUSTRY PAYMENTS UNDER S. 1415, AS AMENDED, AND NET FEDERAL REVENUE EFFECT OF SUCH PAYMENTS ESTIMATED BY THE JOINT COMMITTEE ON TAXATION ON MAY 19, 1998, BEFORE THE LOOK-BACK PROVISIONS

[In billions of dollars]

Provision	Fiscal year—											
	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	1998–2003	1998–2007
I. Calendar Years:												
1. Federal revenues from S. 1415 general tobacco industry payments as adjusted for inflation (by calendar years as in S. 1415)	10.0	14.4	15.4	17.7	21.0	23.6	24.3	25.0	25.8	26.6	102.1	203.8
2. Calendar year volume adjustment	.....	.....	.....	.....	−3.6	−5.0	−5.4	−5.8	−6.2	−6.6	−8.7	−32.7
3. Calendar year payments	10.0	14.4	15.4	17.7	17.4	18.6	18.9	19.2	19.6	20.0	93.4	171.1
II. Fiscal years:												
1. Adjustments:												
a. Convert Federal revenues from S. 1415 general tobacco industry payments to Federal fiscal years	.....	20.8	15.2	17.1	17.5	18.3	18.8	19.1	19.5	19.9	88.9	166.2
b. Change in net revenues from Federal income and payroll taxes (because of the impact of S. 1415 general tobacco industry payments on aggregate taxable income)	.....	−5.2	−3.8	−4.3	−4.4	−4.6	−4.7	−4.8	−4.9	−5.0	−22.3	−41.7
c. Change in net revenues from present-law Federal tobacco excise taxes (because of price increases from S. 1415 general tobacco industry payments)	.....	−0.8	−1.2	−1.5	−1.9	−2.1	−2.2	−2.2	−2.2	−2.2	−7.5	−16.3
d. Net revenue effect of replacing State by State tobacco settlements with S. 1415 payments	.....	0.5	0.9	1.1	1.4	1.6	1.9	2.2	2.4	2.7	5.5	14.7
2. Net Federal revenues from S. 1415 general tobacco industry payments (JCT May 19, 1998 estimate)	.....	15.4	11.0	12.5	12.7	13.2	13.8	14.3	14.8	15.4	64.6	122.9

Note: Details may not add to totals due to rounding.

Mr. LEAHY. Mr. President, I am sure my friend from Oklahoma will allow me to describe what my position will be on it, and I appreciate him stating it. And I do not want to get into the debate he and the Senator from North Dakota have been having. I was here to support, as I have, the amendment of the distinguished Senator from New Hampshire, Mr. GREGG. And what I have before me is an amendment that I think makes a great deal of sense.

I said yesterday that nobody is running up to me in the streets of Vermont and saying, ''Oh, please, whatever you do, be sure and give a lot of immunity to the poor tobacco companies.'' Nobody in Vermont is saying, ''Whatever you do, make sure first and foremost you protect the tobacco companies.''

They have made it very clear that they are concerned with protecting teenagers, concerned with protecting their children, concerned with getting back some of the costs that we in Vermont have spent on health care for those who have suffered from addiction to cigarettes.

But I ask, Mr. President, at the conclusion of my statement that I be allowed to put in the RECORD a letter from C. Everett Koop and David Kessler to Senator GREGG and myself dated May 20, 1998.

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

(See Exhibit 1.)

Mr. LEAHY. I just mention this about it. The letter very forcefully, very eloquently makes the case why the interests of public health are not served by giving big tobacco further special legal protection. They write:

> Special legal protections for tobacco are unfair to patients and their families.

They write further:

> Special legal protections for tobacco are bad for public health, especially children's health.

They write:

> Special legal protections for tobacco are undeserved.

And they write:

> If passed, the special legal protections in the Commerce Committee bill would be the biggest corporate giveaway in history.

And then they say:

> For the sake of public health and children's health, for the sake of the people who are already sick and for those who will become sick, and for the sake of holding the industry accountable for its actions, we urge you to strip the special legal protections from the bill.

I agree with Dr. Koop. I agree with Dr. Kessler. I agree that first and foremost we should protect the people of this country. We should protect the health of the people of this country. We should protect the children of this country. And we should not be giving special limits on legal liability to big tobacco.

I disagree with the position of the White House in trying to allow special legal protection and special immunity for the tobacco companies.

Yesterday, the President wrote to the Senate leaders that:

> If a cap that doesn't prevent anybody from suing the companies and getting whatever damages a jury awards will get tobacco companies to stop marketing cigarettes to kids, then it is well worth it for the American people.

Everybody agrees with that. What doesn't come out in the President's letter is this bill does have provisions that will prevent some parties from suing the tobacco industry. It does cap the total annual payments for the tobacco industry. The liability cap may very well affect the payment of future jury awards to tobacco victims.

So, I disagree with the White House and I disagree with those on both sides of the aisle who would limit some of the liability of the tobacco companies. If the tobacco companies hadn't faced unlimited liability for their actions, we would not even be here today. If the tobacco companies hadn't known that they could be sued, and sued successfully, they never would have admitted some of the things that have now come out. If the tobacco companies had not faced this, we never would have found out the years that they had lied. We never would have found out the internal memos where they were targeting 14-year-olds. We never would have found out even such things as their efforts to make cigarette placements in all kinds of movies, including, of all things, the ''Muppet Movie.'' These are things that we have found out only because they face that liability.

I concur with the distinguished Senator from New Hampshire. I am opposed to limiting liability. With that, I yield the floor.

EXHIBIT 1

ADVISORY COMMITTEE ON TOBACCO POLICY AND PUBLIC HEALTH,
May 20, 1998.

DEAR SENATOR GREGG AND SENATOR LEAHY: We are writing to endorse and support the Gregg-Leahy amendment to S. 1415 to eliminate all special liability protections for tobacco companies. We wish you success and would urge your colleagues to join with you in this effort.

Special legal protections for tobacco are unfair to patients and their families.

Millions of Americans are now sick with tobacco-related illnesses. Millions more will become sick in the future. These are people who started to smoke at a time when the tobacco industry lied about its products, hid scientific studies, and shredded documents. Most of these people started to smoke when they were children whom the industry targeted for special marketing. To protect the industry now would leave many of these patients, their families, and their survivors without remedy.

Special legal protections for tobacco are bad for public health, especially children's health.

Court oversight in the historic Minnesota suit led to the disclosure of thousands of documents about the addictiveness of nicotine and about the industry's plans to market to children. Other legal actions have resulted in consent decrees that will cut back on Big Tobacco's seduction of new young smokers. Under the Commerce Committee bill, these state and local suits would be impossible.

Special legal protections for tobacco are undeserved.

The tobacco industry has proven itself to be an irresponsible corporate citizen. Extending protection to this industry would be to subsidize and condone these activities. No other industry, no matter how valuable to the Nation, has such protections. We should not extend them to an industry whose product that serves only to kill Americans prematurely.

The Senate should not provide special legal protections for tobacco.

If an American jury finds tobacco companies owe damages, the Senate should not overturn that verdict.

If the most skilled lawyers that money can buy cannot get the tobacco industry out of court, the Senate should not become its defenders.

If passed, the special protections contained in the Commerce Committee bill would be the biggest corporate giveaway in history.

For the sake of public health and children's health, for the sake of the people who are already sick and those who will become sick, and for the sake of holding the industry accountable for its actions, we urge you to strip the special legal protections from the bill.

Sincerely,

C. EVERETT KOOP, M.D.
DAVID A. KESSLER, M.D.

The PRESIDING OFFICER. The Senator from Oklahoma is recognized.

Mr. NICKLES. Mr. President, I had printed in the RECORD this Joint Tax table. I also want to clarify a statement. I said, all of this money would be going into the trust fund. That was the way it was designed as it passed the Commerce Committee initially. The Commerce Committee now says the net revenues from this large payment goes into the trust fund. This chart says ''Industry Payments.'' That is not correct. It is consumers' payments. Consumers are going to be paying every dime of this tax.

Granted, they have a section in here that says industry, companies, you pay this amount. But they also have a section in here, on page 189, that says the tobacco companies must pass the cost on to consumers.

> . . . an amount sufficient to pass through to each purchaser on a per-unit basis an equal share of the annual payments to be made by such tobacco product manufacturer. . . .

In other words, consumers, you have to pay every dime of this, every single dime. This is not paid for by tobacco companies. This is not a tax on tobacco companies. This is a tax on consumers. The way to solve this ambiguity on volume adjustments is just say: ''Here is the tax per pack, or per can or whatever it is. And then, if volume goes down, there is less money.'' We do not do that in this bill.

I just mention, too, there is something really phony going on here. Joint Tax—and maybe I am not being as respectful to Joint Tax as I should be. But the way they scored this thing, as I know my colleague knows, they take 25 percent of the revenue from excise taxes and assume that is lost in transmission. So, if you raise $1 in tax, they assume only 75 cents gets to where you are trying to send it. That would usually be correct. If you were going to increase excise taxes on a farmer, he is going to have less money to spend on other products, it is going to slow the economy, so there would be some decline.

This assumption, I don't think, is applicable to these tobacco payments. Maybe the government would lose some percentage, but I don't think it would be as much as 25 percent. And the reason is the companies, by this language, are forced, mandated, to pass on every dime of this payment. I cannot think of any other business—if Nickles Machine Corporation I used to run, if we had an increase in excise tax, granted that might be in our cost of manufacturer. I might try to pass it on in higher prices to consumers and so on. Maybe I would be successful and maybe I wouldn't. Maybe I'd have to eat part of it.

We have language in here saying we don't want tobacco companies to pay a dime of this. We want consumers to pay every single dime of this part. Not the look-back. The look-back, they say, is not deductible, so maybe they are supposed to chew on part of that. But the big part of it is passed on to consumers.

So I want to make sure I was accurate. I think I said this money goes into the trust fund. That was not the

case. The language now says the net revenues go into the trust fund. And the net amount is really determined by the Secretary of the Treasury. He has a great deal of flexibility, I am afraid, to say, ''Oh, well, we think, since this is all passed through, the gross amount could be the net amount.'' He could say that this since it is all passed through.

Maybe I am getting too technical. I just want people to know, when you see estimates from Joint Tax that they agree that this is a $102 billion tax increase over the first 5 years. The look-backs are a question mark. Who knows? But evidently somebody thinks it is real money or they wouldn't be trying to jack up the look-back penalties.

And then the other variable is the volume adjustment, and no one has had scoring on volume adjustments until today. These are purely assumptions. I put those into the RECORD. So, if they were accurate, consumers will pay $102 billion, adjusted by 8.7, so $93.4 billion over the 5 years. So it reduces it somewhat.

For that to happen, you have to assume you are going to have volume less than 80 percent of 1997 over that period of time. Who knows? I don't know. But I always want to be factually correct. I may disagree with the colleagues on substance or philosophy or motives or whatever, but I want to be factually correct. And these numbers, I believe, are factually correct. The volume adjustment is speculative and now Joint Tax says it is minus $8 billion. Great. I do not agree with them that there would be such a large loss of revenue from gross to net, because of the language that says 100 percent of it shall be passed on to consumers. This figure, this payment by consumers, is accurate. Consumers, not tobacco companies, will pay the cost of this bill. I think it is too high.

I yield the floor.

The PRESIDING OFFICER. The Senator from Massachusetts is recognized.

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

The PRESIDING OFFICER. Without objection, it is so ordered. The distinguished Senator from Arizona.

Mr. MCCAIN. Mr. President, I thank the Senator from Oklahoma for a thorough exposition of the bill. He obviously has spent a great deal of time studying it. I, obviously, am not in agreement with a number of his conclusions, but this kind of exposition has been very educational and helpful to the entire Senate. I thank the Senator from Oklahoma, not only for his in-depth knowledge of the legislation but also the comity which has accompanied his and my relationship and difference of opinion on this issue.

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

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

Mr. KERRY. Mr. President, I was not able to be here at the exact moment that the Senator from Vermont was speaking. But I do understand that the Senator suggested that a rationale for his cosponsorship of the Gregg amendment is that he opposes ''a lot of immunity for the tobacco companies,'' and opposes the ''protections'' that are contained in the Commerce Committee.

I will try to emphasize again, because I think we are really either talking past each other here or there is just not an awareness of what is in the bill—there are no protections for the tobacco companies. There is no protection. None. Zero protection. There is no such thing as a lot of immunity in this bill. There is no immunity in this bill. None. Zero immunity.

The tobacco companies will be liable to lawsuits under any circumstances. Whether they play in the tent or they are out of the tent, they are liable for lawsuits. The only distinction here is, if those lawsuits are successful, how much will they be required to pay out in 1 year? That is the only thing that is contained here that is some kind of a limitation.

Instead of being required conceivably to pay out $20 billion in 1 year and go bankrupt so you have no payments to kids, there is a limitation of $8 billion. So you can choose between the system that allows you to conceivably make them go bankrupt in the court system as, I might add, 70-plus percent of the asbestos companies did. We have lines of people who are suing today on asbestos who will never collect because the companies went bankrupt. In fact, there are people who want them to be able to collect under the tobacco settlement because there is a lot of confusion between those diseases that are asbestos-induced versus tobacco-related.

Let's get the terms of this debate correct. We are not talking about immunity; we are talking about whether or not, in exchange for companies giving up their constitutional rights to advertise, in exchange for companies abiding by the look-back provisions, in exchange for companies agreeing not to sue in court, in exchange for companies agreeing to be part of the document depository, in exchange for companies being part of the effort to get our kids not to smoke, we are going to tell them in any one year, ''You're liability is only going to be $8 billion.''

If the court finds that you are liable for $20 billion and there is no finding of liability next year in the court, they are going to have to pay the difference. The $8 billion from the $20 billion means they are still going to have to come in and pay an additional $12 billion, and they will pay up to $8 billion in the next year.

This is rational, in my judgment, Mr. President, because if you don't do this, then you are voting for the status quo, which is a system that is not a system. You would be voting to say, ''OK, we've got this one little option here that invites the companies to come in and be part of the process, but we're going to strip that option away because we want to show how tough we are on the tobacco companies and we're just going to let the lawyers go sue for the next''—whatever, recognizing that, for the last 20 years, not one lawsuit has yet produced a dime for a plaintiff.

Obviously, circumstances have changed. We now have evidence that no plaintiff had in those past years. I understand that. As a lawyer, I would love to go to court with the current level of documentation, and clearly, with the document depository, it will be a lot easier for a plaintiff to go into court and get a judgment. But you are not going to get that judgment in any sense of order. You are going to have what we call a rush to the bar: First lawyers come, first served. The first people to get the biggest judgments will be the first people paid off.

All these people coming in here and talking about the kids and talking about how they want to have some kind of system to get the kids to stop smoking will have abandoned those kids, because those kids are not going to benefit during those years of litigation. That is what we are talking about here. We are talking about whether or not we are going to have a rational approach to this or whether we are all going to feel good and say no liability.

I respect Dr. Koop and Dr. Kessler enormously. We wouldn't be where we are without them. There is no question about that. But I regret enormously that it is somehow their judgment that it is better off for the children to be in that position where we are just going to have these open-ended lawsuits without any incentive whatsoever to try to get the companies to become part of the process.

There is no guarantee they will. There is no guarantee that they will. We may well pass this legislation in its current form, and a lot of those companies will say, ''We still think it is too punitive. We don't want the look-back provisions. We're still going to challenge.'' This bill does not disadvantage us one iota with respect to that choice, because we have a two-part structure where, if they don't agree to participate in giving up their constitutional rights, in setting up the document depository, in being part of the look-back provision, then they can be sued under this bill in the very form that the Senator from New Hampshire is seeking. No loss, no setback, nothing.

The choice here is between whether you are going to go with the status quo

or you are going to hold out some hope that you are going to invite the tobacco companies to be part of a process of giving up what nobody will suggest under the law they could give up otherwise.

The Senator from Utah is one of our strongest experts on the law in the Senate, and he knows full well how the look-back provisions may be challenged. He knows full well how these constitutional rights cannot be given up except by consent. You can't restrict some of the advertising we seek to restrict unless the tobacco companies sign the protocol. Unless you are willing to say to them something that invites them in, they are not going to sign a protocol, and there is no guarantee they will sign it even if you say that.

So I think the choice for the U.S. Senate is very, very clear, and I hope colleagues will vote for common sense and not for the sense that the status quo is somehow going to serve the interests of the country.

I yield the floor.

Mr. HATCH addressed the Chair.

The PRESIDING OFFICER. The distinguished Senator from Utah is recognized.

Mr. HATCH. Mr. President, I thank you. I rise to oppose this amendment. This amendment strikes the so-called ''immunity'' provisions of the floor vehicle.

First, let me say that there are no immunity provisions in the underlying bill. The traditional definition of the word ''immunity'' is: Being in a state ''free or exempt'' from disease or taxes or civil liability or the like. Under this definition, there is no immunity in the Commerce Committee bill or in the amendment that Senator FEINSTEIN and I have developed.

The tobacco companies are not exempt from anything. They will be and are accountable for their actions.

There are, however, in these bills limitations on liability procedures, but these should not be confused with immunity. Under the underlying bill, suits may still be brought. The tobacco companies could still face a multiplicity of suits for civil liability and possible criminal proceedings. This is not immunity by any stretch of the imagination. Indeed, when you are required to fork over a staggering $516 billion as the floor vehicle requires—which is really over $860 billion according to some estimates—you are not getting a free ride.

If this is really immunity, do you think a bipartisan group of 40 States' attorneys general and some of the leading plaintiffs' attorneys in this country who have been suing the tobacco industry for several years would have backed the June 20 settlement? Of course they wouldn't. It contained, justifiably, in my mind, limited liability provisions broader than the Commerce Committee bill, including a limitation on punitive damages for past bad behavior by the tobacco companies.

I am talking about some of the leading plaintiffs' lawyers in the country—men like Wendell Gauthier, Stan Chesley, John Climaco, Jim Parkinson, Ken Carter, John Coale, Bob Redfearn, and Don Hildry —I hate to leave any names out because there are literally dozens of them. I am talking about people who have pursued to the full limits of the law the asbestos industry, the Dow Chemical Bhopal disaster, the Dalkon Shield, and the breast implant manufacturers, and virtually every other plaintiffs' litigation that has taken place over the last 25 years.

And where would we be had these plaintiffs' lawyers not brought these suits? The States themselves are represented by very capable attorneys, attorneys general like Gail Norton of Colorado, Christine Gregoire of Washington, Jan Graham from my own home State of Utah, and Mike Moore of Mississippi, all of whom have worked very closely with me on this matter.

We are talking about top people here, tough-minded public servants. And the States also met the armies of litigators employed by the tobacco industry by contracting with their own legal experts on the part of the States.

Dick Scruggs from Mississippi has been in this from the start on behalf of Mississippi and other States. Professor Lawrence Tribe of Harvard has been hired by Massachusetts and other States.

So we are not talking about a bunch of pushovers here who will lay down in front of the big tobacco bulldozer. These top lawyers all knew they were fighting an uphill battle. And to date, there has never been a penny paid to a litigant in this country due to a jury award. In fact, there has only been one jury award to plaintiffs in the history of the country, I believe for $750,000, and it will be 10 years before that is paid, if it is paid at all.

I have been following tobacco litigation since my early days as a trial lawyer in Pittsburgh, PA, when I watched one of the greatest trial lawyers in the country, Jimmy McCardle of the law firm of McArdle, Harrington, Feeney, and McLaughlin on Prichard v. Liggett & Myers. It was a terrific battle publicized all over the world, as a matter of fact. And they lost because it is so difficult to win in these battles.

But nevertheless, once we establish this document repository, it should be easier to prove cases that can go to jury and, I think, increase the chances of jury awards. These top lawyers all knew that this is uphill. I have to say, from the time that Jimmy McArdle, that great attorney, lost, everybody else has lost since him, except for the one Florida case that is on appeal.

Why are these cases lost? Many legal observers have noted that American juries are very reluctant to award damages in situations where the complaining parties can be viewed as assuming a known risk. So we all have to recognize that the prevailing legal landscape has favored the companies for a long time.

The 40 State attorneys general and dozens of expert lawyers, like the Castano group, did what rational people do every day in litigation in this country. They proposed to resolve their claims through a settlement. And they did achieve a resolution. But they have to have a bill passed through this Congress that is similar to what they negotiated and brings the tobacco companies back on board, albeit screaming, kicking, and shouting all the way.

They brought us a proposal that settled the suits and involved massive payments and a brand new regulatory regime in return for some limited liability restrictions. These restrictions will provide an orderly mechanism for compensation payoffs and will provide the companies with financial certainty.

That is exactly what this legislation should do. The bill we adopt should help resolve these claims and do so in a manner that is in the best interests of the health of the American people.

So not only do I oppose amendments like these, but I think the most effective way to go about this legislation is to devise liability provisions that address the concerns of plaintiffs in a reasonable fashion.

When we consider this legislation, let us keep in mind that some 40 State attorneys general and some of the leading plaintiffs' lawyers in this country have already reached judgment that a fair and rational way to proceed, the best way to proceed, is to effectuate a national settlement of these claims.

Every day in our country lawsuits are settled by negotiating mutually agreeable resolutions that usually involve payments of money and with agreements to change certain behaviors. And that is exactly the theory behind the June 20 proposal and, I might add, the Hatch-Feinstein substitute amendment that we probably will bring up before this is over. So in one sense the June 20 proposal and our substitute amendment are typical.

Of course, what makes this June 20 proposal and our bill atypical is this approach represents the largest settlement proposal in the history of the world; requires the largest payment of punitive damages in the history of the world; contains unprecedented regulatory authority over tobacco products; and, provides for a broad array of public health programs, including public education, tobacco cessation, and counter advertising, that is, if the tobacco companies come back on board.

If they do not come back on board, many important restrictions are not going to happen and we will be immersed and mired in litigation for a long time, maybe 10 years. And then the bill on the floor, if that is the way it comes out, will likely fail dramatically as an unconstitutional piece of legislation.

But if we adopt this settlement approach and can drag the companies back on board, we can achieve advertising and look-back penalties far beyond what the Constitution would allow because we would have a consent decrees

and protocol contracts where the companies would voluntarily agree to waive certain rights. But to get them to do that, there has to be some incentive for them to do that, and that is some reasonable limited liability provisions.

Immunity has nothing to do with it. It is limited liability we are talking about here.

To just give one example, we currently have an FDA rule that is tied up in the courts. This rule bans tobacco billboard advertising within 1,000 feet from public schools.

The Judiciary Committee heard first amendment experts like Floyd Abrams tell us this rule cannot withstand constitutional scrutiny. But if we adopt a bill that contains liability provisions based on the June 20th settlement model that can bring back the companies, kicking and screaming all the way, we can achieve a total ban on all outdoor billboards.

This bill on the floor will not do that. But I believe before this battle is finished the final bill will accomplish that, or we just will not achieve as much public health protections as we can here.

So while the FDA rule wends its way through courts—and I think there is good reason to believe it will fail—today in Florida and Mississippi, through the settlement limited liability approach, there are no tobacco billboards in those States; and soon there will be no billboards in Minnesota because the companies have agreed to stop this advertising. Without reasonable liability limitations, there is no reason for them to just cave in and agree on these matters.

So there are good public policy reasons to oppose this so-called immunity amendment and favor legislation that, like mine, contains the liability limits modeled on the June 20 agreement.

Now, while I respect Drs. Koop and Kessler—I had a lot to do with both of them obtaining their Federal appointments that vaulted them to such prominence—I respect them to a large degree when they are commenting on public health matters within their expertise, when it comes to matters touching on the civil litigation system, I have to rely on the judgment of experts in the field, including 40 State attorneys general and the leading plaintiffs' lawyers in this country. As you would not go to a doctor to fix your car, so you would not go to a doctor for a legal opinion.

I might also add that I have tried some of these cases, too, in the past, not tobacco cases but difficult, contentious litigation. And I think I do know what I am talking about. And I do believe that I would like to see Drs. Koop and Kessler limit themselves to their expertise and not try to intrude into matters that literally they do not fully understand. As a matter of fact, in many respects they are gumming up any possibility of getting all these public health moneys that will help us solve some of these problems.

To be fair, although I do not favor the underlying bill, I have to oppose this amendment. I appreciate our distinguished friend, the Senator from New Hampshire. There is no question he is thoughtful, very decent and a good Senator. I have a tremendous amount of respect for him. I just happen to disagree with him on this matter.

And to be fair, although I do not favor the underlying bill, I have to oppose this amendment as well. There is simply nothing in the bill that would prohibit an individual from bringing suit against tobacco companies. There is nothing in this bill that would even reduce the amount litigants can be awarded.

All that is in the bill is an $8 billion yearly cap on the amount of damages that have been awarded. If the awards amount to over $8 billion, the amount will be paid in succeeding years. So there is really no limitation on liability other than that $8 billion cap. And I have to tell you, that is not enough to get the companies back to the table or to get the companies back to voluntarily agreeing to have advertising restrictions and look-back provisions that work.

In testimony before the Judiciary Committee, while defending the liability provisions of the June 20 settlement—which were even justifiably broader than the cap in the floor vehicle—Laurence H. Tribe, Tyler Professor of Law, Harvard Law School, demonstrated that liability limitations provisions are legal, constitutional, and not unique. As to his constitutional argument, he correctly asserts that the 1978 Duke Power Supreme Court case, allows Congress to alter common law rights such as the granting of punitive damages, and the capping of damages.

He also pointed out that there are a slew of federal statutes that grant limited liability to different industries and entities. The proponents of this amendment who say that no industry has ever received some liability limitations are just wrong. One example of a federal liability limitation is contained in the Price Anderson Act, which places a $560 million cap on compensatory damages in suits against the nuclear industry. The purpose of this cap is to create an incentive for the development of nuclear energy.

Another example is the Federal Credit Union Act, which limits damages for lost profits and pain and suffering for losses resulting in the liquidation of federal credit unions. Other examples include the Black Lung benefits program, the National Swine Flu Immunization program, the National Vaccine program, and certain provisions of both the Federal Employers Liability Act and the Jones Act. That is just mentioning a few.

I wish that the liability provisions in the underlying bill mirrored the liability provisions in my bill—which is modeled on those in the freely-bargained for June 20 settlement. Without those liability provisions which were gained through tough negotiations between 40 state attorney generals and the leading trial lawyers and agreed to by the industry, the industry will not participate to the fullest extent possible in any tobacco bill program.

So I must oppose both this amendment and the underlying bill because I think that the bi-partisan group of 40 state attorneys general and the leading trial lawyers in this country got it right the first time.

I urge my colleagues to reject this amendment and reject the Commerce Committee bill.

What we should do is pass legislation that closely models the settlement proposal brought to us last year by the 40 state attorney generals and the leading plaintiffs' lawyers in this country.

Having said all that, let me just conclude with these thoughts: There is no doubt in my mind the only way this is ever going to work without 10 years of litigation—and 10 million more kids unnecessarily put at greater risk—and a decision by the courts that the bill that is currently being argued on the floor is unconstitutional, is to get back to as close to the attorneys general agreement as we can. Yes, we can add some money to that agreement. It can be higher than the $368.5 billion, but it should be a reasonable amount that gets the companies back on board.

There is no guarantee by anybody that the companies are going to come back on board, but I think there is a pretty good guarantee they won't come back on board under the financial and other requirements of this particular bill, or without the incentive of having some reasonable form of limited liability.

If we can't do these things in a fair and reasonable manner, then why in the world should the tobacco companies come back and voluntarily agree to pay what really involves hundreds of billions of dollars, and without some protections for them with regard to future class action suits?

The industry has agreed that individual suits can be brought and brought with the aid of a document repository. With all the documents, it seems to me it would be easier to bring those individual suits. It would be easier to recover, and in my opinion, you don't need the punitive damages, because you will have a right to compensatory damages which is everything that you can possibly argue before a jury except punitive damages.

I have to say, as a former trial lawyer, I never needed punitive damages to get high verdicts in the cases I tried, and I don't think these plaintiffs' lawyers that we know today who will handle the bulk of the cases in the future will have any difficulties handling compensatory damages and getting very adequate awards for their clients from here on in. Unlike Jimmy McArdle, who had the world to fight as the first litigant attorney in Prichard

v. Liggett & Myers in the early 1960s, attorneys today will have everything going for them because of the tobacco settlement.

This law will work if we do this right. That will be a tremendous change from what poor Jimmy McArdle had to go through in the early days of Prichard v. Liggett & Myers. I remember that case. I was watching it closely. I was hoping he would win. I felt there was little likelihood he would win in Pennsylvania at that particular time because we didn't know then what we know today about the tobacco companies, about this industry and about what this industry has done to entice children to use their products.

I just have to tell you, if we keep doing what we are doing here on the floor, we will have millions more children exposed to a greater risk than they should and be exposed to during the course of the new litigation which could last for 10 years or so. Some of these children will ultimately die prematurely because of this increased risk as this litigation proceeds.

What is really unfortunate is that at the end of that litigation you will find that if this bill passes—the managers' amendment in its current form—the tobacco companies will likely prevail on a number of important matters. Then, where are we?

That means we would have let the American people down by passing legislation that will not work. And in the end, we would have done a lot of unnecessary harm to millions of children, and we will only have to start all over again, and we may not have a group of tobacco companies willing to deal at that time as they have with the attorneys general and plaintiffs' lawyers as we had under the June 20th proposal.

I yield the floor.

Mr. GREGG. It would be my intention to respond to a number of points made by the Senator from Utah and the Senator from Massachusetts. I see the Senators from Nebraska and Minnesota are here. I know they have been waiting, so I will wait for my response.

EXECUTIVE SESSION

NOMINATION OF DAVID R. OLIVER TO BE UNDER SECRETARY OF DEFENSE FOR ACQUISITION

Mr. GREGG. Mr. President, I ask unanimous consent the Senate immediately proceed to executive session to consider the following nomination on the Executive Calendar, Calendar 562, David R. Oliver of Idaho, to be Deputy Under Secretary of Defense for Acquisition and Technology; I further ask unanimous consent that the nomination be confirmed, the motion to reconsider be laid upon the table, and any statements relating to the nomination appear at this point in the RECORD, the President be immediately notified of the Senate's action, and the Senate immediately proceed to legislative session.

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

The nomination was considered and confirmed as follows:

DEPARTMENT OF DEFENSE

David R. Oliver, of Idaho, to be Deputy Under Secretary of Defense for Acquisition and Technology.

LEGISLATIVE SESSION

The PRESIDING OFFICER. Under the previous order, the Senate will resume legislative session.

NATIONAL TOBACCO POLICY AND YOUTH SMOKING REDUCTION ACT

The Senate continued with consideration of the bill.

The PRESIDING OFFICER. The distinguished Senator from Minnesota.

AMENDMENT NO. 2433

Mr. WELLSTONE. I will speak for a couple of minutes on this amendment. I ask unanimous consent after I speak on this amendment that I have 2 minutes to speak as in morning business, and following that, that Senator KERREY be allowed to have the floor.

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

Mr. WELLSTONE. I thank the Chair.

Mr. President, let me join with my colleagues from Vermont and New Hampshire in supporting their amendment. I shall be very, very brief—uncharacteristically brief. I see the Presiding Officer smiling.

Minnesota is a State that has played a very central role in this debate about tobacco. I think if there is one thing that has come out of the litigation, the whole case against tobacco with Minnesota leading the way, Attorney General Humphrey and others, it is this: Minnesota unearthed a lot of documents, around 36,000 documents, and many of the documents have been referred to in the debates on the floor of the Senate. The one thing that you see over and over again is a pattern of lying. It is just a pattern of outright lying on the part of this industry. Mr. President, I don't believe that an industry that has walked away from an agreement, which has really willfully targeted our children, has really caused a tremendous amount of pain among children and their families, has really brought about the addiction of children and too many citizens dying an early death, deserves any immunity at all.

We should not give this industry any special deal. We don't in other cases. I don't think this industry should get immunity. I fully support this amendment. It is as simple as that. I see nothing in what this industry has done over many, many years—the way in which this industry has conducted itself, the way in which this industry has blatantly lied to people in this country, or, for that matter, the way this industry has related to what is going on here in the Senate—that would lead me to the conclusion that they deserve a special deal. I don't think people in the country think they deserve any special deal.

Therefore, this amendment is extremely important. I hope colleagues will support it.

NOMINATION OF JAMES C. HORMEL

Mr. WELLSTONE. Mr. President, I rise to speak one more time—and I have done this from time to time on the floor of the Senate—on behalf of the nomination of James C. Hormel to be U.S. Ambassador to Luxembourg. I have talked about Mr. Hormel's qualifications before, so I need not repeat that.

We are talking about someone who is a loving and devoted father and grandfather, an accomplished businessman, dean of students at the University of Chicago Law School, on the board of directors of all sorts of organizations, from the San Francisco Chamber of Commerce to Swarthmore College—you name it.

One of my colleagues—and I think it is extremely unfortunate—has compared Mr. Hormel, a highly qualified public servant and nominee, to Mr. David Duke who, among other credentials, is a former grand wizard of the Ku Klux Klan, founded the National Association for the Advancement of White People, and claimed that the ''Holocaust is primarily a historical hoax and not against Jews but perpetuated on Christians by Jews.''

Mr. James Hormel has been compared with this man, David Duke. I want to say to my colleagues that, given this kind of statement made publicly by a U.S. Senator, this kind of character assassination, it is more important now than ever that this man, Mr. Hormel, be allowed to have his day in the court of the U.S. Senate. There is overwhelming support for his nomination. He should be brought to the floor of the Senate, and we should have an up-or-down vote.

I want to just announce my intention to colleagues that when we come back, I will have sense-of-the-Senate amendments that the majority leader should bring this nomination to the floor of the U.S. Senate. When colleagues start making comparisons to David Duke to someone who has been such a sensitive, good public servant, that man or that woman—in this particular case, Mr. James Hormel—deserves, out of a sense of decency and fairness, to have his case brought before the U.S. Senate. I am going to be pushing very, very hard on this when we get back.

I thank my colleague from Nebraska for his courtesy.

I yield the floor.