

honor and privilege to do that and to have him with us today.

I thank the Chair.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, leadership time is reserved.

BIPARTISAN PATIENTS PROTECTION ACT

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will now resume consideration of S. 1052 which the clerk will report.

The senior assistant bill clerk read as follows:

A bill (S. 1052) to amend the Public Health Service Act and the Employee Retirement Income Security Act of 1974 to protect consumers in managed care plans and other health coverage.

Pending:

Frist (for Grassley) motion to commit to the Committee on Finance and the Committee on Health, Education, Labor, and Pensions with instructions to report back not later than that date that is 14 days after the date on which this motion is adopted.

Gramm amendment No. 810, to exempt employers from certain causes of action.

Edwards (for McCain/Edwards) amendment No. 812, to express the sense of the Senate with regard to the selection of independent review organizations.

The ACTING PRESIDENT pro tempore. Under the previous order, there will now be 2 hours of debate in relation to the Grassley motion to commit and the Gramm amendment No. 810, the time to be equally divided in the usual form.

The ACTING PRESIDENT pro tempore. The Senator from Nevada is recognized.

SCHEDULE

Mr. REID. Mr. President, I just want to make a brief statement on behalf of Majority Leader DASCHLE. As has been indicated, the resumption of the Patients' Bill of Rights will be the order at hand today. As has been announced, there will be approximately 2 hours of closing debate in relation to the Grassley motion to commit—and I understand he wants to modify his motion.

I ask Senator GRASSLEY, it is my understanding the Senator wants to modify his motion to commit; is that right?

Mr. GRASSLEY. Yes.

Mr. REID. We would not object—and with respect to the Gramm amendment regarding employers. That debate will be ended shortly. There will be two rollcall votes at 11:30 a.m.

I met with Senator DASCHLE early this morning, and he has indicated that without any question we are going to finish the Patients' Bill of Rights before the Fourth of July break.

Now, I would say to everyone within the sound of my voice, I believe we have been on this bill a week. I think we have fairly well defined what the issues are, and I think it would be in

everyone's best interests if today we would decide what those issues are and have amendments offered. If people want time agreements, fine. If they do not, debate them, complete what they want to say, and move on. Everyone has many things to do during the Fourth of July break. But this is important. This bill has been around for 5 years, and we are going to complete consideration of this legislation.

There is also a need to complete the supplemental appropriations bill. As I have indicated before, I think Senator BYRD and Senator STEVENS have done an excellent job in moving that bill along and I think we can do that very quickly. But there are going to be late nights tonight, tomorrow, and Thursday. We are going to do our best to make sure everyone is heard, but also in consideration of other people's schedules, we will do our best to complete action on this legislation as quickly as possible.

I see Senator GREGG, the ranking manager of the bill, is here. I did not see him earlier.

Mr. GREGG. Mr. President, I would like to ask unanimous consent that Senator ENZI be added as a cosponsor of the Gramm amendment which is pending.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. GREGG. I thank the Senator.

The ACTING PRESIDENT pro tempore. The Senator from Iowa.

Mr. GRASSLEY. Mr. President, I hope you will call on the Senator from Texas.

The ACTING PRESIDENT pro tempore. The Senator from Texas.

Mr. GRAMM. Mr. President, I ask unanimous consent that following the vote on the Grassley amendment, each side have a total of 3 minutes to summarize the arguments on the amendment excluding employers from liability.

Mr. REID. No objection.

The ACTING PRESIDENT pro tempore. Is there objection?

The Chair hears none, and it is so ordered.

The Senator from Iowa.

MOTION TO COMMIT, AS MODIFIED

Mr. GRASSLEY. Mr. President, before I speak on my motion, I ask unanimous consent that the pending motion to commit be modified to reflect the referral of the bill jointly to the Committee on the Judiciary and the same 14-day timeframe that affects the Finance Committee and the HELP Committee also apply to the Judiciary Committee.

The ACTING PRESIDENT pro tempore. Is there objection?

The Chair hears none, and it is so ordered.

The motion to commit, as modified, is as follows:

MOTION TO COMMIT

Mr. Grassley moves to commit the bill S. 1052, as amended, to the Committee on Finance, the Committee on Health, Education,

Labor, and Pensions, and the Committee on the Judiciary with instructions to report the same back to the Senate not later than that date that is 14 (fourteen) days after the date on which this motion is adopted.

Mr. GRASSLEY. Mr. President, I thank the majority for permission to modify my motion.

Mr. President, I rise to speak in favor of my motion to commit the Kennedy-McCain bill to the Health, Education, Labor, and Pensions, Judiciary, and Finance Committees with instructions that these committees report the bill out in 14 days.

On a preliminary note, I thank the good counsel of Senators THOMPSON and HATCH. Yesterday, they reminded me that the Kennedy-McCain bill also includes a series of provisions on liability that fall under Judiciary's jurisdiction and have never been reviewed by that committee either. Thus, I have modified my motion to include the Judiciary Committee along with the HELP and Finance Committees.

I am deeply troubled that the Kennedy-McCain bill has bypassed the relevant committees and has been brought directly to the floor—without one hearing, without one markup, and without public input into this particular bill.

As I made very clear on the floor yesterday, I strongly believe that patient protections are critical to every hard-working American who relies on the managed care system. We need a strong and reliable patients' rights bill and I'm supportive of this effort 100 percent. What we do not need is a bill, like Kennedy-McCain, that exposes employers to unlimited liability, drives up the cost of health insurance, and ultimately increases the number of Americans without health coverage.

Instead, I believe we should protect patients by ensuring access to needed treatments and specialists, by making sure each patient gets a review of any claim that may be denied, and above all by ensuring that Americans' who rely on their employers for health care can still get this coverage. I'm confident these goals can be reached.

However, the very fact that our new leadership brought the Kennedy-McCain legislation directly to the floor without proper committee action, violates the core of the Senate process.

I know my colleagues on the other side will waste no time accusing me of delaying this bill, but the truth is, had the relevant committees been given the opportunity to consider the Kennedy-McCain legislation in the first place, I would not be raising these objections.

By bringing this bill directly to the floor, the message seems to me to be loud and clear: that the new chairmen under the new Democratic leadership are merely speedbumps on the road to the floor.

I guess, as a former chairman who hopes to be chairman again in the near future, I do not particularly enjoy being a speedbump. But there's something much more important at stake—

process. A flawed process, more often than not, will lead to a flawed legislative product. We are seeing that point in spades on this legislation.

Does anyone really think that if we had followed regular order and gone through the committee process that the bill before us would be in worse shape? Would we still be sitting around wondering where this bill is going? Or would it be necessary to define the employer liability exception with Senator GRAMM's amendment?

I guess I have more confidence in the committees of jurisdiction than the new leadership and sponsors of this bill do. The HELP, Judiciary, and Finance Committees have the experience and expertise to deal with the important issues this bill presents. My motion simply provides these fine committees with an opportunity to do their jobs.

Now let me turn for a moment to my committee, the Finance Committee. The Kennedy-McCain legislation treads on the Finance Committee's jurisdiction in three ways that are by no means trivial—on trade, Medicare, and tax issues.

In fact, approximately one-third of the nearly \$23 billion in revenue loss caused by this bill, is offset by changes in programs within the jurisdiction of the Finance Committee.

First, section 502 extends customs user fees, generating \$7 billion in revenue over eight years. These fees were authorized by Congress to help finance the costs of Customs commercial operations.

Most of my colleagues know first hand the financial pressures put on the Customs Service. From Montana, to Delaware, Massachusetts, Texas, and California, there is a dire need for funds to modernize the Customs service. Yet, the Kennedy-McCain legislation diverts money intended for Customs and uses it to pay for this bill. This is not what Congress intended.

If these fees are to be extended—and I emphasize "if"—they should be done so in the context of a Customs reauthorization bill in the Finance Committee. This gives the Finance Committee the opportunity to carefully review, analyze and debate the implications of any Customs changes on the future of the Customs service and Customs modernization.

Second, section 503 of the Kennedy-McCain bill delays payments to Medicare providers, which generates \$235 million to help offset the losses in the bill.

It is ironic that while many of us are spending significant amounts of our time working to improve Medicare's effectiveness and efficiency—this bill actually takes steps to exacerbate the frustrations so many providers already experience today with delayed payments in Medicare.

Any changes to Medicare need thorough evaluation and consideration in the Finance Committee—where the expertise exists to determine the implications of any changes to the program.

For those who think we can just tinker with this program, they're wrong. It is much too important to our Nation's 40 million seniors and disabled that rely on it. Any change, large or small, can have a sweeping impact on seniors, providers, and taxpayers.

Finally, let me turn to the third Finance Committee policy area implicated in this legislation. I'm talking about health care-related tax incentives.

Now I know there are no tax code changes in this particular bill. However, in years past, tax incentives have been an important part of this legislation. There's good reason for this. As Senator McCAIN recognized, tax incentives provide balance to patients' rights legislation by making health care more affordable and therefore more accessible.

I am a strong believer in health tax policy and have proposed a number of changes in the tax treatment of health care—including ways to reduce long-term care insurance and expenses, promote better use of medical savings accounts, and improve the affordability of health insurance through refundable tax credits.

But while I might agree with these policies on a substantive level, I will continue to oppose health tax amendments to the Kennedy-McCain legislation simply because the Finance Committee has never been given the opportunity to analyze, review, or discuss the implications of these provisions on the internal revenue code—a code that is the responsibility of the Finance Committee.

My motion provides the Finance Committee with its rightful opportunity to add health tax cut provisions to this legislation. There is no doubt that the Hutchinson-Bond amendment, along with a number of other good health care-related tax cuts, would be included in a package before the Finance Committee.

On that point, I want to make clear that at my urging, Chairman BAUCUS has already agreed to consider a package of health care-related tax cuts in an upcoming Finance Committee markup. So I look forward to working through these very important issues in the committee.

It is my responsibility to Iowans, my Finance Committee members, and all Senators to be vigilant on committee business. I cannot let these things just slip by. That would be easy to do, but it would also be irresponsible.

During my tenure as Finance chairman, Senator after Senator urged that the committee process be upheld regarding tax legislation. I listened and I acted.

I resisted strong pressures to bypass the Finance Committee as we considered the greatest tax relief bill in a generation. I forged a bipartisan coalition and consensus which I believe made it a better bill. Ultimately we were able to craft a bill that benefited from the support of a dozen members from the other side.

So I stand before you as someone who has seen the importance of the committee process as well the success of this process.

The new leadership and this bill's sponsors have simply tossed aside the committees of jurisdiction. As justification for these actions, the new leadership says Republicans did the same thing on their patients' rights bill in 1999, but this is simply not the case.

In 1999, the patients' rights legislation underwent a series of hearings in the HELP committee, and ultimately there were 3 days of markup—let me repeat 3 days of markup—in that committee. And only after the bill was reported out of the committee was it then brought up for consideration by the full Senate.

So let us hear no more discussion on this point. There is no justification for the conduct on this bill. It is a fact that the Kennedy-McCain bill before us today has never undergone the committee processes that the 1999 patients' rights legislation did.

What our new leadership has done is violated the rights of the members of three important Senate committees from utilizing their expertise and experience to fully evaluate the Kennedy-McCain legislation—a job these committees were designed to do.

Any members of the three committees that support this faulty process should beware. Supporting this process means that they support disenfranchising their own rights as committee members.

What my motion does is correct this faulty process, a process that has ensnared a bill that could have otherwise moved through floor debate smoothly, if the committee process had been upheld.

A vote for my motion to commit puts this bill on the right track. It lets members of the HELP, Judiciary, and Finance Committees do the jobs they were sent here to do.

These committees have good track records in this Congress. They will continue to produce legislation that is important to our Nation. Taking this bill through the relevant committees will only improve this legislation and ultimately make it better law. That's what is in the best interests of the patients were trying to protect.

I believe we are at a critical juncture in history. Through a very close election, the American people have instructed those of us who represent them in this town of Washington, DC, to get serious about legislative business.

What the Iowans have told me, and Americans have told all of us, is to work together to produce results. They want less partisanship, more action, and more thoughtful debate.

People in Iowa expect Republicans and Democrats to work together, with President Bush, to get things done. They expect us to refrain from playing partisan politics and to be serious legislators.

We have a responsibility to our constituents who have given us the opportunity to represent them. That responsibility is to legislate in a thorough, fair, and constructive fashion. That is not the way the Kennedy-McCain bill has been handled thus far.

If we are to carry out the people's business in the manner the Senate set forth—through the committee process—then we must utilize this process to produce legislation that will help improve the lives of every American.

After all, is that not what the people really want? A good law that is produced in the proper way.

I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Massachusetts.

Mr. KENNEDY. Mr. President, I yield such time as the Senator from Montana desires.

Mr. BAUCUS. Mr. President, I commend my good friend from Iowa, Senator GRASSLEY, and particularly applaud his continued effort to work in cooperation and in a bipartisan and frank manner to get results. It is an approach he has taken when he was at the helm of the Finance Committee and an approach he knows works. I commend him for it.

I take this opportunity to address one of the amendments presently pending, the amendment offered by my colleague from Texas, Senator GRAMM.

While I will not vote for this amendment, I believe it is critical that we protect employers from unwarranted liability claims. But the Gramm amendment I believe goes too far. It protects employers from liability even when they are responsible for making medical decisions that result in injury or death.

Let me be clear. I do not believe employers should be held liable for medical decisions made by others, nor do I believe they should be exempt from responsibility if they are making medical decisions themselves.

This issue is very important to businesses in my State. It is very important to the people in my State. I must say it is very important to me. For that reason, I am working with my colleagues on a compromise. I have recently spoken with Senator EDWARDS. We are working together on a bipartisan compromise that will shield employers from liability when they are not involved in making decisions about medical care. It is a bipartisan compromise that will also protect patients. I believe there is a middle ground. I will be working with my colleagues to find it.

I yield the floor.

The PRESIDING OFFICER (Mr. CLELAND). The Senator from Massachusetts is recognized.

Mr. KENNEDY. Mr. President, how much time remains?

The PRESIDING OFFICER. The Senator from Massachusetts controls 51 minutes on the motion and the amendment.

Mr. KENNEDY. Mr. President, I yield myself 15 minutes.

Mr. President, the Senate recently completed major education reform after six weeks of debate focused on accountability. We agreed that in order to persuade schools to live up to high standards, serious consequences were needed for schools that failed to improve. Republicans in particular emphasized the need for tough financial sanctions. The risk of losing funds, they argued, is an appropriate and necessary incentive to achieve high performance.

This emphasis on accountability is not new. It was also the hallmark of welfare reform, and the Senate has applied the same principle to many other programs as well. Over and over, our Republican friends have argued that increased accountability is the way to produce responsible behavior.

It is ironic that some of those who have called for accountability most vigorously in these other debates now oppose accountability for HMOs and health insurance companies when their misconduct seriously injures patients. It is irresponsible to suggest that HMOs and insurance companies should not face serious financial consequences when their misconduct causes serious injury or death. If ever there was a need for accountability, it is by those responsible for providing medical care.

The consequences can be extremely serious when an HMO or an insurer denies or indefinitely delays access to essential medical treatment. It can literally be a matter of life and death. Yet there is overwhelming evidence that access to care is being denied in many cases for financial, not medical, reasons.

And after five years of debating this issue, we've finally reached the point where very few Senators will come to the floor and openly claim that HMOs and health insurers should not be held accountable in court when they hurt people. These corporations desperately want to keep the immunity that they currently have, immunity that no other business in America enjoys. But the HMOs and insurers have behaved so irresponsibly and hurt so many people that they are finally in danger of losing it. Too many children have died, too many families have suffered, for even the HMOs' closest allies to stand here and say that they do not need to be held accountable.

So instead, the HMOs' multi-million dollar lobbyists and their allies in Congress have devised a strategy for killing this legislation without directly questioning the need to hold HMOs accountable. Indeed, some of those who repeatedly called for accountability in other areas are the very same members who are searching for ways to enable these companies to escape accountability when their misconduct seriously injures people.

The pending amendment by Senator GRAMM is a perfect example of this strategy of collateral attack—an attempt to kill this legislation by distorting what it would actually do, and

by seeking to turn the focus away from HMO misconduct. Those supporting the Gramm amendment claim that all employers are endangered by this legislation. Such claims are wrong. The vast majority of employers who provide health care merely pay for the benefit. They do not make medical judgments, they do not decide individual requests for medical treatment. Thus, under our legislation, they have no liability. The only employers who would be liable are the very few who step into the shoes of the doctor or the health care provider and make final medical decisions. Our legislation only allows employers to be held liable in court when they assume the role of the HMO or the health insurance company.

By completely exempting employers from all liability no matter how closely tied the employer is to an HMO and no matter how severe the employer's misconduct, Senator GRAMM's proposal aims to break the link of accountability in this bill.

President Bush stated in the "Principles" for the Patients' Bill of Rights which he issued on February 7th: "Only employers who retain responsibility for and make final medical decisions should be subject to suit." That is consistent with what our bill does. But Senator GRAMM's amendment is directly at odds with the President's principle. The Gramm amendment would mean that "employers who retain responsibility for and make final medical decisions" could not be sued.

I'm surprised that the Senators from Texas would propose such an extreme approach—eliminating all accountability for employers no matter what they do. Under their proposal, employers are never held accountable, period, even if an employer causes the death of a worker's child by interfering in medical decisions that should have been made by doctors.

The Gramm amendment is a poison pill designed to kill this legislation. Not only does it absolve employers of liability regardless of how egregious their conduct, it also creates a loophole so enormous that every health plan in America would look for a way to reorganize in order to qualify for the absolute immunity provided by the Gramm amendment. Senator GRAMM creates a safe harbor so broad that it will attract every boat in the fleet.

We all know what would happen if this amendment became law. HMO lawyers would craft contracts that enable them to be treated as employees of the companies they serve, so HMOs could take advantage of Senator GRAMM's absolute immunity. Other employers would turn to self insurance as an obvious way to avoid accountability for the actions of their health plans.

Health insurance companies would rework their contracts to give employers the final say on benefit determinations in order to take advantage of this shield from accountability.

Today fewer than 5 percent of employers assume direct responsibility for

medical decisions on behalf of their employees. But if the Gramm amendment became law, the share of employers taking on these decisions would grow enormously. By providing absolute immunity from accountability, the Gramm amendment creates a strong incentive for employers to intervene in medical decisions, despite the fact that most employers are not qualified to do so.

Employers and HMOs are free to negotiate any relationship they want, and that relationship can be detailed in writing, or it can be detailed in informal "understandings" that workers never get to see. What the Gramm amendment does is leave families completely vulnerable to the most unscrupulous HMOs and employers.

For example, an employer could demand that an HMO call it for approval before allowing any treatment that would cost over a certain amount, compromising the patient's privacy and enabling the employer to make medical decisions based on cost alone. The Gramm amendment would completely shield an employer who causes grave injury or death in this way, and the HMO might also escape liability because it could show that the employer alone made the final decision.

Subtler employers could instruct their HMOs to delay or complicate the treatment approval process for certain kinds of medical care or for certain employees. The Gramm amendment would allow an employer to require its HMO to send it all requests for mammograms, and the employer would not be accountable if it chose to delay or deny a request for a mammogram that would have timely detected breast cancer. The same employer practice can interfere with many diagnostic and treatment decisions.

As Judy Lerner discovered, there is no end to the irresponsible behavior of some unscrupulous employers. Ms. Lerner worked in Boston for over two decades as a consultant in a human resources firm that self insured, and she relied on the health benefits that the company provided. But when she broke her leg in several places and endured emergency surgery, the company simply stopped helping with her medical bills, agreeing only to pay for crutches. Despite her doctors' vigorous arguments for continued home medical care, the company abandoned her. The Gramm amendment would leave all employees like Ms. Lerner vulnerable after they have been told that their medical bills would be covered at the time they accepted employment and begin working hard. The Gramm amendment allows employers to deny necessary medical treatment any time it suddenly becomes too costly or inconvenient, regardless of how much the employee has relied on that coverage.

Most employers, of course, would not find it morally acceptable to intervene in medical decisions against their employees. But if I were a small business owner, I wouldn't want to compete in

the environment created by the Gramm amendment because it gives the worst employers an economic incentive to cut corners on employee health care and frees them from all accountability when they do so. It would create an uneven playing field, allowing unscrupulous employers to gain a business advantage over their honorable competitors.

As the President says, "employers who retain responsibility for and make final medical decisions should be subject to suit." That is what President Bush wants, and that is what we want to accomplish. I am confident that the McCain-Edwards language accomplishes this, but I remain open to other ideas for writing President Bush's principle into law.

Under our language, employers have no liability as long as they do not make decisions about whether a specific beneficiary receives necessary medical care. The only employers who can be brought into court are the very few who step into the shoes of the doctor or the health care provider and make final medical decisions.

Our bill does not authorize suit against an employer or other plan sponsor unless "there was direct participation by the employer or other plan sponsor." "Direct participation" is defined as the "actual making of such decision or the actual exercise of control" over the individual patient's claim for necessary medical treatment.

Our bill directly protects employers from liability by stating: "Participation . . . in the selection of the group health plan or health insurance coverage involved or the third party administration" will not give rise to liability; "Engagement . . . in any cost-benefit analyses undertaken in connection with the selection of, or continued maintenance of, the plan or coverage" will not give rise to liability; "Participation . . . in the design of any benefit under the plan, including the amount of co-payment and limits connected with such benefit" will not give rise to liability. Our language is clear. As long as the employer does not become involved in individual cases it is immunized from suit.

Employers are very well protected by our legislation as it is written. We are pleased to consider other strategies for accomplishing President Bush's principle on this issue, but the loophole that the Texas Senators propose fundamentally contradicts the President's principle and ours.

Senator SNOWE and others are working on language to codify that principle, and I am looking forward to seeing their ideas.

The Gramm amendment is exactly the wrong medicine for America. It deserves to be soundly defeated for the sake of a level playing field for all employers, and for the good health of employees and their families.

Mr. President, I reserve the remainder of my time.

The PRESIDING OFFICER. Who yields time?

Mr. BUNNING. Mr. President, I will take the time Senator GRAMM has and yield myself as much time as I may consume.

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

Mr. BUNNING. Mr. President, I rise in strong support of the Gramm amendment and ask unanimous consent to be listed as a cosponsor.

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

Mr. BUNNING. Today in the United States we do not mandate that any employer or business provide health insurance. We do not force them to buy it for themselves or their employees. We let the employer make this decision.

And employers all across the United States do provide health care insurance that covers over 160 million people. These employers do not have to provide that health care. They do this voluntarily for a number of reasons. Some actually do it because they care about their employees, but most do it because it is good business—it helps attract employees to come to work for them. But regardless of why these employers offer health benefits, the important factor is that they do this voluntarily.

There is no employer mandate in America. We had that debate in 1994 during the argument about the Clinton health bill, and it was clear that everyone—the American people and American business—wanted to keep our voluntary system. But if the bill before us today becomes law, that could all change.

In spite of what the Senator from Massachusetts said, businesses—big and small—all over America would stop offering health insurance benefits to their employees. And the reason they would stop can be summed up in one word—lawsuits.

The simple fact is that the Kennedy-McCain bill would expose employers who provide health care insurance coverage to their employees to lawsuits. I have heard some supporters of this bill claim that employers are protected from lawsuits in this bill. We just heard the good Senator from Massachusetts say that. They say that this bill protects our current system. They point out that on page 144 of the Kennedy-McCain bill that there is a section in bold headline that reads: "Exclusion of Employers and Other Plan Sponsors." But what they don't tell you is that on the very next page the bill reads, as clear as day: ". . . A Cause of Action May Rise Against an Employer . . ." After that there are four pages explaining when an employer can be sued.

That means that while this bill does exclude suits against doctors and hospitals and other providers, it does not exempt suits against employers who purchase health insurance. In fact, the bill exposes employers who provide health care insurance to both State and Federal lawsuits. It exposes them

to unlimited economic damages, unlimited noneconomic damages, unlimited punitive damages in State court, and \$5 million in damages in Federal court.

Ladies and gentlemen, that is an awful lot of lawsuits.

I believe that this exposure to liability in the Kennedy-McCain bill will scare employers away from providing health insurance. Instead of providing coverage, one of two things is going to happen if this bill becomes law. Employers are either going to drop their coverage altogether or they will give their employees cash or some sort of voucher and wish them well in searching for the best deal for themselves and their families they can find in health care. This would turn our entire health system on its head and would lead to serious problems.

I don't believe anybody in this Chamber really wants that. Instead, I urge support for the Gramm amendment. This amendment would apply language from the current Texas State law to specifically protect employers that provide health benefits from facing lawsuits for doing so. It is clear cut. It is a simple solution, but it is very clear in its intent.

For weeks some of my colleagues have been eager to point out that Texas has a Patients' Bill of Rights, and some of them even talk about this is a model for the Federal legislation. Now we have the opportunity to do just this and to ensure that employers cannot be sued for doing the right thing—for helping their employees. It is simple.

We know the bill before us as written will not become law, and the expanded employer liability is one of the very tough sticking points. Now we have a chance to fix it, to improve the bill, and to make it signable.

I want to vote for a Patients' Bill of Rights, a bill of rights that is going to become law. A vote today for the Gramm amendment is a critical step in that direction. A vote against the amendment means that we will probably just talk about these problems without doing anything to change them. I urge my colleagues to vote to protect employers and employees alike and support the Gramm amendment.

We do not want single-payer health insurance in the United States. It was proposed in 1994 and soundly defeated. Even though the opponents of the Gramm amendment would like to think that this is the reason they are opposing it, that it prevents liability, the basic fact is that they may want no health care benefit at all and then force the United States to have a single-payer plan at the end. We will do anything in our power to defeat that.

I urge a vote on the Gramm amendment and yield back my time.

The PRESIDING OFFICER. Who yields time?

The Senator from Tennessee.

Mr. THOMPSON. Mr. President, I would like to speak on the Gramm

amendment. I see that neither Senators GRAMM nor GRASSLEY are present. I understand there is time remaining for Senators GRASSLEY and GRAMM. I suppose the appropriate thing to do would be to ask for 10 minutes of the time on the Gramm amendment.

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

Mr. THOMPSON. Mr. President, we are proceeding to clear the air on this issue, and that is important. It is a very important issue. One of the things Senator GRASSLEY pointed out was that this did not go through the regular committee process. It is a very complicated bill, and we are just now seeing the complications of it; one of those being the extent to which employers are liable, employers can be sued.

Unfortunately, we didn't have a chance to work all that out in committee. So now we are here in this Chamber arguing about the exposure of employers.

We are making progress because, when we first started this debate, the supporters of the McCain-Kennedy-Edwards bill basically said: We were not attempting to go after employers. That is not what this is about. Then in the fine print, yes, well, under certain limited circumstances.

I think we know now that there is, indeed, extreme exposure as far as employers are concerned and that it constitutes a significant part of the effect of this bill. We are making progress. Now we can talk about the extent to which employers should or should not have exposure and liability.

We have heard statements today that there are a lot of employers out there that will do the wrong thing; that even though they are not required to have health insurance for their employees, apparently there are employers out there that will set up health care plans and then do everything they can to disadvantage their own employees, and that that consideration is driving this provision of the bill. So we are, indeed, refining the issue; the lines are being drawn.

The response to the issue of suing employers has always been: Don't worry about that. The main thing is we are going after the big bad HMOs. You don't have to worry about anything else. When times get really tough, we bring out another picture of some poor individual who is used to demonstrate the evilness of managed care.

Our hearts go out to these people. These are people in need. But the average observer in America must be watching this and asking themselves: Why doesn't the Government just require these people to be covered for anything all the time in unlimited amounts? Why doesn't the Federal Government just take care of it? Or if the Government doesn't want to do it, why don't we make some insurance company pay somebody for any claim they make, if it is a real need, at any

time for any amount? In fact, why didn't we pass the Clinton health care bill a few years ago? The average person must be asking: If that is the only issue, taking care of sick folks, then why don't we nationalize this health care system of ours? That is the logical conclusion of all that we have been hearing.

The answer, of course, is that in public policy matters, there are tradeoffs to be considered. There is never just one side of the coin.

We know, for example, that we set up managed care in this country because health care prices were rising up to the point of almost 20 percent a year. We knew that couldn't be sustained so we put in a managed care system. Some HMOs abused that and did some bad things. States passed laws. Thirty some States passed laws addressing some of these problems. The State of Tennessee has broader coverage than the bill we are considering today. It is not as though the States have been standing still. They are covered. Health care costs are going back up.

So here we come and we are going to lay on another plan that, if passed in the current form, without question, will drive up health care costs again.

My heart goes out to these poor people who are being used in this debate to demonstrate the necessity for the passage of this legislation. But I want to refer to a group of individuals myself. In fact, I want to refer to 1.2 million individuals. I don't have the space or the time or the resources to bring in pictures of the 1.2 million people who, the most conservative estimates say, will be thrown off of insurance altogether if this bill passes.

The Congressional Budget Office says that at a minimum—and there are other estimates, but that is the lowest one I have seen—1.2 million people will lose insurance altogether. Who is going to bring their pictures in here to demonstrate to the American people that they are disadvantaged by the bill we might pass that will drive health care costs up so great that these small employers that some would like to demonize or large ones, for that matter, that some would like to demonize don't have to provide health care at all?

What is going to keep them from just saying, as has been pointed out this morning, that the costs are too great, the liability is too great? We want to do the best we can. We are not perfect. We might make mistakes. But instead of setting up a system to rectify those mistakes, we will be opened up to unlimited lawsuits at any time, anywhere in the country, in any amount. Why should we have that aggravation? Why not just give the employees X number of dollars and say, you take care of it—and they may or may not take care of it with that money—or if you are a small employer, to drop insurance coverage altogether. Who is going to speak for that 1.2 million people who they say will wind up without any insurance at all?

There won't be any arguments with any HMOs because there won't be any insurance at all.

So the lines have been drawn in this debate. We have people over here needing help, needing assistance. We have set up a review process to get independent people to look to determine whether or not these employers are taking advantage of people. So far so good.

Then the proponents of this bill want to lay in a system of lawsuits on top of that. We draw the line in there and say that, yes, let's have an administrative process to see whether or not employers are taking advantage of folks. Let's have an independent doctor look at it. After that, let's not lay on unlimited lawsuits against employers who do not provide the health care and expose them to liability, when we say that what we are going after is the big bad HMOs. Why expose these people who are providing health insurance? They are not providing health care, so why expose them to liability?

The question remains, Do we want to sue employers? Do we want to have the right to sue employers or not? The proponents of this bill say yes, but only with regard to when they directly participate in decisionmaking. This gets a little technical, but it is very important. There is a certain resonance of the proposition that if somebody does something wrong, they ought to be held accountable. I have tried a few cases myself, and I believe in that principle. I think that is right. But the problem in the context of this health care debate, which we nationalize to a certain extent with ERISA for a portion of the population, and now we are going to nationalize the rest of it with this bill, the problem is we are setting it up so that, by definition, a large group of employers are going to be considered to be directly participating because they are self-insured and they have employees who are on the front end of these claims processes. They tell me that these self-insured plans are some of the best plans that we have. They don't go out and hire an HMO. They try to do it themselves, in-house, with their own people, looking out for their own employees, who they don't have to insure if they don't want to, but they do. I am told that they provide more benefits than the other plans. They are some of our better plans. But by cutting out the middleman, so to speak, and doing it themselves, they are going to be subject to liability under this bill.

The second point of exposure has to do simply with the fact that employers have settlement value. What lawyer worth his salt, if he is going to sue anybody along the line here in this process, would not include an employer as a part of this lawsuit? An employer has a chance of deciding whether or not to go to court and stand on principle because he is not liable and spend several thousand dollars defending himself or settle up front and pay the other side in order to get out of the lawsuit.

The other side says they don't want to sue employers unless they have control. I mentioned direct participation. The other key words are "or control"—to exercise control of the health care plan. The only problem with that is under ERISA law, by definition, employers are supposed to have control over these plans. So if you just look at the definitional sections of the applicable law, on day 1 you have a large number of employers that are subject to this lawsuit. So let's not kid ourselves about that.

The first part of this debate was that most employers are not covered. Most employers are not covered. Now, we know that is not true. The issue now is whether or not they should be. You say, well, what if they do something wrong? That is a good point. Why should they be any different? Why should they have immunity? We could ask the same thing about treating doctors and about treating hospitals and about any number of entities around America, including U.S. Senators. Why do we have protection for anything we say in this Chamber under the speech and debate clause? Is it because we are better than anybody else or because we don't ever go over the line and do something wrong or maybe even outrageous? No. It is because of the trade-offs of public policy because there are other considerations, just as there are other considerations when we lash out and follow our natural instinct to sue an employer.

You are going to drive costs up; you are going to drive people out of the system; and you are going to cause more uninsured. Besides, there is accountability. There is a sense of the Senate pending today that talks about the importance of the independent evaluation that this bill creates. The employer doesn't get to make a decision to cut somebody off under this bill, and that is the end of it. It goes through an independent evaluation process. It goes through an external review process. Then, if it is a medical decision, it goes to an independent medical reviewer.

This bill spends pages on pages in setting up these individual entities, protecting them, qualifying them, having the Federal Government look over their shoulders. They are the final word. If the employer is wrong, they are the final word, and they don't have anything to do with the employer. There might be some hypothetical cases where some evil employer might sneak through the cracks somewhere. All I am saying is it is our obligation to consider both sides of this coin. If in trying to do that, if in trying to reach that hypothetical extreme case we drive up health care costs and we drive small employers out of the health care business and we do wind up with over a million more people uninsured, we are making a bad bargain.

I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. KENNEDY. How much time remains?

The PRESIDING OFFICER. The Senator controls 37½ minutes.

Mr. KENNEDY. I will yield myself 2 minutes. I want to remind my good friend from Tennessee when he talks about the issues of cost, that we have heard this issue raised before by the Chamber of Commerce regarding family and medical leave. They estimated that its cost would be \$27 billion a year. It has been a fraction of that. I don't hear Members wanting to repeal it. We heard about the issue of cost when we passed Kassebaum-Kennedy, which permits insurance portability, and is used particularly by the disabled. We heard that Kassebaum-Kennedy was estimated to cost tens of billions of dollars. That cost has not developed. Nobody is trying to repeal it.

We heard about costs when we passed an increase in the minimum wage. We heard that it would lead to inflation and lost wages. We have responded to that. The cost issue has always been brought up.

I will remind the Senator that we have put in the RECORD the pay for William McGuire and United Health Group, the largest HMO in the country. The total compensation is \$54 million and \$357 million in stock options for a total compensation of \$411 million per year. That is \$4.25 per premium holder. The best estimate of ours is \$1.19, and you get the protections. We can go down the list of the top HMOs they are making well over \$10 million a year and are averaging \$64 million in stock options. We could encourage some of those who want to do something in terms of the cost, to work on this issue, Mr. President.

In the 1970s, we welcomed, as the principal author of the HMO legislation, the opportunity to try to change the financial incentives for decapitation, to keep people healthy. There would be greater profits for HMOs. It is a good concept. To treat people and families holistically is a valid concept and works in the best HMOs.

What happened is that HMOs, and in many instances, employers, started to make decisions that failed to live up to the commitment they made to the patient when the patient signed on and started paying the premiums. That is what this is about. The patient signs on and says: I am going to have coverage if I am in a serious accident. Then we have the illustration of the person who broke their leg and the employer said: Absolutely not. We are cutting off all assistance. That person was left out in the cold.

There is no reason to do that. The only people who have to fear these provisions are those employers that make adverse decisions with regard to an employee's health. It seems to me they should not be held free from accountability any more than anyone else should be.

How much time remains? I yield 12 minutes to the Senator from North Carolina and that will leave me how much?

The PRESIDING OFFICER. Twenty-two minutes.

Mr. KENNEDY. I yield the Senator from North Carolina 15 minutes.

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

Mrs. HUTCHISON. Mr. President, I ask unanimous consent to speak after the Senator from North Carolina.

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

Mr. EDWARDS. Mr. President, I want to speak to some of the concerns and comments that have been made by my friend and colleague from Tennessee with whom I have been working over the course of the last few days on this issue. There are a couple of issues he raised that deserve a response.

First is the general notion that an appeals process, before going to court, is adequate in and of itself. There are two fundamental problems with that logic. Remember, the way the system works under both pieces of legislation is if an HMO denies care to a patient, they can go through an internal appeal. If that is unsuccessful, they can go to an external appeal. If that does not resolve the issue and they are hurt, they can then go to court.

There are two reasons the appeal by itself does not resolve the issue.

An HMO says to a family: We are not going to allow your child to have this treatment. The child then suffers an injury as a result, and a week later, or however long it takes to complete the appeals process, the HMO's decision is reversed by an appeals board.

An independent review board says: Wait a minute, HMO, you were wrong to start with. Unfortunately, the only thing that independent review board can do is give that child the test they should have had to start with, but the child has already suffered a serious permanent injury as a result. The treatment no longer helps.

The problem is if the HMO decides on the front end they are not going to pay for some care that should be paid for, and the child is hurt as a result, and then 1 week or 2 weeks later the appeals board reverses that decision and says, yes, they are going to order the treatment, this child has nowhere to go and their family has nowhere to go.

That is the point at which—and I think the Senator and I may agree on this—we believe the HMO should be held accountable. The independent review board cannot fix the problem where the child has been injured for life. The HMO that made the decision, just as every entity in this country, should be held responsible and accountable for what they did. That is what we believe. We believe in personal responsibility.

The second reason the appeals process by itself does not solve the problem: If there is nothing beyond the appeal, it creates an incentive for the HMO, which is what I am talking about, to have a policy of when in doubt, deny the claim because the worst that is ever going to happen is

they are going to finish this appeals process and some appeals board is going to order them to pay what they should have paid to start with. If they take 1,000 patients for a particular kind of treatment and deny care to those 1,000 patients, the majority of them are never going to go through an appeal, so they save money. Then they go through the appeal and the worst that can ever happen to them is with 30 or 40 of them, an appeals board orders them to go back and pay what they should have paid.

The problem is fundamental. The appeals process alone does not create an incentive for the HMO to do the right thing.

On the other hand, if the HMO knows if they make an arbitrary wrongful decision and somebody is hurt as a result, injured as a result—if that child suffers a permanent injury as a result—they can be held responsible for that as everybody else who is held responsible, then it creates an enormous incentive for the HMO to do the right thing.

That is what this legislation is about. Senator MCCAIN, Senator KENNEDY, and I structured this legislation to avoid cases having to go to court, to create incentives for the HMO to do the right thing, something they are not doing in many cases around the country now.

The problem is, without both the appeals and the possibility of being held responsible down the road, we do not create the incentive for the HMO to do the right thing. We know that today around the country many families are being denied care they ought to be provided by an HMO.

There are fundamental reasons the system is set up the way it is. It is all designed not to get people to court and not even to get people into an appeals process but to get the patient the correct care, to get them the care for which they have been paying premiums.

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

Mr. EDWARDS. Yes.

Mr. THOMPSON. I thank the Senator for addressing the issues I raised, and I ask this as a legitimate point of inquiry and not just a debating point.

Mr. President, it occurs to me with regard to the Senator's first point, and that is coverage might be denied initially but later overruled, and in the interim—I think he used the example of a small child again—a child might be suffering damage, does not ERISA currently provide injunctive relief? It allows a person under those circumstances to go into Federal court for mandatory injunctive relief, and would that not address the concern the Senator has?

Mr. EDWARDS. I thank the Senator for his question. It is a perfectly fair question. The problem, of course, is that many times it could be a situation where it would take entirely too long to go to court and get injunctive relief. When there is a situation where they

have to make a decision about a family member, whether it be a child or an adult, and the HMO says they are not paying for the care, and they are in the hospital, the last thing they are going to be talking about is: I need to hire a lawyer, go to court, and get injunctive relief. What they need is care at that moment, and in many cases, as the Senator knows from his personal experience before coming to the Senate, during the interim, during that short period of time, that window of opportunity to provide the care to that patient who may be hospitalized or may not be hospitalized is the critical time.

Mr. THOMPSON. If the Senator will—

Mr. EDWARDS. Excuse me. It is impossible during that period of time to get injunctive relief against an HMO, and I might add, the last thing in the world a family is thinking about when they have a member of their family who is in trouble and needs health care is going to court to get an injunction. Now I yield.

Mr. THOMPSON. I thank the Senator. I could not agree more with that last point. However, my experience has been that injunctive relief is designed by nature for very rapid consideration. You can get very rapid consideration, but you do have to go to court to get it.

My question is, if we are not going to avail ourselves or require claimants to avail themselves of the processes if they believe they have been wronged, does that not necessarily lead to the conclusion that we must grant all claims?

How does a person considering a claim know which one—let's assume they are dealing in good faith. In every case where there is an injury or potential injury going to occur, is the logical conclusion that we should see to it that all claims are granted regardless of whether or not the person considering the claim thinks it is clearly not covered under the agreement?

If we do not go through the processes that are in law for people to avail themselves and to show to an independent arbiter or judge that their claim is meritorious, if we say we do not have time for that, then doesn't that mean we have to grant all of them?

Mr. EDWARDS. Reclaiming my time, my response to the Senator's question is simple and common sense. For a family in a bad situation needing medical care immediately, the last thing in the world they are thinking of is hiring a lawyer, going to court and trying to get an injunction. The Senator well knows that process by itself can take enough time for something serious to happen in the interim.

As to the second issue the Senator raises, all we are saying in our legislation, in the structure of our system—internal appeal/external appeal—if that is unsuccessful and there has been a serious injury, they can be treated and taken to court the same as everyone

else. We expect the HMO, which, by the way, is in the business of making these health care decisions, although of course not to cover absolutely everything, to make reasonable, thoughtful judgments about what is covered and what should not be covered.

Now back to the issue of employer liability. First of all, the answer to the Gramm amendment is that it is inconsistent with what the Republican President of the United States has said regarding our bill and the President's principle: "Only employers who retain responsibility for and make final medical decisions should be subject to suit." This is the President's written principle. That is the way our bill is designed, that only employers engaged in the business of making individual medical decisions can have any liability or any responsibility.

With that said, we are working, as I speak, with colleagues, Republicans and Democrats across the aisle, to fashion language that accomplishes the goal of protecting employers while at the same time keeping in mind the interests of the patient.

There are other legitimate issues raised. For example, one argument that has been made is that employers may be subjected to lawsuits they do not belong in, and there is a cost associated with being in those cases for too long. We are working as we speak to create better language, better protection for employers so there is no question that employers, No. 1, can be protected from liability, and No. 2, if they are named in a lawsuit improperly, they don't belong in the lawsuit and shouldn't be named, they have a procedural mechanism for getting out quickly.

The truth is, the Gramm amendment is way outside the mainstream. All the work that has been done on this issue, including the work we are doing with our colleagues, both Republicans and Democrats, is a way to fashion a reasonable, middle of the road approach that provides real and meaningful protection to employers without completely eliminating the rights of patients. That is what we have been working on. We are working on it now and are optimistic we can resolve that issue.

Mr. KENNEDY. Will the Senator yield?

Mr. EDWARDS. Yes.

Mr. KENNEDY. I yield another 2 minutes. Does not the Senator agree that the majority of employers now are doing a good job and are not interfering with these medical decisions?

Mr. EDWARDS. Absolutely.

Mr. KENNEDY. At the present time, a small number of employers are interfering with medical decisions. If the Gramm amendment is accepted, this will put the good employers at a serious disadvantage in competition with others, does he not agree? Would not the others be able to formulate a structure so they could effectively cut back on excessive costs for the health care

system for their employees, while the good ones who are playing by the rules would be put at a rather important competitive disadvantage? Does the Senator not agree that for the employers working within the system and playing by the rules, this is an invitation to change their whole structure and to be tempted to shortchange the coverage and protection for their employees?

Mr. EDWARDS. In response to the question, the answer is, of course we believe employers, the vast majority of employers, care about their employees and want to do the right thing. Our legislation is specifically designed to protect those employers, just as the President of the United States has suggested needs to be done.

What we have done in this legislation, what the President has suggested, and in the work that continues as we speak on additional compromise language, all is aimed at the same principle and the same goal.

This amendment is outside that mainstream—different from our legislation, different from the principle established by the President of the United States, and different from the compromise that is being worked on at this moment.

I remain optimistic we will be able to reach a compromise that provides real and meaningful protection to the employers of this country we want to protect. We have said that from the outset. We stand by it. We want to protect them.

If I may say a couple of things about the issue of costs which was raised a few moments ago, the CBO has not said anybody will become uninsured as a result of this legislation. What the CBO has said is there will be a 4.2-percent increase in premiums over 5 years because of our legislation and a 2.9-percent increase if the competing legislation passes, roughly 4 percent versus roughly 3 percent. The difference between these two pieces of legislation on cost is a very minuscule part related to litigation. I think the difference is less than half of 1 percent related to litigation. Rather, the differences are related to quality of care. If people get better access to clinical trials, better access to specialists, better emergency room care, a more enforceable and meaningful independent review process, if those things occur, there is a marginal cost associated with it.

We have real models. We don't have to guess about what will happen. Those models are Texas, California, and Georgia. In those States, the number of uninsured, while the patient protection laws have been in place, has gone down, not up. We have some real, although short term, empirical evidence about what happens when this patient protection is enacted.

We have to be careful. A lot of arguments being made are the same arguments that have been made by HMOs for years to avoid any kind of reform, to avoid any kind of patient protec-

tion. We are working in this legislation to give real protection to somewhere between 170 and 180 million Americans who are having problems with their HMO. We want to put the law on the side of patients and doctors instead of having health care decisions made by insurance company bureaucrats.

The PRESIDING OFFICER. The time yielded has expired.

Mr. EDWARDS. I ask to be yielded another 5 minutes.

Mr. KENNEDY. How much time remains?

The PRESIDING OFFICER. The Senator from Massachusetts controls 17 minutes.

Mr. KENNEDY. I yield 5 minutes to the Senator from North Carolina and the Senator from Arizona the remaining time.

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

Mr. EDWARDS. Mr. President, in summary, let me speak to the two amendments we will next be addressing. First, the Gramm amendment is outside the mainstream, outside what the President of the United States has suggested, outside of what we have in our legislation, and outside of what we are working on with Senators from across the aisle.

Second, as to the Grassley motion to commit, the problem is it sends it back to a number of committees and slows down the process. We need to do something about this issue and quit talking about it. The American people expect us to do something about it. Thousands of Americans each day are losing access to the care they have, in fact, paid for while this process goes on. We need to get this legislation passed and do what we have a responsibility to do for the American people. This is an issue on which the Senate, the House, and the American people have reached a consensus. It is time to act. As to these two vehicles, I urge my colleagues to reject them.

Finally, I will talk about the story of a young woman in North Carolina. Her name is Shoirdae Henderson, from Apex, NC. At the age of 12 she was diagnosed with a rare hip condition. It made it difficult for her to walk. The Henderson family's HMO sent Shoirdae to a hospital to see specialists about her problem. The specialist in this HMO-approved hospital said she needed surgery to keep her hip from fusing and having to walk with a limp. Even though the family had taken Shoirdae to the HMO specialist, the HMO refused to listen to her doctors. They came in with excuse after excuse to keep her from getting surgery. Every one of the HMO excuses proved over time to be groundless. It looked as if she would finally get the operation her doctors had recommended to begin with. Just 2 days before she was supposed to have surgery, the HMO told her family they wouldn't pay for it. They wanted her to try physical therapy instead. Shoirdae's father spent hours dealing with the HMO, as so many families

have, trying to get his daughter the care the doctors said she needed. He made call after call and faxed them. He requested an appeal. He never got an answer. The hospital finally had to cancel her surgery as a result.

After several sessions of physical therapy, another HMO doctor took one look at Shoirdae's x rays and sent her back to the hospital. She still needed the surgery. The therapy had not worked. In fact, Shoirdae's hip had gotten worse—so much worse during all of this time that now the doctors told her the surgery wouldn't work. If she had gotten the operation her doctors said she needed when they recommended it, her hip would not have fused. She might today be able to walk, run, and play without a limp. Instead, she walks with a severe limp today and she has to wear special shoes because the HMO refused to pay for what was obviously needed—the surgery. The HMO refused to do what the doctors recommended. In fact, they overruled what the doctors recommended.

Her father wrote to me and said: This has been the most horrible experience of my life. Imagine what it has done to my daughter.

This is what this debate is about. This debate is about the 170 million to 180 million Americans who have health insurance—HMO coverage—but have no control over their health care.

The HMOs have had the law on their side for too long. It is time for us to finally do something to put the law on the side of patients and doctors so that the Shoirdaes all over this country, when their doctor recommends that they have surgery, can have the surgery they need; when the doctor recommends a test, they can have the test they need.

I yield the floor.

The PRESIDING OFFICER (Mrs. CARNAHAN). Under the previous order, the Senator from Texas is recognized.

Mrs. HUTCHISON. Madam President, how much time is remaining on the side of Senator GRASSLEY and on the Gramm-Hutchison amendment?

The PRESIDING OFFICER. The Senator from Texas has 9 minutes. Senator GRAMM has 7½.

Mrs. HUTCHISON. Thank you, Madam President.

I ask unanimous consent that I have 6 minutes allocated—4 minutes from Senator GRASSLEY's time and 2 minutes from Senator GRAMM's time. It is my intention to yield 4 minutes to Senator NICKLES of my 6 minutes.

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

Mrs. HUTCHISON. Will the Chair notify me at the end of 2 minutes?

Madam President, I want to speak on behalf of the Grassley motion which would send this bill to committee so that it could be marked up and fully debated because while we have had great debate, bypassing the committee process I think has caused us to have to write the bill in this Chamber. I don't think that is a good way to pass legislation.

I think we all want to have a Patients' Bill of Rights that is well vented and well debated and that we know will have the intended consequences because the last thing we want to do is have unintended consequences when we are talking about the health care of most Americans.

I hope we can commit the bill to bring it back in a better form.

Second, I hope people will support the Gramm-Hutchison amendment because this is the Texas law. Senator HARKIN, on a news program this weekend, said: I would love to have just the Texas law for the entire Nation. The Gramm-Hutchison amendment is the Texas law verbatim when it applies to suing a person's employer because what we don't want to do is put the employer in the position of standing for the insurance company. The employer wants to be able to offer insurance coverage to their employees. But if they are going to be liable for a decision made by the insurance company and the doctors, then they are put in a position that is untenable. What we want is health care coverage where the decisions are made by the doctors and the patients.

The Senator from North Carolina had a picture of a lovely young woman. He said: This is what the debate is about. It is what the debate is about.

The Breaux-Frist plan would definitely address her concerns because it would give her the care she needs rather than going directly for a lawsuit and possibly delaying the health care she needs—and for other patients.

Madam President, I ask my colleagues to support the Gramm-Hutchison amendment and support the Grassley motion. Let's get a good bill that will have the effect of increasing coverage in our country and not decreasing it.

Thank you, Madam President. I yield 4 minutes to Senator NICKLES.

The PRESIDING OFFICER. The Senator from Oklahoma is recognized.

Mr. NICKLES. Madam President, I thank my friend and colleague from Texas, Senator HUTCHISON, for her comments. I also wish to thank the Senator from Texas, Mr. GRAMM, for his leadership on the amendment, as well as Senator THOMPSON.

I hope employers around the country have been watching this debate. I have heard some of the proponents of the underlying McCain-Kennedy-Edwards measure say: It is not our intention to sue employers. We don't want to do that. No. We will try to fix it. I have even heard on national shows that: We don't go after employers under our bill. On the "Today Show," a nationally televised show, Senator EDWARDS on June 19 said: Employers cannot be sued under our bill. That was made on June 19. Senator HARKIN yesterday said: I would love to have the Texas law for the entire Nation.

The Texas law that Senators GRAMM and HUTCHISON have quoted says: This chapter does not create any liability on

the part of an employer or an employer group purchasing organization. There is no liability under Texas law. Senator EDWARDS said: We don't sue employers. But if you read the bill, employers beware; you are going to be sued.

The only way to make sure employers aren't sued is to pass the Gramm amendment. To say we are not going to sue employers, but, wait a minute, if they had direct participation, and you take several pages to define direct participation, what you really find is that if any employer meets their fiduciary responsibilities, they will have direct participation. In other words, employers can be sued for unlimited amounts, with no limit on economic damages and no limit on noneconomic damages. That means no limit on pain and suffering. That is where you get the large jury awards. You can be sued for that amount in Federal court. You can be sued for that amount in State court with no limits—with unlimited economic and noneconomic damages.

Employers beware. If you want to protect employers, vote for the Gramm amendment.

You always hear people say: Oh, we want to go after the HMOs; they are exempt from liability, and so on. But it is not our intention to go after employers.

Employers are mentioned in this bill, and they are liable under this bill.

There was action taken in the bill to protect physicians. There is a section exempting physicians. There is a section exempting hospitals and medical providers. We are exempting them but not employers.

Senator HARKIN said, We want to copy the Texas law nationwide. Texas exempted employers. We can do that today. You can avoid going back to your State and having your employer saying, Why did you pass a bill that makes me liable for unlimited damages? You can vote for this amendment and protect employers. You can vote for this amendment and not only protect employers but employees because when employers find out they are liable for unlimited pain and suffering and economic and noneconomic damages, the net result is, unfortunately, a lot of employees—not employers—will lose their coverage.

I urge our colleagues to support the Gramm amendment.

Mr. HATCH. Mr. President, I rise in favor of the Grassley motion to commit this legislation to the Finance Committee, the HELP Committee and the Judiciary Committee.

The legislation before this body is one which will have an enormous impact on medical providers, the health insurance industry, employers and, most important, the patients. As the ranking Republican of the Senate Judiciary Committee, I have serious concerns with the liability provisions of this bill and how they will be impact employers, medical providers and patients. The McCain-Kennedy bill creates new causes of action, changes the

careful balance of ERISA's uniformity rules, and has potential new adverse implications on our judicial system. Moreover, the liability provisions have been crafted without the benefit of appropriate and necessary review of the appropriate committees of jurisdiction. My colleagues, this is not the way to legislate. At the very least, the Judiciary Committee should be afforded the opportunity to review the liability provisions that will clearly have a major impact on our legal system.

Just a few months ago, when the bankruptcy reform legislation was brought to the Senate floor under rule 14, the legislation had been considered by the Judiciary Committee, the entire Senate and a bipartisan conference committee over the last 6 years. However, Democrats raised objections then that the bill needed to be reviewed by the Judiciary Committee before consideration on the Senate floor. As a result, we followed regular order and the committee reviewed the bill after which it was sent to the Senate floor for consideration.

Now the tactics of my friends on the other side is to bypass the committees altogether which is exactly what they vocally opposed on bankruptcy reform legislation just a few months ago. Moreover, we now have the third iteration of the liability provisions which is less than a week old. Clearly, the legal ramifications of these provisions are not well known, and I think it would be in the best interest of this legislation to craft language that is truly going to help patients which we all have been saying is our No. 1 priority.

The provisions in the McCain-Kennedy legislation make sweeping changes that will affect our judicial system. This bill changes Federal law and permits various causes of action in both State and Federal courts. It also changes the rules governing class action lawsuits, as well as impacting punitive damages all the while exposing new classes of individuals to open-ended liability.

I want to emphasize that these are all critical important, legal issues that must be considered carefully. The regular process of the Senate should not be circumvented for the political expediencies of my friends on the other side. Why rush this important bill through the Senate? According to the Congressional Budget Office, this legislation will cause premiums to increase by at least 4.2 percent. As a result, it is estimated that 1.3 million Americans will lose their health insurance because health premiums will become too expensive. Even worse, employers benefits altogether for fear of more expanded liability exposure under so-called bipartisan Democrat proposal.

Shouldn't we hear from experts and other legal scholars in an open forum before passing such a monumental bill that impacts so many Americans? It is very apparent to everyone in this Chamber that the trial lawyers have

been principally involved in drafting these liability provisions and they have done so with their own interest in mind. And believe me, as a former medical malpractice attorney, I know what their tricks are, and I know what they are trying to do. This provisions are simply not in the best interest of the American people.

Accordingly, I urge my colleagues to support his motion to commit. It is incumbent upon us to do this right and to do this in the best interest of patients, not trial attorneys. I am confident that with a little extra time, we can make these provisions legally sound. We have spent far too many years on this issue not to do it right. We have a real opportunity to pass meaningful patients' rights legislation. Let us not squander this opportunity by acting expeditiously without the benefit of more careful and thoughtful review.

The PRESIDING OFFICER. Who yields time?

The Senator from Texas.

Mr. GRAMM. Madam President, could you tell me how much time the two sides have?

The PRESIDING OFFICER. You have 4 minutes and a half. The Senator from Massachusetts has almost 12 minutes.

Mr. GRAMM. Madam President, I would like my amendment to close out the debate.

Does Senator GRASSLEY have time?

The PRESIDING OFFICER. He has 5 minutes. You have 9 minutes. The Senator from Massachusetts has 12 minutes.

Mr. GRAMM. Let me just allow the majority to go ahead.

Mr. MCCAIN. I say to the Senator from Texas, I think it is perfectly reasonable for you to have the last 5 minutes.

I ask the Presiding Officer that one of us be recognized so that the Senator from Texas has the final 5 minutes.

The Senator from Iowa wants—

Mr. GRASSLEY. Two minutes.

The PRESIDING OFFICER (Mr. REID). Did the Senator from Arizona propose a unanimous consent request that the Senator from Texas have the final 5 minutes?

Mr. KENNEDY. And that the Senator from Iowa have 2 minutes.

Mr. GRASSLEY. I thank my colleagues.

The PRESIDING OFFICER. Without objection, it is so ordered. That will be the order.

Mr. GRASSLEY. Mr. President, I have spoken twice on the issue of committing this legislation to the committees to express the point of view that there is a lot of turmoil in working out compromises on the floor of the Senate. That is not a very good way to draft a piece of legislation.

If the leadership had not immediately brought this bill to the Senate Chamber, and the committees had done their work, this bill would have been handled in a much more expeditious way, but, more importantly, it would

have been in a way in which we would have had a lot of confidence in the substance of the legislation, with a lot fewer questions asked. I think when people see a product from the Senate, they want to make sure that product is done right.

So I offer to my colleagues the motion and hope that they will vote yes on the motion to commit the legislation to the respective committees—Health, Education, Labor; Judiciary; and Finance—for the fair consideration of this legislation and a final, good product that we know serves the best interests of the people, which obviously is to make sure that everybody is protected with a Patients' Bill of Rights.

I yield the floor.

The PRESIDING OFFICER. Who yields time?

The Senator from Arizona is now recognized.

Mr. MCCAIN. Mr. President, I think it is important, because of the issue of what is happening or not happening in the State of Texas and Texas State law, that I take a few minutes to quote from a letter I just received from the President of the Texas Medical Association, Dr. Tom Hancher, who also was a key player in the formulation of the language and the legislation that passed the State of Texas in 1997.

I would like to quote from the letter that Mr. Hancher sent me:

I have been watching the debate over the Patients' Bill of Rights and can understand the confusion over many of the issues. We, in Texas, debated managed care reforms for over two years culminating in the passage of a package of managed care reforms in Texas in 1997. Because Texas' laws have become the basis for evaluating certain aspects of proposed federal reforms, I hope I can help to clarify some areas for you. As Texas Medical Association worked closely with the sponsors of these reforms, including the managed care accountability statute, I would like to offer our experiences on this issue. . . . I will focus on the three areas of primary disagreement—employer exemption, medical necessity standards for independent review, and remedies under Texas' managed care accountability law.

Much as you are seeing in Washington, our lawmakers were deluged with concerns about employers being legally accountable for the actions of the managed care plan. We believed that this was impossible given the construction of our legislation. Both the definition of a managed care plan and the action of that plan—making medical treatment decisions—prevented such lawsuits from being brought. Nevertheless, the insurers and employers continued to express their concerns that our bill would cost hundreds of citizens their medical coverage because of the fear of litigation.

We agree with your approach that any entity making medical treatment decisions should be held accountable for those decisions. Texas took a different approach in 1997, however, because we knew that no state law could achieve that goal. ERISA law in 1997 was such that no state law could hold employers of large self-funded plans accountable for actions related to their benefit plans. . . .

We were certain that small to medium sized employers in our state were providing health benefits through fully insured, state licensed products. Clearly, those employers

were not making medical treatment decisions. While it was the intent of the Texas Legislature to hold accountable any entity making medical treatment decisions, it was our belief that because of ERISA, a blanket exemption for employers in a state law would have no practical impact on the large, self-funded employers. Therefore, we provided a broad employer exemption primarily to allay the fears of small and medium-sized, fully-insured businesses over exposure to legal liability for medical decisions.

The reason why I quote this is because that is basically the language we are using in this legislation.

The Senate co-sponsor of the managed care accountability bill said it best on the floor of the Texas Senate: "If an HMO stands in the shoes of the doctor in the treatment room, and stands in the shoes of the doctor in the operating room or the emergency room, then it should stand in the shoes of the doctor in the courtroom." It is hard to argue why this philosophy should not apply to anyone making those direct medical decisions, HMOs or the very few employers who do this. Any employer who decides not to make these decisions very clearly is not subject to a lawsuit.

Our goal in constructing the independent review (IRO) provision of our bill was a simple one: use independent physicians to evaluate disputes over proposed medical treatment. We require these physicians to utilize the best available science and clinical information, generally accepted standards of medical care, and consideration for any unique circumstances of the patient to determine whether proposed care was medically necessary and appropriate. Our standards are virtually identical with the independent review provisions in the McCain/Edwards compromise currently pending before the Senate.

I repeat, the Texas Medical Association President says: Our standards are virtually identical with the independent review provisions in the McCain/Edwards compromise currently pending before the Senate.

Review decisions were to be made without regard for any definition of medical necessity in plan documents. The Texas Department of Insurance reviews the plan contract for specific exclusions or limitations (i.e., number of days or treatments). If there is no specific contract provision to exclude the eligibility for review, the case is submitted to the independent review organization. Medical necessity is often a judgment call. We wanted those judgments made without any conflict of interest. Medical necessity definitions created by plans will likely err in favor of the plan. An IRO's decision should be a neutral one. Using a plan definition would prevent that. Additionally, we do not define "medical necessity," but rather set forth broad standards for reviewers to make an informed decision based upon all available information. . . .

Finally, there has been a great deal of confusion over damages in personal injury or wrongful death cases in our state. Currently, Texas has no caps on economic or non-economic damages. Punitive damages are calculated using the following formula: two times the amount of economic damages, plus an amount not to exceed \$750,000 of any non-economic damage award. We chose to treat managed care plans as any other business. Therefore, they are accountable under general tort law and not subject to the cap on damages in wrongful death cases. The limitation on recovery in wrongful death cases applies only to health care entities and is part of a separate section of our law.

The debate in Texas over patient protections was long, sometimes contentious, and

ultimately successful. With over 1300 independent reviews (48% upheld the plans' determination and 52% overturned the plans' decision) and only 17 lawsuits—

I want to emphasize: Only 17 lawsuits—

I am proud of how our laws are working for the people of Texas enrolled in managed care plans. On behalf of my colleagues and our patients, I ask that you not take any action that would undermine what we have done in our state. Best wishes in your deliberations.

It is signed: Tom Hancher, MD, President of the Texas Medical Association.

I urge all of my colleagues to read this letter from Dr. Hancher. I think it lays out the issues surrounding this particular amendment and remaining areas of dispute that we might have.

Mr. President, I cannot support the pending amendment because I believe that employers should be held accountable for medical decisions they have made if those decisions resulted in a patient's injury or death.

I do not believe employers should be held liable for the decisions made by insurers or doctors. Nor do I believe this legislation would subject employers throughout the country to a tidal wave of litigation as our opponents claim.

But if an employer acts like an insurance company and retains direct responsibility for making medical decisions about their employee's health care then they should be held accountable if their decisions harm or even kill someone.

If an employer is not making medical decisions, and very few employers do, then they will not be held liable under our legislation.

Let me repeat—employers will not be held liable or exposed to lawsuits if they do not retain responsibility for directly participating in medical decisions.

I keep hearing from opponents of our bipartisan bill that our language is vague and would subject employers to frequent litigation in state and Federal court. I don't believe this is true.

Our legislation specifically states that direct participation is defined as "the actual making of [the] decision or the actual exercise of control in making [the] decision or in the [wrongful] conduct." This language clearly exempts businesses from liability for every type of action except specific actions that are the direct cause of harm to a patient.

The sponsors of this legislation are willing, however, indeed we would welcome an amendment that helps further clarify the employer exemptions provided for in the bill. I know that Senators SNOWE, DEWINE and others are working on such an amendment.

But we cannot, in the interest of greater clarity, give employers a kind of blanket immunity when they assume the role of insurers and doctors by making life and death decisions for their employees. That is what the pending amendment would do.

Let's just step back for a moment and reflect on how the employer based

health care system is structured and works. An employer contracts with an insurer to provide health care coverage for their employees. The insurer is then responsible for making the medical decisions that go with managing health insurance. That is how the system typically works and how employers want it to work.

Most businesses simply do not make medical decisions. Hank who runs a local plumbing company does not tell the HMO his company has contracted with, "We have clogged drains and need Joe Smith back at work. We can't afford for him to be laid up waiting for surgery." And Hank would not be held liable under our bill because he is not practicing medicine—he is repairing plumbing.

Now, I admit there are a small group, of mostly very large companies that have chosen to provide insurance to their employees themselves.

In these small number of cases, employers have made the decision to sell plumbing and act as an insurer that makes medical decisions.

And if the decisions they make harms or kills someone then why should they have a blanket exemption from liability as this pending amendment would provide them, a blanket exemption that we do not provide doctors or nurses or hospitals?

Mr. President, I yield the floor.

THE PRESIDING OFFICER. Senator MCCAIN and Senator KENNEDY have 3½ minutes.

Mr. KENNEDY. Mr. President, let me yield myself the time. As I understand, the Senator from Texas is going to close.

THE PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. Mr. President, this legislation is very simple. The point of the overall Patients' Bill of Rights is to permit doctors to make the final, ultimate decision on what is in the best interest of the patient. Doctors, nurses, trained personnel, and the family should be making that judgment. However, we find that the HMOs are overriding them.

Now we have put this into the legislation. If it is demonstrated with internal and external appeals that a HMO has overridden the doctors, they are going to have a responsibility towards the patient. They are going to have to give that person, who might have been irreparably hurt, or the patient's family, if the patient died, the opportunity to have some satisfaction.

What the Gramm amendment says is, if that same judgment is made by the employers, they are somehow going to be free and clear. He can distort, misrepresent and misstate what is in this legislation, but we know what is in the legislation. What it does is hold the employer that is acting in the place of the HMO accountable. If the employer is making a medical decision that may harm an individual or patient, or may cause that patient's life or serious illness, they should bear responsibility.

Under the Gramm amendment, they can be free and clear of any kind of responsibility no matter how badly hurt that patient is.

That is absolutely wrong. I can see the case where the HMO is sued. The HMO says: Don't speak to me; it was the employer that did it. And then the employer says: Look, the Gramm amendment was passed. We are not responsible at all. This amendment is another loophole. It is a poison pill. It is a way to basically undermine the whole purpose of the legislation.

Doctors and nurses should be making medical decisions and not the HMO bean counters who are looking out for the profits of the HMOs. Employers should not be making these medical decisions either. They may say, every time my employee has some medical procedure that is over \$50,000, call me, HMO. I don't want to pay more than \$50,000. Then the HMO calls them up and the employer says, no way, don't give that kind of medical treatment to my employee. The HMO listens to the employer, the patient does not get that treatment, and dies. Under the Gramm amendment, there will be no accountability.

I hope his amendment is defeated.

The PRESIDING OFFICER (Mrs. CARNAHAN). Under the previous order, the Senator from Iowa has 2 minutes, followed by the Senator from Texas.

Mr. GRAMM. The Senator from Iowa has spoken. I assume if we add up the time, I have 7 minutes. I would like to take it.

The PRESIDING OFFICER. The Senator is correct.

Mr. GRAMM. Madam President, nothing in this amendment has anything to do with HMOs. Nothing in the amendment that I have offered would in any way exempt any HMO from any liability. Both Senator KENNEDY and Senator MCCAIN talked about HMO liability. Senator MCCAIN talked about HMOs standing in the shoes of doctors. This amendment I have offered is not about HMOs.

Senator KENNEDY talks about HMOs escaping liability by blaming it on the employer. Nothing in the amendment I have offered in any way would allow that to happen.

The amendment I have offered has to do with employers. Why is this an issue? It is an issue because, in America, employers are not required to provide health insurance. Employers, large and small, all over America provide health insurance because they care about their employees and because they want to attract and hold good employees. But every employer in America has the right under Federal law to drop their health insurance.

I am concerned, and many are concerned, that employers would be forced to drop their health insurance given the liability provisions in the bill.

I have here a number of letters from business organizations endorsing my amendment. I send to the desk and ask unanimous consent that these letters

be printed in the RECORD: an NFIB letter designating this a small business vote; a letter from Advancing Business Technology representing the AEA; the National Association of Manufacturers; the National Council of Chain Restaurants; the National Restaurant Association; and the National Association of Wholesalers and Distributors, all letters endorsing the Gramm amendment; and finally, a wonderful letter from the Printing Industry of America talking about the dilemma they would face if this amendment did not pass.

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

NATIONAL ASSOCIATION
OF WHOLESALER-DISTRIBUTORS,
Washington, DC, June 22, 2001.

Hon. PHIL GRAMM,
U.S. Senate, Russell Senate Office Building,
Washington, DC.

DEAR SENATOR GRAMM: Thank you for offering an amendment to S. 1052, the McCain-Kennedy "Bipartisan Patient Protection Act," to shield employers from liability lawsuits authorized by the bill. We write on behalf of the 40,000 employers affiliated with the National Association of Wholesaler-Distributors (NAW) to express our strong support for this critically important amendment.

The vast majority of NAW-affiliated employers voluntarily offer health insurance as an employee benefit. Those employer sponsors of group health insurance benefits are already alarmed by repeated annual increases in health insurance premiums and the growing pressure health insurance costs are placing on their bottom lines. These employers are deeply concerned about the additional premium cost increases with which they will be confronted if the McCain-Kennedy bill becomes law. It is quite clear that many will manage these cost increases by terminating or, at a minimum scaling back, their plans.

NAW members are further concerned about the exposure to costly lawsuits and liability they will face if the McCain-Kennedy bill becomes law and they continue to voluntarily offer health insurance as an employee benefit. Many will manage the newly-acquired risk by terminating their plans altogether.

The proponents of the McCain-Kennedy bill have repeatedly claimed that S. 1052 shields employers from liability. As you have so clearly demonstrated, it does not, and should S. 1052 become law in its current form, the consequence of its failure in this regard will leave many Americans who today benefit from employer-provided medical coverage, without health insurance coverage in the future. This dramatic undermining of our employer-based health insurance system is clearly adverse to the interests of employers, their employees and their employees' families.

There are other serious weaknesses in the McCain-Kennedy bill with which NAW members are concerned; however, adoption of your amendment will at least mitigate one of the worst excesses of the McCain-Kennedy bill. Therefore, NAW is pleased to support your amendment, and we thank you for your leadership.

Sincerely,

DIRK VAN DONGEN,

President.

JAMES A. ANDERSON, Jr.,

Vice President-Government Relations.

NATIONAL RESTAURANT ASSOCIATION,
Washington, DC, June 22, 2001.

Hon. PHIL GRAMM,
U.S. Senate,
Washington, DC.

DEAR SENATOR GRAMM: As debate continues on S. 1052, the McCain-Kennedy-Edwards patients' rights bill, the National Restaurant Association sincerely appreciates your amendment to clarify the Senate's intent that employers will not be subject to liability for voluntarily providing health benefits to their employees. A vote in support of the Gramm employer liability amendment will be considered a key vote by the National Restaurant Association.

The majority of America's 844,000 restaurants are small businesses with average unit sales of \$580,000. Rather than risk frivolous lawsuits and unlimited damages authorized under S. 1052, many businesses will be forced to stop offering health benefits to their employees. Even without the effect of litigation risk economists predict at least 4-6 million Americans could lose their employer-sponsored health coverage as a result of the increased costs of S. 1052. We urge you to avert this harmful situation.

By taking language from the Texas patients' rights bill, your amendment will clearly define that employers would not be subject to liability. This amendment is critical given that S. 1052 currently exposes employer sponsors of health plans to liability and limitless damages in the following ways:

Lawsuits are authorized against any employer that has "actual exercise of control in making such decision." [p. 146] This broad phrase would generate lawsuits by allowing an alleged action by the employer to constitute "control" over how a claims decision was made. ERISA's fiduciary responsibility obligates employers to exercise authority over benefit determinations.

Lawsuits are authorized for any alleged failure to "exercise ordinary care in the performance of a duty under the terms and conditions of the plan." [p. 141]. Under "ordinary care," simple administrative errors could become the basis of a lawsuit alleging harm. Because all provisions of S. 1052 would be incorporated as new "terms and conditions" of the plan upon enactment, these new statutory requirements would further expand employer liability.

Nothing in S. 1052 precludes a lawsuit against employers who will be forced to defend themselves in state and federal courts against allegations of "direct participation" in decision making. [p. 145]

Thank you for your effort to protect employees' health benefits by correcting the vague and contradictory language in S. 1052. We urge the Senate to support your amendment to ensure that employers will not be sued for voluntarily providing health coverage to 172 million workers. The Gramm employer liability amendment will be a key vote for the Association. Thank you for your leadership.

Sincerely,

STEVEN C. ANDERSON,
President and Chief Executive Officer.

LEE CULPEPPER,

Senior Vice President,
Government Affairs and Public Policy.

NATIONAL ASSOCIATION
OF MANUFACTURERS,

Washington, DC, June 25, 2001.

Hon. PHIL GRAMM,
U.S. Senate, Senate Russell Office building,
Washington, DC.

DEAR SENATOR GRAMM: I write in strong support of the amendment you have offered with your colleague from Texas, Senator Kay Bailey Hutchison, to the McCain-Kennedy "Bipartisan Patient Protection Act."

We hope that all Senators who agree that employers who voluntarily sponsor health-coverage should be protected from liability will support your amendment.

There should no longer be any dispute that the McCain-Kennedy bill exposes employers to direct and indirect liability costs for adverse benefit determinations. Whether or not employers actively intervene into a given benefit determination, they are charged with responsibility for all aspects of plan administration under ERISA's fiduciary responsibility standard (including benefit determinations). Thus, an employer can either actively or passively meet the McCain-Kennedy bill's standard of "direct participation" (the act of denying benefits or the actual exercise of authority over the act).

The Gramm-Hutchison Amendment is the Texas Health Care Liability Act's unambiguous exemption of employers as adapted to ERISA. We certainly hope a majority of senators will agree on the need to protect employers from health care liability.

The National Association of Manufacturers will continue to oppose the underlying McCain-Kennedy bill as adding too much additional cost to the existing double-digit (13 percent on average) health-care inflation. The rising cost of health-coverage, together with the high cost of energy, is exerting a significant drag on the economy. The Senate, however, should be heard on the specific question of health-care liability for employers.

Again, we urgently ask your support for the Gramm-Hutchison Amendment (Senate Amendment 810) which will be considered for designation as a key manufacturing vote in the NAM Voting Record for the 107th Congress.

Sincerely,

MICHAEL ELIAS BAROODY,
Executive Vice President.

NATIONAL RETAIL FEDERATION,
June 25, 2001.

To the Members of the U.S. Senate:

Tomorrow morning, you will have the opportunity to vote on a critically important amendment offered by Senator Gramm to the Kennedy-McCain "Patient Protection Act of 2001" that will exempt employers from new lawsuits authorized by the legislation. On behalf of the National Retail Federation (NRF), I strongly urge you to support this amendment. The vote on the Gramm amendment will be a key vote for NRF.

At a time when retailers are struggling to deal with annual double-digit increases in health costs, subjecting employers to liability would be the breaking point for many businesses. Many employers would be forced to terminate or significantly scale back their health benefits programs rather than face a lawsuit that could bankrupt their business—leaving many working Americans without access to affordable insurance. The Gramm amendment will unquestionably help to preserve the ability of employers to provide valuable health benefits to their employees and their families.

Although passage of the Gramm amendment would address one of the most serious flaws in S. 1052, it is important to note that we remain concerned and strongly opposed to the broader liability provisions in the bill. Although NRF supports the goals of the legislation to ensure that individuals have the ability to address their disputes through an independent appeals process, allowing broad new causes of action in state and federal court for virtually uncapped damages would have dire consequences on the employer-based health care system. The costs of open-ended liability on health plans will ultimately be borne by employers and employees alike.

As background, the National Retail Federation (NRF) is the world's largest retail trade association with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet and independent stores. NRF members represent an industry that encompasses more than 1.4 million U.S. retail establishments, employs more than 20 million people—about 1 in 5 American workers—and registered 2000 sales of \$3.1 trillion. NRF's international members operate stores in more than 50 nations. In its role as the retail industry's umbrella group, NRF also represents 32 national and 50 state associations in the U.S. as well as 36 international associations representing retailers abroad.

Again, we urge you to support the Gramm amendment, and to support future efforts to remedy the onerous liability provisions in S. 1052.

Sincerely,

Senior Vice President, Government Relations.

NATIONAL COUNCIL OF CHAIN RESTAURANTS OF THE NATIONAL RESTAURANT FEDERATION,

Washington, DC, June 25, 2001.

Hon. PHIL GRAMM,
U.S. Senate, Russell Senate Office Building, Washington, DC.

DEAR SENATOR GRAMM: On behalf of the National Council of Chain Restaurants, I am writing to thank you for introducing your amendment to protect employers from liability lawsuits authorized by the Kennedy-McCain "Patients' Bill of Rights" currently being debated by the Senate.

The National Council of Chain Restaurants ("NCCR") is a national trade association representing forty of the nation's largest multi-unit, multi-state chain restaurant companies. These forty companies own and operate in excess of 50,000 restaurant facilities. Additionally, through franchise and licensing agreements, another 70,000 facilities are operated under their trademarks. In the aggregate, NCCR's member companies and their franchisees employ in excess of 2.8 million individuals.

Although most of the nation's chain restaurant company employers offer health care benefits to their employees, these employers have become increasingly concerned with the skyrocketing costs of providing such coverage. In fact, many employers are already being forced to reevaluate whether they can continue to afford providing health care insurance to their employees. The Kennedy-McCain bill's imposition of liability on health plans will exacerbate this problem even further, as health insurers will simply pass on the costs to employers in the form of higher premiums. As costs are driven ever upward, many employers will assuredly be forced out of the market, pushing even more working families into the ranks of the 43 million uninsured.

But the Kennedy-McCain bill not only renders health plans liable to suit, it also imposes liability on employers, despite claims by bill proponents that employers are shielded. The very notion that an employer could be sued for generously and voluntarily providing health insurance to his or her employees is outrageous. Indeed, if employers are exposed to liability for their voluntary provision of health insurance to their employees, in addition to the increased premium costs resulting from health plan liability under the Kennedy-McCain bill, many employers will have no choice but to discontinue this important employee benefit.

The Kennedy-McCain bill threatens to undermine the nation's employer-sponsored health care system at a time when the economy is softening and millions of Americans

are currently without coverage. Although serious problems with S. 1052 remain, your amendment would correct one of the numerous excesses of this extreme legislation.

Sincerely,

M. SCOTT VINSON,
Director, Government Relations.

ADVANCING THE BUSINESS OF TECHNOLOGY,

Washington, DC, June 25, 2001.

Hon. PHIL GRAMM,
U.S. Senate, Russell Senate Office Building, Washington, DC.

DEAR SENATOR GRAMM: I am writing on behalf of AeA (American Electronics Association), the nation's largest high-tech trade association representing more than 3,500 of the nation's leading U.S.-based technology companies, including 235 high-tech companies in Texas, to thank you for offering your amendment to exempt employers from the liability provisions contained in S. 1052, the Bipartisan Patient Protection Act.

An overwhelming majority of AeA member companies provide their employees, their dependents, and retirees with quality health care options. AeA and its member companies are concerned that the liability provisions in S. 1052 would threaten our member companies' ability to continue to offer health insurance benefits. It only makes sense that exposing employers who provide health insurance to their employees to unlimited legal damages will result in fewer employers offering their employees' health insurance. Unlimited damage awards against insurance companies and employers will create a powerful incentive for lawsuits against both. At a minimum, companies that offer health insurance will see their litigation costs increase. Health insurance premiums will also increase, as litigation costs are passed through to both employers and employees.

Higher health insurance premiums will mean fewer health insurance options for employees, and in some cases, the loss of insurance coverage for employees as companies drop health insurance. The liability provisions in S. 1052 will also put pressure on companies to drop their health insurance benefits, primarily from individuals and institutions that own stock in these companies. Shareholders will be reluctant to permit companies to assume liability for employer-provided health insurance and they may pressure companies to drop their health insurance in order to protect the value of their stock.

AeA and its members share Congress' concern about improving the accessibility, affordability and quality of health care services for all Americans. But AeA and its members believe that S. 1052, especially the liability provisions in the bill, will undermine that worthy objective, and ultimately lead to more uninsured workers. AeA supports your amendment to S. 1052, as the first in many needed steps to improve this legislation.

Sincerely,

WILLIAM T. ARCHY,
President and CEO.

NATIONAL FEDERATION OF INDEPENDENT BUSINESS,
Washington, DC, June 25, 2001.

DEAR SENATOR: On behalf of the 600,000 members of the National Federation of Independent Business (NFIB), I urge you to support Sen. Phil Gramm's amendment exempting all employers from liability who voluntarily offer health care to their employees.

The Kennedy/McCain version of the "Patients' Bill of Rights" exposes small business owners to liability for unlimited punitive and compensatory damages that will force many small businesses to drop coverage. For

most small business owners, it only takes one lawsuit to force them to close their doors. In fact, 57 percent of small businesses said in a recent poll that they would drop coverage rather than risk a lawsuit.

Expanding liability in claims disputes could also increase health care premiums by as much as 8.6 percent at a time when small businesses are already experiencing annual cost increases in excess of 15 percent. Such increases will only force small businesses to drop coverage, adding many to the ranks of the uninsured.

Both Republicans and Democrats have said that the Texas law works. Now is the time to put those words into action. Support Senator Gramm's amendment to exempt employers from unlimited lawsuits! This will be an NFIB Key Small Business Vote for the 107th Congress.

Sincerely,

DAN DANNER,
Senior Vice President,
Federal Public Policy.

PRINTING INDUSTRIES
OF AMERICA, INC.,
Alexandria, VA, June 22, 2001.

Senator PHIL GRAMM,
Russell Senate Office Building,
Washington, DC.

DEAR SENATOR GRAMM: We are aware that the battle lines in the Patients' Bill of Rights may be so sharply drawn that there is little that can be done at this point to overcome the political issues; however, I want to outline the real world impact of passage of the Kennedy-McCain bill.

Our association is 114 years old. For a good portion of our recent history we have provided health benefits to our employees through a self-funded trust. We chose this option because we are a safe workplace and we have very good claims experience as well as a solid balance sheet. We purchase stop-loss insurance for protection of the assets of the organization above a specified limit. We provide benefits to 70 active employees, their dependents, and 14 retirees. Until 1974, we provided a retiree medical program for all our employees but rising costs forced us to drop that program, grand-fathering the employees who were hired prior to that time. We require only \$50 contribution per month for our employees to include their dependents in our health care plan. We cover medical, dental and eye care through a PPO network or, at the option of the employee, a fee for service arrangement. Our prescription drug program requires an employee to pay \$3.00 per generic prescription and \$5.00 for brand name prescriptions. This is about the best plan available to any employee in the Washington area.

We are the ultimate decision maker in our plan. One of the benefits to self-funding is that we can and do make decisions affecting the health care of our employees. We have never made a negative decision. We have made several very significant positive decisions to help employees in very difficult health situations.

If the Kennedy-McCain bill is passed, we likely will be forced to terminate our plan and move to a fully insured plan. We currently pay almost \$600,000 per year for our plan. We cannot pay any more. Moving to a fully insured plan will almost certainly reduce the benefits for our employees as we will lose the advantage of not having to pay overhead for an insurance company. We anticipate losing 25% of our benefits. Here are some of the things we will lose:

Our retiree program. When we renegotiated our plan this past year, we received proposals from insurance companies for our retiree program. We could not find one in the area who would pick up the plan.

Our prescription drug benefit. While we would not lose it, we would have to more than triple the price to \$10/\$20. This also is based on the proposals we received last year.

Our ability to make decisions for our employees and their dependents. We would have to be concerned that the ability to make good decisions has the other side—turning down the next employee. In other words, we could be sued for failing to make a decision. Our organization cannot expose the assets of the organization to that liability potential.

Our very small employee contribution. Employees share of the benefits will go up. The \$50 per month family coverage will likely be increased to \$200 per month. Co-pays and deductibles will also rise. Some coverage may have to be dropped altogether.

We have discussed this issue and other Patients' Bill of Rights issues with our employees and member firms. Many people do not understand the issues. They do not believe Congress would do something like this. Our concern is that you may not knowingly do something like this. But this is real.

We would be pleased to discuss this and other matters related to this legislation with you. We are not alone in the impact this bill would have on our employees. I am aware that we have many self-insured, jointly trusted union plans in our industry that would also be affected in this manner but they do not understand the legislation.

Please feel free to contact me if you wish to discuss our concerns.

Sincerely,

BENJAMIN Y. COOPER,
Senior Vice President.

Mr. GRAMM. Let me review very quickly where we are. Our colleagues who support the pending bill say that the bill does not allow employers to be sued. If you look at the language of their bill, it clearly says it on line 7 on page 144, "Causes of action against employers and plan sponsors precluded." Then it says:

Subject to subparagraph (B), paragraph (1)(A) does not authorize a cause of action against an employer. . . .

That has been pointed to over and over again to say that employers cannot be sued. The problem is that on line 15, the bill goes on and says:

CERTAIN CAUSES OF ACTION PERMITTED.—Notwithstanding subparagraph (A), a cause of action may arise against an employer or other plan sponsor. . . .

Then the bill goes on for 7½ pages of ifs, ands, and buts about when employers can be sued. They can be sued if they have "a connection with;" they can be sued if they "exercise control," which is very interesting because under ERISA, which is the Federal statute that governs employee benefits provided by the employer, every employer is deemed to exercise control over every employee benefit.

The bottom line is, despite all the arguments to the contrary, in the bill before us, employers can be sued.

The Texas Legislature faced exactly this same dilemma, and they concluded that they wanted an absolute carve-out of employers. Why? Not that they believed employers were perfect; not that they believed every employer was responsible, but because they couldn't figure out a way to get at potential employer misbehavior without creating massive loopholes which would

produce a situation where employers, large and small, could be dragged into a courtroom and sued because they cared enough about their employees to help them buy health insurance.

The Texas Legislature decided you ought not be able to sue an employer.

Senator McCAIN read a letter from the Texas Medical Association president, but he did not read the one paragraph in the letter that I was going to read. It is a very important paragraph. Let me explain why. Opponents of this amendment say: You ought to be able to sue employers if employers are making medical decisions. The point is, this bill—and the Texas law and every Patients' Bill of Rights proposal made by Democrats and Republicans—has an external appeal process that a panel of physicians and specialists, totally independent of the health care plan and totally independent of the employer, that will exercise the final decisionmaking authority.

How could an employer call up this professional panel, independent of the health insurance company or the HMO, and in any way intervene? They couldn't.

The line from the letter from the Texas Medical Association addresses exactly this point. It points out that the State couldn't reach into ERISA. But another reason that it wasn't necessary or advisable to try to sue employers was, from the letter:

Additionally, we believed that utilization review—

And this is the review process—agents were making the decisions regarding appropriate medical treatment for employees of these self-funded plans. We contended that these state-licensed utilization review agents would be subject to the managed care accountability statute—

Which is the Texas law.

The same would be true under this bill. Under this bill, no employer can make a final decision. The final decision is made by this independent medical review.

So what is this all about? It all boils down to the following facts: If we leave this provision in the bill, which says employers can be sued and has 7½ pages of ifs, ands, and buts about suing them, and then interestingly enough says you can't sue doctors, you can't sue hospitals, but you can sue employers in its conclusion, then what is going to happen is all over America businesses are going to call in their employees.

The example I used yesterday, and I will close with it today—am I out of time?

The PRESIDING OFFICER. The Senator's time has expired.

Mr. GRAMM. Let me wrap up by saying, all over America, small businesses are going to call in their employees and say: I want to provide these benefits, but I cannot put my business at risk, which my father, my mother, my family have invested their hearts and souls in; therefore, I am going to have to cancel your health insurance.

I urge my colleagues to vote for this amendment.

I yield the floor.

Mr. KENNEDY. Madam President, I am prepared to yield back the minute on the Grassley motion. As I understand it, Senator GRASSLEY is going to yield back his time.

I ask for the yeas and nays on both the Grassley motion and the Gramm amendment.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The question is on agreeing to the motion.

The clerk will call the roll.

The senior assistant bill clerk called the roll.

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

The result was announced—yeas 39, nays 61, as follows:

[Rollcall Vote No. 196 Leg.]

YEAS—39

Allard	Enzi	McConnell
Allen	Frist	Murkowski
Baucus	Gramm	Nickles
Bennett	Grassley	Roberts
Bond	Gregg	Santorum
Breaux	Hagel	Shelby
Brownback	Hatch	Smith (NH)
Bunning	Helms	Stevens
Burns	Hutchison	Thomas
Campbell	Inhofe	Thompson
Cochran	Kyl	Thurmond
Craig	Lott	Voivovich
Crapo	Lugar	Warner

NAYS—61

Akaka	Durbin	McCain
Bayh	Edwards	Mikulski
Biden	Ensign	Miller
Bingaman	Feingold	Murray
Boxer	Feinstein	Nelson (FL)
Byrd	Fitzgerald	Nelson (NE)
Cantwell	Graham	Reed
Carnahan	Harkin	Reid
Carper	Hollings	Rockefeller
Chafee	Hutchinson	Sarbanes
Cleland	Inouye	Schumer
Clinton	Jeffords	Sessions
Collins	Johnson	Smith (OR)
Conrad	Kennedy	Snowe
Corzine	Kerry	Specter
Daschle	Kohl	Stabenow
Dayton	Landrieu	Torricelli
DeWine	Leahy	Wellstone
Dodd	Levin	Wyden
Domenici	Lieberman	
Dorgan	Lincoln	

The motion was rejected.

Mr. KENNEDY. I move to reconsider the vote.

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

The motion was agreed to.

AMENDMENT NO. 810

The PRESIDING OFFICER. Under the previous order, there will now be 6 minutes for closing debate, divided in the usual form, prior to a vote on or in relation to the Gramm amendment No. 810.

Who yields time?

Mr. KENNEDY. I understand there are 3 minutes to a side.

The PRESIDING OFFICER. The Senator is correct.

Mr. KENNEDY. I yield myself a minute and a half and a minute and a half to the Senator from North Carolina.

Madam President, we have just finished the education legislation. In this

legislation, we held students accountable, school districts accountable, teachers accountable, and children accountable. Now we are trying to hold the HMOs accountable if they override doctors, nurses and trained professionals regarding the care for injuries of individuals. That is the objective of this legislation.

However, if employers interfere with medical judgments, they ought to be held accountable as well. The Gramm amendment says: No way; even if an employer makes a judgment and decision that seriously harms or injures the patient, there is no way that employer could be held accountable.

We may not have the language right, but at least we are consistent with what the President of the United States has said. We may have differences with the President of the United States and we do on some provisions. However, the Gramm amendment is an extreme amendment that fails to protect the patients in this country and fails to provide that needed protection.

Mr. GRAMM. Madam President, I make a point of order that the Senate is not in order. Senator EDWARDS deserves to be heard.

The PRESIDING OFFICER. The Senate will be in order.

The Senator from North Carolina is recognized.

Mr. EDWARDS. Madam President, this is an issue on which we have consensus. The President of the United States said, "Only employers who retain responsibility for and make vital medical decisions should be subject to suit."

Our bill provides exactly as the President describes. As Senator KENNEDY has indicated, we have consensus not only with the President of the United States but in this body and in the House of Representatives based on the Norwood-Dingell bill which was voted on before. This is an issue about which there is consensus.

We are continuing to work. Senator SNOWE and others are leading that effort. We are working across party lines to get stronger and more appropriate language so that employers know that they are protected without completely leaving out the rights of the patients.

I urge my colleagues to vote against the Gramm amendment, which is outside the mainstream, outside our bill, outside our position, outside Norwood-Dingell, and outside what the President of the United States has said.

I yield the floor.

The PRESIDING OFFICER. The Senator from Texas.

Mr. GRAMM. Madam President, throughout this debate, those who are in favor of this bill have said our bill is just like the Texas bill. Look at Texas. No employers have been sued, and there have been a minimum number of lawsuits. Yet when you look at this bill, it says employers can't be sued. Then it says they can be sued. And it has 7½ pages of ifs, ands and buts.

Are employers connected with the decision? Do they exercise control? ERISA says that in any employee benefit the employer is deemed to exercise control, which would mean that every employer in America is covered. The Texas legislature did not assume that every employer was perfect. They were worried about unintended consequences.

They also concluded that no employer can be the final decisionmaker because this bill, as in our bill, has an external review process that is run by independent physicians that are selected independently of the plan. They make the final decision, not an employer.

The Texas legislature decided what we should decide here; that is, if you get into ifs, ands, and buts, what is going to happen all over America is businesses are going to drop their insurance.

If we should pass the bill without this amendment in it, it is easy to envision that we could have a small business where the business owner calls in his employees and says, Look, we worked hard to provide good health benefits, but my father and my mother worked to build their business. I have worked. My wife has worked. We have invested our whole future in this business, and I cannot continue to provide benefits when I might be sued.

Think about the unintended consequences. That is what the Texas legislature did. They concluded that employers should not be liable. They cannot make the final decision under this bill. They cannot make the final decision under Texas law because it is made by an external group of physicians. But when you make it possible to sue them, they are going to drop their health insurance, and you are going to have fancy reviews and stiff penalties, but people aren't going to have health insurance.

I urge my colleagues to look at Texas. If you want to take all the claims of the benefits of Texas, do it the way they did it. They thought you created unintended consequences by letting employers be sued. They knew that employers could not make the final decision because they had external review, just as this bill and every other bill has. By doing an employer carve-out, they guaranteed that every small and large business in the State would know they cannot be sued.

The PRESIDING OFFICER (Mr. CORZINE). The question is on agreeing to amendment No. 810. The yeas and nays have been ordered, and the clerk will call the roll.

The assistant legislative clerk called the roll.

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

The result was announced—yeas 43, nays 57, as follows:

[Rollcall Vote No. 197 Leg.]

YEAS—43

Allard	Frist	Nickles
Allen	Gramm	Roberts
Bennett	Grassley	Santorum
Bond	Gregg	Sessions
Brownback	Hagel	Shelby
Bunning	Hatch	Smith (NH)
Burns	Helms	Smith (OR)
Campbell	Hutchinson	Stevens
Cochran	Hutchison	Thomas
Collins	Inhofe	Thompson
Craig	Kyl	Thurmond
Crapo	Lott	Voivovich
Domenici	Lugar	Warner
Ensign	McConnell	
Enzi	Murkowski	

NAYS—57

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

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

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

The motion to lay on the table was agreed to.

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

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

Mr. REID. Mr. President, we were in the process of trying to propound a unanimous consent request, but all the parties are not here. We will do that at 2:15.

MORNING BUSINESS

The PRESIDING OFFICER. Under the previous order, there will now be a period for the transaction of morning business for not to exceed 30 minutes with Senators permitted to speak therein for up to 5 minutes each.

Under the previous order, the Senator from Wisconsin is recognized to speak for up to 15 minutes.

COLORADO REPUBLICAN CASE

Mr. FEINGOLD. Mr. President, on April 2 of this year, the Senate voted overwhelmingly to pass the McCain-Feingold bill and ban soft money. Even before the roll was called on final passage and 59 Senators voted "aye," the Senate's foremost opponent of reform declared that he relished the opportunity to bring a constitutional challenge to the bill. "You're looking at the plaintiff," the Senator from Kentucky announced.

Opponents of reform have consistently expressed confidence that the courts will strike down our efforts to clean up the campaign finance system. They regularly opine that the McCain-Feingold bill is unconstitutional, and, despite clear signs to the contrary in the Court's opinion last term in *Nixon v. Shrink Missouri Government PAC*, express great certainty that the Supreme Court will never allow our bill to take effect.

Well, in its decision yesterday morning in *FEC v. Colorado Republican Federal Campaign Committee*, the Court again dumped cold water on that certainty. The court held that the coordinated party spending limits now in the law—the so-called "41a(d) limits"—are constitutional. It ruled that the coordinated spending limits are justified as a way to prevent circumvention of the \$1,000 per election limits on contributions to candidates that the Court upheld in the landmark *Buckley v. Valeo* decision in 1976. In my view, the decision makes it even more clear that the soft money ban in the McCain-Feingold bill will withstand a constitutional challenge.

The first thing to note about the Court's ruling is that it reaffirms the distinction the Court has drawn between contributions and expenditures and the greater latitude that the Court has given Congress in the case of restraints on contributions. The Court noted that the law treats expenditures that are coordinated with candidates as contributions, and the Court has upheld contribution limits in previous cases with that understanding. It agreed with the FEC that spending by a party coordinated with a candidate is functionally equivalent to a contribution to the candidate, and that the right to make unlimited coordinated expenditures would open the door for donors to use contributions to the party to avoid the limits that apply to contributions to candidates.

The Court rejected the Colorado Republican Party's argument that party spending is due special constitutional protection. Instead, the Court found that the parties are in the same position as other political actors who are subject to contribution limits. Those actors cannot coordinate their spending with candidates. The Court noted that under current law and the Court's previous decision in the first *Colorado* case, the parties are better off than other political actors in that they can make independent expenditures and also make significant, but limited, coordinated expenditures. The limits on coordinated expenditures have not prevented the parties from organizing to elect candidates and generating large sums of money to efficiently get out their message, the Court noted.

After determining that limits on party coordinated spending should be analyzed under the same standard as contribution limits on other political actors, the Court had little trouble in deciding that there was ample justification for those limits based on the need to avoid circumvention of the

contribution limits in the federal election laws. It pointed to substantial evidence of circumvention already in the current system, and the near certainty that removing the 41a(d) limits would lead to additional circumvention. The Court held:

[T]here is good reason to expect that a party's right of unlimited coordinated spending would attract increased contributions to parties to finance exactly that kind of spending. Coordinated expenditures of money donated to a party are tailor-made to undermine contribution limits. Therefore, the choice here is not, as in *Buckley* and *Colorado I*, between a limit on pure contributions and pure expenditures. The choice is between limiting contributions and limiting expenditures whose special value as expenditures is also the source of their power to corrupt. Congress is entitled to its choice.

So, Mr. President, I am pleased that the Court upheld Congress's right to limit the coordinated spending of the parties. But even more than that, I am pleased at the way that the Court looked at the constitutional issues in the case and the arguments of the parties. The Court's analysis demonstrates an understanding of the real world of money and politics that gives me great confidence that it will uphold the soft money ban in the McCain-Feingold bill against an inevitable constitutional challenge.

As my partner and colleague, Senator McCAIN, pointed out to me prior to my taking the floor, of course this decision was about hard money; but if you really read it, it isn't so much about hard money or soft money, it is just about money and the corrupting influence it has on our political process.

For example, the Court noted that "the money the parties spend comes from contributors with their own interests." And the Court recognized that those contributors give money to parties in an attempt to influence the actions of candidates. The Court said:

Parties are thus necessarily the instruments of some contributors whose object is not to support the party's message to elect party candidates across the board, but rather to support a specific candidate for the sake of a position on one, narrow issue, or even to support any candidate who will be obliged to the contributors.

This is precisely the point that we who have fought so hard to ban soft money have been making for years. These contributions are designed to influence the federal officeholders who raise them for the parties, and ultimately, to influence legislation or executive policy. The Court shows that it understands this use of contributions to political parties when it states:

Parties thus perform functions more complex than simply electing candidates; whether they like it or not, they act as agents for spending on behalf of those who seek to produce obligated officeholders.

The Court also recognized that the party fundraising, even of limited hard money, provides opportunities for large donors to get special access to lawmakers. The Court states: