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Senate

(Legislative day of Monday, March 6, 1995)

The Senate met at 9:30 a.m., on the expiration of the recess, and was called to order by the Honorable JOHN ASHCROFT, a Senator from the State of Missouri.

PRAYER

The guest chaplain, the Reverend Dr. Neal T. Jones, Columbia Baptist Church, Falls Church, VA, offered the following prayer:

Let us pray:

Gracious Heavenly Father, we thank You for the support of our constituents: optimists, pessimists, and realists. We ask Your help in passing legislation that will meet the needs of all our people.

Save us from optimism that exaggerates human goodness and ignores evil capacities. Deliver us from pessimism that looks at light and calls it darkness. Deliver us from pessimism that cloaks the world in black. Also, take us beyond the borders of realism. We need more than diagnostic accuracy and cold verdicts of limited human insight.

We, therefore, ask You to raise us above optimism, pessimism, and realism to hope. Help us to trust You, the One before, after, and within—always in charge of history. We praise You for giving us existential usefulness because of eternal trust.

In Jesus' name. Amen.

The PRESIDING OFFICER. Thank you, Reverend Jones.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore [Mr. THURMOND].

The assistant legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, March 9, 1995.

To the Senate:

Under the provisions of rule I, section 3, of the Standing Rules of the Senate, I hereby appoint the Honorable JOHN ASHCROFT, a Senator from the State of Missouri, to perform the duties of the Chair.

STROM THURMOND,
President pro tempore.

Mr. ASHCROFT thereupon assumed the chair as Acting President pro tempore.

RECOGNITION OF THE MAJORITY LEADER

The ACTING PRESIDENT pro tempore. The majority leader is recognized.

SCHEDULE

Mr. DOLE. Mr. President, this morning the leader time is reserved, and there will now be a period for the transaction of routine morning business until the hour of 11 a.m. with Senators permitted to speak therein for up to 5 minutes each with the following Senators to speak for up to the designated times: Senator THOMAS 10 minutes; Senator BAUCUS for 25 minutes; Senator DASCHLE for 30 minutes; Senator MCCONNELL for 10 minutes; and Senator BREAU for 15 minutes.

At the hour of 11 a.m. the Senate will resume consideration of H.R. 889, the supplemental appropriations bill.

We expect rollcall votes throughout the day and into the evening.

I am not certain how many amendments are pending. I guess it depends upon the disposition of one particular amendment. We will see what happens as we hopefully make progress on this important bill today.

MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Under the previous order, there will now be a period for the transaction

of morning business for not to extend beyond the hour of 11 a.m. with Senators permitted to speak therein for up to 5 minutes each.

Mr. THOMAS addressed the Chair.

The ACTING PRESIDENT pro tempore. The Senator from Wyoming.

Mr. THOMAS. I thank the Chair.

(The remarks of Mr. THOMAS pertaining to the introduction of S. 518 are located in today's RECORD under "Statements on Introduced Bills and Joint Resolutions.")

Mr. BAUCUS addressed the Chair.

The ACTING PRESIDENT pro tempore. The Senator from Montana.

Mr. BAUCUS. Mr. President, what is the pending business?

The ACTING PRESIDENT pro tempore. The Senate is conducting morning business. The Senator from Montana is recognized to speak for up to 25 minutes.

Mr. BAUCUS. I thank the Chair.

(The remarks of Mr. BAUCUS, Mr. CONRAD, and Mr. DASCHLE pertaining to the introduction of the legislation are located in today's RECORD under "Statements on Introduced Bills and Joint Resolutions.")

Mr. DASCHLE addressed the Chair.

(The remarks of Mr. DASCHLE, Mr. DORGAN, Mr. BUMPERS, Mr. KOHL, and Mr. FORD, pertaining to the introduction of S. 519 are located in today's RECORD under "Statements on Introduced Bills and Joint Resolutions.")

Mr. MCCONNELL addressed the Chair.

The PRESIDING OFFICER. Under the previous order, the Senator from Kentucky is recognized to speak for up to 10 minutes.

Mr. MCCONNELL. I thank the Chair.

LEGAL REFORM

Mr. MCCONNELL. Mr. President, the House of Representatives is in the

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



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midst of Legal Reform Week and on its way to passing three bills which, if enacted, would dramatically overhaul and improve our civil justice system. So, Mr. President, the first thing I would like to do is commend the House for its determination and its commitment to change the legal system.

With the exception of the general aviation bill last year, no court reform legislation of any sort has ever gotten anywhere in the Congress.

So the House this week is about to do something truly historic. Over in the House and over here I hope we now realize the civil justice system is broken.

Injured parties wait too many years to have their cases heard. While a few win big damage awards, many people suffering personal injuries do not get adequately compensated for those injuries. We know that for every dollar spent in America in these tort cases only 43 cents makes it to the injured party and 57 cents is taken up by the courts and the lawyers; 57 cents out of every dollar for transaction costs. That is not civil justice. More than half the money goes to transaction costs—lawyers, and expert witness fees, as well as administration of the court system.

Not only do victims fare poorly in the current legal system, but scarce economic resources are drained from more productive uses. Municipalities and nonprofit organizations must absorb spiralling insurance costs, threatening the important public services they provide. No small businessman can afford to be without a lawyer because of the liability maze. And, ultimately, the burden falls on the American people—as taxpayers and consumers, paying more for Government services and higher costs at the checkout counter.

In fact, enactment of legal reform would give the American people a much deserved tax break—a break from the litigation tax that is strangling our economy. This tax break, unlike all others, will not even require a budgetary offset. And, even more significantly, it will not impact the Social Security trust fund.

Perhaps if we add some specific language protecting Social Security to these bills, we will pick up a few Democrat votes. And, maybe then the President could support legal reform. Because as we learned from Attorney General Reno this week, the administration is strongly opposed to the legal reform effort. Interestingly, the administration's unhappiness with these initiatives focuses on federalism—State's rights. I am quite amazed by this approach; after all this administration has not met a problem that could not be solved without a new or expanded Federal program. We only need to remind ourselves of the health care debacle. It is only on this issue—legal reform—that they have suddenly found the 10th amendment.

The fact is, the problem is a national one, and Congress has ample power to

act, consistent with the commerce clause of the Constitution. Former Judge Robert Bork has eloquently disposed of the federalism issue in a letter he recently wrote to the Speaker. I ask that Judge Bork's letter be printed in the RECORD.

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

WASHINGTON, DC,
February 27, 1995.

Hon. NEWT GINGRICH,
Office of the Speaker, U.S. House of Representatives, Washington, DC.

DEAR MR. SPEAKER: I understand that several provisions either already in H.R. 956, the Contract With America's legal reform provision, or proposed to be included in it, have been criticized as unwarranted intrusions on the authority of the States.

The provisions include virtually all the reform measures that have been discussed over the previous several Congresses, including limits on punitive or non-economic damages and joint and several liability (whether applied to product liability suits or broader categories of cases); defenses relating to compliance with applicable federal regulations; regulation of contingency fees and other aspects of attorney conduct; and various statute of limitations reforms.

There can be little question that these reforms are well within the scope of Congress' authority under the Commerce Clause of the Constitution as it has been interpreted for many years. Beginning in the 1930s, the courts have read this Clause as a comprehensive grant of authority to Congress to regulate virtually any type of activity affecting the national economy. The measures under discussion indisputably fall within this broad category of regulation.

As you know, I have long believed, like many scholars and jurists (and many Members of Congress), that these broad interpretations of the Commerce Clause are questionable, and arguably out of keeping with the scheme of coordinate sovereignty intended by the Framers of the Constitution. Rather than simply resting on the federalism case law, therefore, I believe those measures are justifiable and necessary to protect the balance between State and Federal authority contemplated by the Framers. They could not have foreseen the spectacular growth, complexity, and unity of today's economy. It cannot be said with any certainty that they would not have passed a measure like H.R. 956 in today's circumstances.

The problems addressed by H.R. 956 are national problems. That is true not only because interstate commerce is affected, and not only because products and services are made more expensive as insurance costs rise, but also because the plaintiffs' tort bar chooses to sue in jurisdictions where awards of compensatory and punitive damages are highest. As a consequence, a state like California or Texas can impose its views of appropriate product design and the penalties for falling short on manufacturers and distributors across the nation. This is a perversion of federalism. Instead of national standards being set by the national legislature, national standards are set by the courts and juries of particular states.

No problem more preoccupied the Constitutional Convention than the necessity of protecting interstate commerce from self-interested exploitation by the States. Madison observed in Federalist No. 42 that no defect in the Articles of Confederation was clearer than their inability to protect interstate commerce. And in Federalist No. 11, Hamilton made clear that one of the key purposes

of the new Constitution was to prevent interstate commerce from being "fettered, interrupted and narrowed" by parochial state regulation.

The civil justice reforms under discussion are all designed to vindicate this central constitutional purpose. It can no longer be disputed that abusive litigation is having a profoundly adverse impact on interstate commerce. Indeed, a growing body of evidence suggests that the very purpose of much of this litigation is to discriminate against interstate commerce on behalf of local interests. Although discrimination of this type was anticipated by the Framers, the misuse of litigation to achieve this effect is a relatively recent development. It is not surprising, therefore, that Congress has not previously found it necessary to regulate in this area.

It is thus neither inconsistent nor hypocritical for Congress simultaneously to protect interstate commerce from parochial discrimination and to protect States and localities from unwarranted federal interference. Both steps are essential to maintain the constitutional balance established by the Framers. Clearly, over the last fifty years the overwhelming trend has been towards the unwarranted expansion of Federal authority at the expense both of the States and of individual liberties, and Congress can and should reverse that trend. But this fact should not blind us to the continuing necessity of protecting interstate commerce from parochial, discriminatory regulation by states and localities. Federal intervention for this purpose is not merely constitutionally permissible, it is important to vindicate the Framers' constitutional design.

Sincerely,

ROBERT H. BORK.

Mr. MCCONNELL. Mr. President, there is only one objection to reforming the legal system. And it is the objection of the trial bar. They may be getting beat in the House, but they have not really begun to fight. We will see them use their muscle in the Senate. They will throw everything they have at us. They will wrap themselves in the tragic stories of real people who have suffered injuries. And they will let Ralph Nader and his network of organizations which they—the trial lawyers—fund argue on their behalf.

Contrary to their assertions, our reforms will not hurt victims. We want to help victims get fairly compensated without long, drawn-out litigation. We want to encourage those responsible for injuries to settle with injured parties early. And, the House bill moves in the right direction.

But as the debate shifts to the Senate, I want to encourage my colleagues to look seriously at the McConnell-Abraham bill, S. 300. Our bill reverses the incentive structure of the legal system. We set up rewards for early settlement. We want to put more money in the hands of victims. Our limitation on attorney contingent fees, as the Washington Post editorial page noted this week, will do just that.

Mr. President, I ask unanimous consent that the Washington Post editorial be printed in the RECORD.

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

[From the Washington Post, Mar. 8, 1995]
CIVIL JUSTICE REFORMS

House Republicans are moving quickly to pass a series of bills designed to reform the civil justice system. At least three separate measures are expected to go to the Senate before the weekend: a bill concerning the payment of attorneys' fees, another making changes in securities fraud law and a third setting new rules for the payment of punitive damages and changes in product liability law.

Not every bill deserves support in its present form. But there is no denying that the majority party has taken on a problem that has been festering for some time. In their favor, it should also be noted that some of the more defective provisions of the "Contract With America" on this subject have already been improved by compromise and will probably be further fixed by the Senate.

The "loser pays" provisions of the first bill, which was passed yesterday, would have required unsuccessful litigants to pay winners' lawyers fees. It was always a bad idea. Taking any case to court would have been extremely risky, especially for those of modest means. As originally drafted, the bill deserved to be defeated. But it has been modified so that a loser must pay only if he has rejected a settlement offer and after trial is awarded less than that offer. Better, but still not perfect. The Senate should consider an alternative offered by Sens. Mitch McConnell and Spencer Abraham that would provide an incentive to litigants to settle (immediate payment and hourly attorneys' fees) and a penalty (reduced contingency fees in some cases) to attorneys who don't. Both measures are designed to encourage early settlement of disputes, but the McConnell-Abraham bill is less Draconian.

Securities fraud provisions have also been softened to take into account some of the suggestions offered by the chairman of the Securities and Exchange Commission, Arthur Levitt. The problem here—frivolous class-action lawsuits against a company as soon as its stock drops—is a real one. As reported by the House Commerce Committee, this bill drew support from almost half the Democrats. But additional changes may be warranted to protect stockholders in meritorious cases.

The most hotly contested bill will be considered last. It would limit punitive damages in all civil cases to three times compensatory damages including pain and suffering, or \$250,000, whichever is more. It would also narrow the risk of manufacturers' and sellers' liability in certain cases involving defective products. Many of the latter provisions make sense. Why not limit damages if the user has altered or misused the product, or if the accident was caused by drug or alcohol abuse? As for punitive damages, reform is overdue. Guidelines and limits must be set, whether caps are \$250,000 or \$1 million or something higher. Juries are at sea and sometimes come in with awards that are neither reasonable nor justified.

Yes, the fear of high punitive damages may keep manufacturers on their toes. But so would the fear of large fines payable to the public treasury in case of egregious misconduct. The system of providing unpredictable multimillion-dollar awards to single plaintiffs in order to deter corporate misconduct is unfair and inefficient. A shift to fines would make sense. Barring that change, clear guidelines on punitive damages are needed.

Mr. MCCONNELL. Mr. President, our early offer provision, which builds upon a bill introduced by House Minority Leader GEPHARDT 10 years ago, will pay

victims all of their losses, while taking many cases out of the court system altogether.

Our Nation is suffering from, as one editorial cartoonist called it, *lawsuitenitus*. It is a contagious disease and it is raging at epidemic proportions. The cure is a strong dose of legal reform. The only ones who will not like the medicine are those who thrive on the disease and profit from the spread of *lawsuitenitus* by earning huge fees.

Mr. President, we will have a number of bills here in the Senate to consider—the McConnell-Abraham Lawsuit Reform Act; the McConnell-Lieberman-Kassebaum Health Care Liability Reform and Quality Assurance Act; the Product Liability Fairness Act will be introduced next week, and there will be other initiatives. I look forward to comprehensive hearings on these bills, in the Judiciary, Commerce, and Labor Committees.

I am genuinely excited about the possibility of something happening on this issue. I remember being here 10 years ago as chairman of the Courts Subcommittee of Judiciary in 1985 and 1986, and we had numerous hearings on the subject of tort reform. But I knew we had no chance. We have had no chance for years. One of the positive results of last year's election, Mr. President, is that civil justice reform is now on the front burner and that genuinely excites this Senator who has had a great interest in this issue for many, many years.

And, most importantly I am hopeful we will enact reforms which give the American people a legal system that is fair, equitable, and accessible for the resolution of their disputes.

Mr. President, I thank you for your time.

I yield the floor.

Mr. BREAUX addressed the Chair.

The PRESIDING OFFICER. The Senator from Louisiana is recognized.

THE CONGRESS CAN BREAK THE TELECOMMUNICATIONS POLICY STALEMATE

Mr. BREAUX. Mr. President, for more than 10 years the Congress has deferred to Federal courts on making and shaping telecommunications policy. Antitrust law intended to remedy anticompetitive practices when AT&T dominated all facets of America's telecommunications services is the basis of court controlled communications policy. The resulting breakup of AT&T in 1983-84 under Judge Greene's modified final judgment is still the policy basis for keeping the brakes on the future development of this critical industry: Telecommunications is the engine of America's continuing race into the information age.

Technical complexities and the massive scale of economic returns for potential competitors in the industry have made it difficult to arrive at any industry-led agreement on fair and just

terms for bringing full competition to reality. Certainly such an agreement would simplify congressional efforts to unleash the industry from Federal court edicts so that the benefits of open competition will bring new and lower cost services, increased employment, and a continually improved telecommunications infrastructure.

Right now, Mr. President, between 50 and 65 percent of all U.S. jobs involve information processing, goods, or services; 90 percent of jobs created over the last 10 years were information related.

But there is more to come if we in the Congress can fashion reasonable legislation for evenhanded treatment of potential major competitors. Telecom giants are poised to spend billions over the coming 10 years to restructure their networks. One estimate of capital spending by the Bell companies alone on the information highway for equipment and infrastructure between 1994 and 1998 is \$25 to \$50 billion.

Mr. President, I believe that we can supercharge and sustain this potential growth if we fashion communications laws that will assure all telecommunications competitors that each of them will have a fair chance to thrive in fully competitive markets. We have a situation now in which each competitor is fearful of a law that will give an unfair advantage to equally powerful competitors.

As I see it, Mr. President, the key to establishing open competition in telecommunications is to deliver a fair process for freeing the grip that Bell operating companies now have on the local exchange system. Ideally, Mr. President, if any telecom carrier can have interference-free, open access to the local exchange to fully compete for the delivery of telecommunications, video, and information services to homes and businesses and at the same time allow for the regional Bells to have access to and the ability to provide long distance service for their customers, we would have created the stimulus for maximum growth in this industry.

But the Bell operating companies, Mr. President, are understandably reluctant about engaging in a process of enabling open access to the local exchange if it means tying their hands while equally strong competitors are raiding their customer bases. I am considering legislation that would require the Bells to provide to competitors interconnection to Bell company local exchange switches; provide access to network features on an itemized basis; provide technology that will allow consumers to move to a competitor and keep the same telephone number, and take other steps to assure State and Federal regulators that their systems are open to full competition.

The Bells are concerned, Mr. President, that this process of opening up the local loop under some legislative proposals will not be satisfied until