parents do we have in this body? How many people in this body have dealt with young people? I suppose everybody in this body remembers when they were 16, 17, 18—and you believe that the Government is going to regulate behavior and change behavior? We are going to make everybody's lifestyle healthier? That is another dynamic that has not been debated in this.

Ignoring other problems—isn't it interesting that the real problems in this country for young people, far more severe and far more immediate, are with illegal drugs and underage alcohol use, but, yet, we are not talking too much about those issues today. Why aren't we? Because we are losing the illegal drug debate and war. More young people today are on illegal drugs than before. It is a tougher issue. It is everybody's concern. But we beat our breasts down here and say, aren't we doing something great because we are going to take care of underage cigarette smoking.

By the way, you can look at numbers and polls on this. I know they all have them, and I have one done by Citizens for a Sound Economy, May 13 to 15 of this year, asking 1,200 Americans, as parents, what their biggest concern for teenagers is. No. 1, illegal drug use, 39 percent; gangs, 16 percent; alcohol, 9 percent; tobacco use, 3 percent. Again, does this diminish the importance of this issue? No, of course not, but let's have some perspective in this debate. And there are other problems that young people face. We have numbers from polls and from very conclusive studies that show what I am talking about.

Let me conclude, Mr. President, with a couple of final observations.

There is an interesting thread of arrogance that has run through this debate: Government is smarter; we can tell you what to do; you really don't understand the seriousness of tobacco use; you are not smart enough to sort it out yourself; but you see, we are in the Congress, we will tell you when something is dangerous and when it isn't; you can't read; you don't understand, I am sorry.

We can have that kind of society. We can have that kind of a world. Some countries do. But if that is what you opt for, you will opt for also giving up some personal freedom, some personal responsibility, and it might be a better world that way. But that is another part of this debate we haven't heard enough about, and it should be part of it.

As I said in my earlier remarks, all my colleagues mean well. They are well motivated, they want to make the world better, they want to do the right thing. There is no question about that. But I hope they will think for a few moments about some of the issues I have raised as we step back for a moment and try to put in perspective what we are doing. Are we really making the world better and accomplishing what we want to accomplish, focusing on teenage smoking, underage smoking, which, by the way, there are now laws on the books to deal with? Are we making it better by putting hundreds of billions of dollars of new taxes on our people, building a bigger Government and more programs and more regulations, and then on top of that, having to deal with the unintended consequences of our action that will affect culture and it will affect society? Those are all part of the total debate, Mr. President, that should be brought into focus.

I will vote against this bill, because I think it is not the right way to deal with some very serious problems.

I yield the floor.

Mr. CHAFEE addressed the Chair.

The PRESIDING OFFICER. The Senator from Rhode Island.

Mr. CHAFEE. Mr. President, there are two unanimous consent requests to be made. Senator HARKIN briefly has one.

Mr. HARKIN. I thank the Senator for yielding. Mr. President, parliamentary inquiry, I understand the Senator from Rhode Island is speaking next under a unanimous consent agreement, and after that is Senator HATCH?

The PRESIDING OFFICER. Senator HATCH.

Mr. HARKIN. I ask unanimous consent that after Senator HATCH, the Senator from Iowa be recognized to speak.

Mr. MCCAIN. I object. Objection.

The PRESIDING OFFICER. Objection is heard.

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

The PRESIDING OFFICER. The Senator from Rhode Island still has the floor.

Mr. CHAFEE. The Senator from New Hampshire has a unanimous consent request to make.

PROVIDING FOR CONDITIONAL ADJOURNMENT OR RECESS OF BOTH HOUSES OF CONGRESS

Mr. GREGG. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of S. Con. Res. 98, the adjournment resolution. I further ask unanimous consent that the resolution be agreed to and the motion to reconsider be laid upon the table.

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

The concurrent resolution (S. Con. Res. 98) was agreed to, as follows:

S. CON. RES. 98

Resolved by the Senate (the House of Representatives concurring), That when the Senate recesses or adjourns at the close of business on Thursday, May 21, 1998, Friday, May 22, 1998, Saturday, May 23, 1998, or Sunday, May 24, 1998, pursuant to a motion made by the Majority Leader or his designee in accordance with this concurrent resolution, it stand recessed or adjourned until noon on Monday, June 1, 1998, or until such time on that day as may be specified by the Majority Leader or his designee in the motion to recess or adjourn, or until noon on the second day after Members are notified to reassemble pursuant to section 2 of this concurrent resolution, whichever occurs first; and that when the House adjourns on the legislative day of Friday, May 22, 1998, or Saturday, May 23, 1998, pursuant to a motion made by the Majority Leader or his designee in accordance with this concurrent resolution, it stand adjourned until 2:00 p.m. on Wednesday, June 3, 1998, or until noon on the second day after Members are notified to reassemble pursuant to section 2 of this concurrent resolution, whichever occurs first.

SEC. 2. The Majority Leader of the Senate and the Speaker of the House, acting jointly after consultation with the Minority Leader of the Senate and the Minority Leader of the House, shall notify the Members of the Senate and House, respectively, to reassemble whenever, in their opinion, the public interest shall warrant it.

NATIONAL TOBACCO POLICY AND YOUTH SMOKING REDUCTION ACT

The Senate continued with the consideration of the bill.

The PRESIDING OFFICER. The Senator from Rhode Island has the floor.

AMENDMENT NO. 2433

Mr. CHAFEE. Mr. President, let me offer a few thoughts on why I believe the amendment authored by my good friend from New Hampshire, Senator GREGG, should be rejected.

Senators TOM HARKIN, BOB GRAHAM and I struggled with the liability issue when we were developing our own antitobacco bill, the so-called KIDS Act. We began our deliberations with a review of the global settlement that was reached by the 40 attorneys general from the various States. In summary, we concluded that we could not support some of the provisions of that legislation; namely, the prohibition on class action suits.

The attorneys general agreed that no class action suits would be permitted and there would be a ban on punitive damages against the industry. That is what the industry got out of the negotiation with the attorneys general, amongst other things.

Given the tobacco industry's behavior, how could we, the three of us working on that legislation, possibly accede to tort protections that would nullify entire categories of lawsuits, leaving injured parties high and dry?

But there were balancing factors which also had to be weighed, Mr. President. The industry's consent is terribly important to the implementation of a comprehensive national tobacco policy. It is far better to have the industry at the table and agreeing.

Certainly, endless litigation serves no one's interests but the lawyers. Thus, something had to be done to create a more certain environment, both for the plaintiffs and for the tobacco companies. Hence, we decided to include an annual liability cap in our bill of $8 billion; $8 billion would be paid out each year and that was it. If there were subsequent suits and judgments had been brought and earned previous thereto or subsequent, they would fall in line and collect in the ensuing years.

While the structure of the cap in Senator McCain's bill is somewhat different than the cap we had in our bill, nonetheless the intent is the same. The cap in the McCain bill does not stop a single lawsuit. It doesn't prevent a single lawsuit from being brought. It doesn't stop one injured party from being able to collect. Moreover, only those tobacco companies that accept and abide by the terms of this bill will be able to obtain the financial predictability that is provided by this liability cap. In other words, the company doesn't get the cap unless it agrees to a series of requirements upon the companies or company that we believe are very important to reach a fine settlement.

What are some of these? What do the tobacco companies have to do to be eligible for a so-called cap? It must sign a national protocol, a binding consent decree to assure it will abide by all terms of the McCain bill. It must agree not to delay its implementation through endless court challenges. These terms they must agree to, amongst other things, are: They must make very steep annual payments to the Federal Government. They must meet tough annual youth smoking reduction targets. In other words, there are percentages that youth smoking must go down each year. The companies have to meet those requirements. It obviously encourages them to come forward with ingenious stop-smoking efforts or cease from smoking or decline from taking up smoking. They must pay large fines if they fail to meet these goals.

What they also agree to is to fundamentally alter the way the tobacco products are manufactured and distributed, and they accept the regulation of tobacco products by the U.S. Food and Drug Administration, so-called FDA.

If tobacco companies fail to abide by the terms of this bill, they are not going to be eligible for the liability cap. The liability cap is something that helps the companies reach some certitude of what their payments are going to have to be. But if they don't meet these terms, they lose the rights under the cap. If they fail to meet the annual youth smoking reduction targets by more than 20 percent in any given year, they lose the protection of the cap. If they are caught evading the antismoking provisions, they lose the protection of the cap. So this isn't some giveaway to the tobacco industry. It is a necessary trade-off to obtain a strong national tobacco control policy.

At the end of the day, when all is said and done, we hope the tobacco industry will return to the table and sign the consent decrees which will accompany this bill. If the Gregg amendment is adopted, it reduces, obviously, the chances for that occurring.

What is the incentive for a tobacco company to come to the table if they lose even this cap protection? If we all are for obtaining the strongest possible antitobacco policy, then we ought to vote to table this amendment; that is, the amendment of the distinguished Senator from New Hampshire.

President Clinton supports the cap, as do many others who want a tough national policy to discourage youth smoking. Giving some predictability to tobacco companies who are willing to change the way they do business, it seems to me, is a small price to pay to get them at the table and participating in implementing these tough policies—indeed, the advertising policies to cease certain types of advertisements and to enter into other kinds of advertisement directed toward encouraging young people to give up smoking or to deter them from taking it up in the beginning.

So, Mr. President, I believe that the cap is a very worthwhile part of this McCain bill. And I urge my colleagues to reject the proposed amendment.

I thank the Chair.

Mr. MACK. Mr. President, there are few industries I consider more vile than the cigarette manufacturers. I believe they lied to the American people and knowingly addicted millions to their harmful product. It is with this disgust and anger in mind that I encourage my colleagues to vote against the Gregg Amendment.

Although at first blush it may seem the ''right'' thing to strike the liability cap if we want to punish the tobacco manufacturers, in effect we will have done exactly what they want us to do: Kill the bill. We should first ask ourselves what we are trying to accomplish with this legislation: Reduce teen smoking, fund worthy tobacco-related programs while holding harmless innocent parties such as farmers. Would the Gregg Amendment further any of those goals? No.

The provision stricken by this amendment does not grant immunity to anyone, rather it sets a yearly cap on what they will pay and allows us to charge fees, put in place advertising restrictions and conduct strict oversight. In essence, it keeps the companies out of bankruptcy thereby allowing us to keep a close eye on them and force them to undo some of the damage they have done. The liability cap of $8 billion per year cuts off no one's rights or payments, other than for those who want to settle their claims. Taking it away would likely result in many aggrieved parties going unpaid because the companies would file for bankruptcy protection, effectively shutting out meritorious plaintiffs from recovery.

For those of my colleagues worried about the tax burden imposed by tobacco legislation, I would think they would all vote against this amendment as well. If the Gregg Amendment is passed and the liability cap stricken, the fee would then become a pure tax and the overall tax burden on the American public would likely double. Here's why: The current bill would then not settle any state lawsuits, but rather simply impose a tax of at least $1.10. Because those state suites would continue, and likely be successful or settled, we should expect that the states will begin to impose their own taxes on tobacco. That means we see a $2–3.00 per pack increase in taxes—which is outrageous. In short, if you want to do nothing but tax and spend, vote for the Gregg Amendment. If you actually want to try and solve some of the problem of reducing teen smoking you should vote against it.

Mr. HARKIN. Mr. President, we are engaged in a historic debate and action on a plant that brought death and disease to millions of people in this country for 300 years. The outcome of our work will determine whether this nation moves to a sensible tobacco policy that will prevent the premature death of millions of our children or continues on the path of death and disease.

This is truly a historic, once in a lifetime opportunity to save lives and protect children. When else have we had legislation before us that truly could save millions of American lives? It is an opportunity I've been working towards since 1977 when I first introduced legislation to end taxpayer subsidies to tobacco advertising.

The need for bold action couldn't be clearer. Today, as in any other day, 3,000 children in America will take up a deadly habit that will cut 1,000 of their lives unnecessarily short. That's more than 3 jumbo jets full of children crashing every day. And the problem is getting worse. Smoking among high school seniors is at a 17-year high.

It is not reflected in this chart, but the CDC just reported that the percentage of high school students who smoke has increased from 27.5 percent in 1991 to 36.4 percent in 1997. They further found that a shocking 42.7 percent of students—and these are kids generally between 14 and 17—used cigarettes, smokeless tobacco or cigars in the past 30 days. We also know that the vast majority—fully 90 percent—of adult and lifelong smokers begin at or before their 18th birthday.

We can change all that. We know the key ingredients to reducing teen smoking. We know that a comprehensive set of reforms is needed. We need solid authority and resources for the FDA to oversee tobacco products. We need an aggressive education and counter advertising effort. We need community-based prevention. We need to expand our research. We need to have strong financial incentives for tobacco companies to take every action to cut teen smoking. And, most importantly, we need to price cigarettes out of the range of children.

Every major public health expert agrees that the single most important component of a comprehensive strategy to cut child smoking is a sudden and significant price increase. This is the centerpiece of S. 1889, the KIDS Act, I introduced with Senator JOHN CHAFEE and Senator BOB GRAHAM. Our bipartisan legislation provides for a

$1.50 increase in the per pack price of cigarettes—$1.00 the first year and another 50 cents the next.

As Dr. C. Everett Koop and Dr. David Kessler said, this proposal is ''tough medicine for a tough problem.''

Our approach, according to the CDC and other experts, would cut smoking by children in half, over the next three years. That's the sharpest and fastest reduction achieved by any bill proposed to date.

The bill before us, as reported out of the Commerce Committee, has a number of commendable features. In many ways it is very similar to the Harkin-Chafee-Graham KIDS Act. It has strong FDA provisions, strong public health provisions and its look-back and liability provisions have been substantially improved. We are very pleased that much of our work is reflected in the bill and we commend Senator MCCAIN for his good efforts.

However, on the crucial question of price, the bill is inadequate. The bill would increase the price of a pack of cigarettes by $1.10 over 5 years. To have the greatest impact on teen smoking the price should be increased by at least $1.50 a pack over a very short period of time.

I will be doing everything, working with my colleagues, on a bipartisan basis, to correct this fundamental shortcoming of the pending measure.

While I'll have a lot more to say about many aspects of this legislation, I want to focus the remainder of my remarks today on this critical issue of price. I do this not only because it is the most important feature of the legislation, but because it has been the focus of an onslaught of misleading television, radio and print ads as well as statements and mailings by the tobacco industry in my state of Iowa and around the nation.

The tobacco companies have been making a number of false arguments about the impact of increasing the price to cut down on teen smoking. Most disturbing have been their statements that teens don't respond to price increases—that increasing the price won't have an effect on the rates of underage smoking.

These accusations are not only run counter to the finding of every major public health organization and countless economists and studies, they contradict the industry's own internal documents and analyses that they tried to hide from the American people for so long.

Many studies published in respected journals have clearly documented the impact of price increases on teen smoking. The most recent estimates from the CDC is that for every 10 percent increase in the real price of cigarettes, the prevalence of teen smoking is cut by 7%.

In its report this year, Taking Action to Reduce Tobacco Use, the Institute of Medicine of the National Academy of Sciences concluded that ''the single most direct and reliable method for reducing consumption is to increase the price of tobacco products. . . .''

In 1994, the Surgeon General's report Preventing Tobacco Use Among Young People concluded that increases in the real price of cigarettes significantly reduces cigarette smoking and that young people are at least as price sensitive as adults.

And we have to look no further than our neighbors to the north—Canada—to find a real world example of the impact of price increases on teen smoking. As this table shows (attached) when real prices in Canada increased from $2.09 to $5.42, the number of 15–19 year olds smoking fell from 42 percent to 16 percent—a drop of 62 percent. However, when tobacco taxes were reduced, youth smoking began increasing after 15 years of decline.

As I said earlier, in addition to the abundant evidence on youth smoking and price, the tobacco industry themselves have admitted this in a number of their internal documents. For example, a 1981 Philip Morris document said, ''In any event, and for whatever reason, it is clear that price has a pronounced effect on the smoking prevalence of teenagers. . . .''

A 1987 Philip Morris document further details their knowledge and concern about the relationship to price and hooking kids as the next generation of smokers. The document says:

> You may recall from the article I sent you that Jeffrey Harris at MIT calculated, on the basis of Lewit and Coate data, that the 1982–83 round of price increases caused two million adults to quit smoking and prevented 600,000 teenagers from starting to smoke. Those teenagers are now 18–21 year olds . . ., 420,000 of the non-starters would have been PM smokers. Thus, if Harris is right, we were hit disproportionately hard. We don't need to have that happen again.

A 1982 RJR Reynolds document—that I ask unanimous consent to have included in the RECORD at this point—states clearly that an increase in the price of cigarettes will result in ''thousands of new smokers lost.'' This document says that a 15.1 percent increase in the real price will result in the loss of 93,000 ''new smokers'' aged 13 to 17 years old.

So when the tobacco companies now argue that increasing the price of tobacco products won't impact youth smoking—they are once again blowing smoke. They are once again trying to deceive the American people.

So, Mr. President, we have important work to do this week. We have the opportunity to do a lot of good and strike a blow for our children and for public health. I look forward to working with my colleagues, on a bipartisan basis, to seize this opportunity.

Tobacco reform is the issue of 1998. It is the crown jewel of this Congress. And passing a strong comprehensive tobacco bill is an opportunity we simply can't let pass by.

Unfortunately, victories in the tobacco wars have come few and far between. In 1988, we finally changed Federal law on smoking in airplanes. It was a full ten years later, and after failing one time, the Senate took its next step last September by passing the Harkin-Chafee plan to fully fund enforcement of the FDA youth ID check.

But I am more hopeful now than ever that we can pass a comprehensive plan that would once and for all change how this nation deals with tobacco and dramatically cut the number of our kids addicted to this deadly product. Mr. President, our goal is to be on the Senate Floor three years from now announcing that indeed, child smoking has been cut in half. We should all put our energies into making that happen.

Mr. FRIST. Mr. President, I rise to speak about the pending tobacco legislation. I am concerned that we have gotten off track in our consideration of comprehensive tobacco legislation and the importance of preventing children smoking.

Our focus must be youth smoking.

In an earlier speech on this floor, I reminded my colleagues of some of the alarming statistics about youth smoking. I will not dwell on all of those statistics; however, it is important to remember that 3,000 kids will start smoking today, and 1,000 of those children who start smoking over these 24 hours will die prematurely. Our purpose is to prevent these deaths.

I urge my colleagues to focus on the health of our children, and their children—to keep in mind youngsters traveling that tricky path from childhood to adulthood, surrounded by temptations and convinced of their own invincibility. What can we do to make it more likely that these children will arrive at adulthood without crippling addictions?

Mr. President, before answering that question and discussing the pending legislation, I want to pause and recall some recent history that helps explain how we have reached this point in the legislative process.

For many years, individuals were not successful in suing the tobacco industry because of the ''assumption of risk'' doctrine. No jury would side with the plaintiff because the smoker assumed the risks associated with smoking. However, a group of State attorneys general got together and started suing the industry to recover Medicaid cost for smoking related illness, thus avoiding the ''assumption of risk'' doctrine.

In the course of these lawsuits, internal industry documents were made public. From these documents, we learned that the Industry knew a lot more about the addictive nature of nicotine and the destructive effects of smoking tobacco than was previously thought.

Some states began to settle for huge sums from the tobacco industry. Mississippi settled in 1996 for $3 billion. Florida and Texas were the next to settle, for $11.5 billion and $15.3 billion respectively. And, as we have all read in the last week, Minnesota is the most recent to settle—at $6.6 billion.

In the spring of 1997, everyone came to the bargaining table —40 attorneys general, the industry, members of the plaintiffs' bar, and public health groups. They all sat down and worked out an historic tobacco settlement on June 20, 1997. The basic elements of the June 20th settlement included:

Industry payments of $368.5 billion over 25 years—to be funded by raising the price of cigarettes by $.70 per pack over 10 years;

Advertising restrictions—the industry voluntarily limited its First Amendment rights;

Youth access provisions and tough licensing for retailers who sell tobacco;

$2.5 billion per year for smoking cessation programs, public education campaigns and state enforcement;

FDA authority to regulate tobacco and smoking;

No class action suits or suits by any government entity;

Immunity for the industry from all punitive damages for past actions; and

Individuals were allowed to bring suits to recover compensatory damages for past conduct and compensatory and punitive damages for future conduct.

Because the settlement required the enactment of federal law, it came before Congress. We are here because the June 20th settlement requires us to be here. Implementing the provisions of that settlement, or provisions similar to it, requires federal legislation.

As we all know, several committees had jurisdiction over different provisions in the June 20th Agreement. Judiciary obviously had its role; the Labor Committee had its expertise in the public health programs and the FDA authority; Finance had jurisdiction over international trade aspects; Commerce, the liability and interstate commerce expertise; and the Agriculture Committee had a keen interest in the effects this type of unprecedented legislation will have on farmers—the one group not invited to the bargaining table during settlement negotiations.

After months of work, it became clear that it was impossible for all of these committees to put together their respective pieces of a comprehensive package in a vacuum. The Majority Leader asked Chairman MCCAIN to take on the herculean task of crafting comprehensive legislation to address underage smoking through the Commerce Committee.

The bipartisan bill produced by Senator MCCAIN and the Commerce Committee is by no means perfect. Even Senator MCCAIN admits that. But it is important that we not lose sight of the Commerce bill's virtue: it is a comprehensive approach. It is vital that the United States Senate address children smoking in a timely, thoughtful manner—the Commerce bill gives us the structure for doing this.

I return, then, to our central legislative focus: preventing youth smoking. After 6 hearings in the Labor Committee, 11 hearings in the Commerce Committee, and chairing a hearing on October 27, 1997 in my subcommittee on Public Health and Safety, I am convinced that the goal of cutting underage smoking in half over the next 10 years can be achieved only by a three-component comprehensive strategy. All three parts are necessary. No single part will accomplish this goal.

1. First, we must address advertising targeted to children. An article in the Journal of the American Medical Association reported on February 17 that advertising is more influential than peer pressure in enticing our children to try smoking, and it estimated approximately 700,000 kids a year are affected by advertising. The industry cannot continue to target kids, our society must stop glamorizing smoking on television and in the movies, and we must restrict advertising at sporting events and near our schools.

We tell our kids not to smoke, but then we look the other way when retailers sell to kids. We tell our kids that tobacco will shorten their lives, but clever advertising drowns out our message. So, we must restrict tobacco marketing that appeals to kids, but I know that the industry, like all industries marketing legal products, has substantial First Amendments rights that must be respected.

2. The second element of a comprehensive program is that there must be strong, effective public health initiatives, including tobacco-related research, treatment and surveillance. A bold effort is necessary to keep people from starting to smoke and to help people stop smoking. A strong commitment to basic science and behavioral research is critical. We need the very best scientific research on the physiology of nicotine addiction.

Such focused research made possible by this bill might even uncover a pill that eliminates the addictive nature of nicotine. Such a discovery alone would solve the destructive aspects of youth (and adult) smoking. This type of research might have benefits beyond tobacco; it also could be vital in our fight against substance abuse more generally.

3. Access is the third element. We must attack how easy it is for kids to get their hands on tobacco products. States must enforce the laws against youth smoking. Retail outlets must be a partner in our efforts to stop youth smoking. We must make vending machines far less accessible to kids. The price of cigarettes must go up—enough to discourage a teenager from purchasing, but not enough to create a black market—and there must be consequences for the underage teenagers who are caught with tobacco products.

As Chairman of the Public Health and Safety subcommittee, I heard chilling testimony from teens about how easily they purchased tobacco products. Nickita from Baltimore, now 18 years old, started smoking when she was 14. She testified that she would normally get her cigarettes from the store. She testified that she never had a problem buying cigarettes in the store, in fact, ''people in my community as young as 9 years old go to the store and get cigarettes. They do not ask for I.D.s.''

The lesson I learned from this testimony: We must enforce youth access laws. We must make it impossible for children to buy cigarettes in any neighborhood in this country. It is shameful that in America in 1998, a teenager can purchase tobacco in any of our neighborhoods.

Price is also a factor in access. While it is obviously only one of many factors, price does affect the level of a product's consumption. Consumption had been decreasing in the 1970s; however, between 1980–1993 the downward trend accelerated, with consumption falling by 3% a year at the same time that the inflation adjusted price of cigarettes increased by 80%. In addition, the early 1990s saw price cuts, and consumption leveled off with only modest decreases in price until 1996. Then, in 1997, prices rose by 2.3%, and consumption fell again by 3%.

Expert testimony, based on data from this country and others, clearly demonstrates that the price of cigarettes affects consumption. But a higher price alone won't solve this problem; a comprehensive solution is necessary.

Mr. President, I believe the Commerce Committee's bill is a good start toward addressing all three aspects of a comprehensive package: advertising, public health, and access. It also addresses an issue ignored by the June 20th settlement: tobacco farmers. These farmers were not at the table during the negotiation of the June 20th agreement. The industry ignored them. The attorneys general ignored them. Yet these hardworking men and women bear absolutely no responsibility for ads targeting kids or for underage sales. These men and women work hard for modest incomes, and we cannot ignore the impact that this legislation will have on their circumstances. The Commerce bill tries to rectify this oversight.

So, the Commerce bill addresses the three areas a comprehensive approach must include, and it protects tobacco farmers. That does not make the bill ideal. It is by no means perfect; however, it is not necessarily guilty of all the charges lodged against it.

Some urge that the bill is merely an attempt to destroy an industry that is producing a legal product, by raising the price too much. This is a legitimate concern. Are the numbers in the Commerce bill too high? We have had countless numbers of financial experts come before several of the committees of jurisdiction, and no one agrees on the answer to this question. Wall Street, the Treasury Department, and public health groups all have different levels.

We do know one thing: the industry agreed to $368.5 billion in exchange for some assurances that they were immune from future cost of unpredictable

lawsuits. Maybe the Commerce bill's figure of $516 billion is too high without similar assurances of protection. The industry obviously feels it is. But we know we cannot always trust the industry. I hope that, through our debate here, we can find common ground on the issue of the tobacco industry's payments.

I do not believe that those who support a comprehensive solution to teen smoking are trying to destroy the industry. Tobacco products are legal to manufacture and consume. We are engaged, however, in the tricky exercise of finding a price level that will help diminish teen consumption without bankrupting the industry or creating a black market. I am confident that we can work together in good faith to find that price.

I am gratified that the Senate rejected Senator KENNEDY's amendment, which would have treated industry payments as an excise tax of $1.50 per pack. This $1.50 tax was too much. The proponents were no longer as concerned with a comprehensive program targeted at preventing children from smoking as they were with enacting an excessively punitive excise tax, which would have punished smokers—who we need to be helping—and hit the working poor the hardest.

There is a temptation, especially among those who are always searching for revenue streams, to seize upon the opportunity of an excise tax to raise vast amounts of funds for other initiatives. We should be guided by health objectives and not by the search for revenue streams. The funds generated by the agreement should be used for tobacco related and health related activities—not the creation of new entitlements.

Mr. President, let me also address a related issue the tobacco industry is raising: Is the Commerce bill just a big tax bill? I find the industry's complaint that it is somewhat ironic. As I already noted, the industry volunteered to make over $368 billion in payments—all passed on to the consumer—as part of the July 20th payment. The industry called that payment a ''voluntary payment.'' That level was simply not enough; for one thing, it did nothing for the tobacco farmer, who was abandoned by the industry. Something more than $368 billion was necessary.

Yet now the industry complains that the entire amount of the payments included in the Commerce bill is a ''tax.'' Maybe, as I said, the Commerce bill's payments are too much. But it is disingenuous for the tobacco industry to now contend that the payments are all a tax; they came to us and sought our legislation, and they volunteered over $368 billion. We upped the ante a bit—in large part to protect farmers—and now it's suddenly a giant tax. We cannot treat this argument too seriously.

I want to emphasize how much more effective we can be with a settlement. We must have an industry that doesn't market to kids—a settlement gets us that—a price increase alone does not. Without the cooperation of the industry, there is no doubt that this bill will be held up in the courts—putting us years behind in our effort to reduce smoking. The industry does have First Amendment rights, and it can exercise them.

I invite the industry to come back to us and provide us with credible information about the level of payments they can afford. The industry can work with us to prevent youth smoking—or it can distort the record and continue to be vilified in the public eye. For the sake of stopping children smoking, I prefer that the industry rise above causing the problem of youth smoking and be part of the solution.

Some have charged that the Commerce bill is too bureaucratic. I believe that our families, communities and states should be empowered to fight teen smoking in the manner most suitable for the concerns of that state or community. We don't need big federal government structures to achieve our goal. The Manager's Amendment to the Commerce bill has done a good job of streamlining the bureaucracy it originally created. I am especially supportive of the increased empowerment and flexibility given to the States for the use of funds and for control over the public health initiatives.

Having said that, a comprehensive approach to prevent youth smoking isn't a simple undertaking. If we are after results, there must be a structure in place. I believe that we can effectively and efficiently use existing structures, in conjunction with the States, to have a comprehensive approach. Indeed, I played a crucial role in helping draft those portions of the Commerce bill dealing with the Food & Drug Administration. These provisions have earned widespread support, and I spoke on the floor Monday to explain them. They prove that we can use an existing agency to implement commonsense regulations to reduce youth smoking.

Another criticism of the Commerce bill concerns the possibility that it may create a black market. We should be realistic about the possibility of a black market. If we create a black market by raising the price too high—as was done in Canada—then we will lose all control over youth access. Again, this is one reason I voted against Senator KENNEDY's $1.50 per pack tax. Instinctively, and based on testimony to the Commerce Committee, I believe that price level is too high.

In short, Mr. President, I do have concerns with some parts of the Commerce bill. For this reason, I will be open-minded in considering amendments to it. The Commerce bill is a good starting point, but it is only a starting point. We can and should improve on it—as long as we do not lose sight of our ultimate objective: a comprehensive approach to prevent teen smoking.

The single criterion I will employ in assessing the amendments that come before the Senate is this: Is the amendment likely to complement a comprehensive strategy to prevent teen smoking? In other words, does it help restrict advertising targeted at children, promote public health, and address access to tobacco? If so, I will consider it; if not, I will reject it.

I respectfully suggest, Mr. President, that my colleagues keep the same focus. Rather than attempting to treat the tobacco bill as a new revenue stream—like my colleagues who want a $1.50 per pack excise tax—and rather than treating the bill as a chance to create many new federal programs, I urge my colleagues to focus on the children who will start to smoke during this debate. One-third of those children will die prematurely because they started to smoke. We must focus on stopping them from smoking.

Four years ago, I was saving lives as a heart and lung surgeon. I saw the ravages of tobacco in the operating room. The people of Tennessee elected me to use common sense to advance the public good. I submit that crafting a comprehensive approach to keep children from smoking is a chance for the Senate to save lives through the exercise of common sense. I urge my colleagues not to stray from that goal.

Mrs. MURRAY. Mr. President, we are engaging in one of the most important public health debates of this generation. We have a historic opportunity to enact a comprehensive, national antitobacco strategy to end the plague of death caused by smoking. As I listen to the debate here in the Senate I am discouraged by much of what I hear. This is not about taxes, or tax cuts. This is not about what the tobacco companies get or don't get in the deal. This is not about First Amendment rights or increased litigation. This is about one thing and one thing only. Will we stand up to the tobacco companies for our children?

Will the U.S. Senate say enough is enough. Will we fight to prevent the deaths of five million children under age 18 who will eventually die from smoking-related disease? Or will we allow the tobacco companies to shape the debate and beat back our efforts to protect children. Today, 4.1 million children age 12 to 17 are current smokers. Isn't this enough for the tobacco industry? Are we going to sacrifice more of our children?

I have listened very carefully to all sides on these issues. I have been told that a tax that is too high will bankrupt the industry. I have been lobbied by many claiming that without special deals, the tobacco companies will not agree to restrict advertising or will litigate this legislation to death. But, I have also heard from pediatricians; public health officials; former Surgeon General C. Everett Koop; and many Washington State members of the American Cancer Society, who have expressed their concerns by illustrating

the human costs of the lies and deceit utilized by the tobacco companies.

Tobacco kills more than 400,000 Americans every year. More people die in this country from smoking related illness than from AIDS, alcohol, car accidents, murders, suicides, drugs and fires. Twenty seven percent of Americans who die between the ages of 35 and 64 die from tobacco-related diseases. Isn't this enough? Why has it taken us so long to get to this point of the debate? 400,000 Americans die each year while we do nothing.

We owe our children more. I owe the children of Washington State more. I have an obligation to push for the toughest tobacco bill possible. I can promise you that on my watch the tobacco companies get no special deal and that protecting our children is what controls the debate. It is not what can the tobacco companies live with, but is right for our children.

The tobacco bill that I support will have economic sanctions that will force corporate culture changes by the industry. I will support efforts that penalize the companies if they continue to prey on our children. And I will not support anything that forgives an industry that sold a product that could potentially kill five million children alive today.

I have made some difficult decisions and votes throughout this process. But, I am proud of my votes to increase economic barriers to prevent children from purchasing cigarettes. I know the tobacco companies hate these kind of barriers. As we discovered in an internal Philip Morris document from 1981, ''In any event, and for whatever reason, it is clear that price has a pronounced effect on the smoking prevalence of teenagers.'' There is no dispute on the sensitiveness of children to price increases. Both public health advocates and the tobacco companies agree. The public health community supports these barriers and the tobacco industry fears them. But some in the U.S. Senate disagree that price matters. I stood up and said no you will not addict 3,000 children a day with cheap cigarettes.

Some of us argue on the floor that without special immunity protection or predictability, the tobacco companies will never accept tough advertising restrictions or consent to FDA regulation. To this I would respond simply by saying if we make the look-back surcharges so tough that without major cultural changes companies will see profits evaporate, we will get our advertising restrictions. If we show that these advertising strategies are aimed at our children we will get these restrictions. We do not need to give special deals that allow tobacco companies to walk away from their responsibilities.

The tobacco companies have lied to Congress and the American people now they want to negotiate in good faith. In the 1980's, there was legislation in the House of Representatives regarding safe cigarettes. There is technology that would allow tobacco companies to manufacture a cigarette that was almost fire safe. The Safe Cigarette Act, introduced by Representative MOAKLEY was fought at every level by the industry. They claimed that it was not cost effective to make a cigarette that would prevent the tragic death of children in fires caused by a carelessly discarded cigarette. Saving children from a horrific death from fire was not enough of an incentive for the manufacturers to sacrifice some of their billions of dollars in profits. Instead they sacrificed children.

Now the industry wants immunity. We are supposed to give them caps on their liability and responsibility in exchange they will become responsible corporate citizens. This claim simply has no merit. They do not deserve any special deals.

Will the tobacco companies challenge these provisions in court? It is hard to imagine an industry that has patented their own brand of litigation and used legal maneuvers to hide their deceit and lies, walking away from another opportunity to challenge restrictions in court. If this industry wants to tie this up in court for years to come, I would say we need to make the look-back surcharges so tough that their own stock holders will not allow this kind of irresponsible behavior. I caution the tobacco industry—if you want to spend the next few years litigating instead of cleaning up your practices you may very well become extinct in the next Century. What would the world be like without the plague of tobacco? Maybe this is what the industry should ask the American people?

I urge my Colleagues to think long and hard about this debate. We will never get another chance like this one to really make the world a safer and healthier place for our children. Let's side with our children today instead of the tobacco companies.

Mr. WYDEN. Mr. President, the international provisions of the tobacco legislation have been the subject of many hours of discussion and negotiation. The current provisions serve as a strong platform that I hope this body will continue to build upon in the years to come as we seek to protect all children from the diseases and the economic costs brought about by tobacco use. I received letters which demonstrate the breadth of support and the importance the public health community places on maintaining the international tobacco control provisions in the tobacco legislation.

I ask unanimous consent to have these letters printed in the RECORD.

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

EFFECTIVE NATIONAL ACTION TO CONTROL TOBACCO

May 20, 1998.

Hon. RON WYDEN,
Hart Senate Office Building,
U.S. Senate, Washington, DC.

SENATOR WYDEN: Last summer's agreement between the tobacco industry and the Attorneys General was flawed because of its failure to consider international tobacco and health issues. We commend you for your strong leadership on this issue and support your efforts to ensure the greatest level of protection possible from tobacco for all children.

The international provisions in S. 1415 represent a good start. It is vital, however, that they not be weakened at all and that serious consideration be given to strengthening them.

Thank you for your tremendous leadership in protecting people from tobacco. We look forward to working with you on this issue.

Sincerely,

American Association of Physicians of Indian Origin; American Cancer Society; American College of Preventive Medicine; American Heart Association; Association of Teachers of Preventive Medicine; Campaign for Tobacco-Free Kids; Interreligious Coalition on Smoking OR Health; Latino Council on Alcohol and Tobacco; National Association of County and City Officials; Partnership for Prevention; Summit Health Coalition.

LATINO COUNCIL ON ALCOHOL AND TOBACCO,

Washington, DC, May 19, 1998.

Hon. RON WYDEN,
U.S. Senate, Senate Hart Office Building, Washington, DC.

DEAR SENATOR WYDEN: The Latino Council on Alcohol and Tobacco (LCAT), members of the Hispanic Health and Education Working Group and other Latino professionals want to thank you and your staff for your hard work in supporting international provisions for tobacco control. You and your colleagues are putting forth a signal, a good beginning, a starting point for assuring that the children of the world will be protected from the unacceptable practices of the tobacco giants.

Latino parents, educators and public health experts believe that US standards should be upheld worldwide. Federal workers should not support tobacco companies or their subsidiaries abroad. International agencies such as the World Health Organization and the Pan American Health Organizations and non-profit organization should receive funding for their efforts to prevent, treat and stop the spread of smoking related diseases. Anti-smuggling provisions should be strengthened. The US should be a leader in the fight against the spread of tobacco related diseases. You have made it clear through your efforts that public health has no boundaries.

We trust that you will continue to work on international tobacco control. We thank you for your leadership and commitment to these issues.

Sincerely,

JEANNETTE NOLTENIUS.

AMERICAN LUNG ASSOCIATION,

May 19, 1998.

Hon. RON WYDEN,
U.S. Senate, Washington, DC.

DEAR SENATOR WYDEN: Thank you for your commitment to protect the world's children from tobacco. The American Lung Association shares your concern that children around the world are prime targets for the tobacco industry. The international provisions of S. 1415, as amended, represent a strong first step toward curbing the worldwide tobacco problem that the World Health Organization calls a global epidemic.

The result of tobacco legislation should not be to redirect the tobacco industry's focus from America's children to children elsewhere around the world. Because of your efforts, the bill's international measures will

fund a public health effort around the world, require cigarette labeling and permanently stop the U.S. government from marketing and promoting the export of cigarettes. We cannot allow this progress to be rolled back by weakening amendments on the Senate floor.

Strong international tobacco control measures are part of the sound tobacco control policy outlined by the public health community and leaders like Dr. Koop and Dr. Kessler. This approach also includes a significant increase in the cigarette excise tax, full authority for the Food and Drug Administration, complete document disclosure, strict penalties on the industry for marketing to children, protection from environmental tobacco smoke, potent public health programs and, of course, no special protections, like immunity or caps, for the tobacco industry.

Sincerely,

JOHN R. GARRISON,
CEO and Managing Director.

Several Senators addressed the Chair.

The PRESIDING OFFICER. Under the previous order, the Senator from Utah is recognized at this time.

Mr. KERRY. If I could just ask a parliamentary, procedural question.

Mr. HATCH. I will be happy to yield without losing my right to the floor.

Mr. KERRY. Mr. President, with the agreement of the Senator from Arizona, we want to try to structure the order for the next three speakers, if we could. I ask unanimous consent that after the Senator from Utah speaks——

Mr. MCCAIN. Senator DASCHLE.

Mr. KERRY. The minority leader be recognized; and after the minority leader, the Senator from New Hampshire be recognized——

Mr. MCCAIN. Then do a tabling motion.

Mr. KERRY. At which point, Senator MCCAIN will move to table.

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

Mr. KERRY. I thank the Chair. And I thank the Senator from Utah.

Mr. HATCH. You are welcome.

A critical component of our debate must be the issue of this bill's constitutionality. This is a matter of extreme seriousness.

We are considering a bill that is fundamentally flawed with respect to its constitutionality. And that is despite the fact that each one of us swore to uphold the Constitution of the United States of America when we were elected and sworn into this office.

Many skeptics, particularly in the media, contend that Congress will pass for political reasons any measure that gains any sort of consensus, even if it violates the Constitution.

I reject that. I certainly hope they are wrong. I believe that the most important job that members of Congress have is to protect, preserve, and defend the Constitution of the United States. And, as Judiciary Committee chairman, I take this job very seriously.

Why? The answer is, for over 2 centuries the Constitution has been the genesis of our liberty and a source of America's amazing growth and prosperity.

The Constitution fosters liberty and prosperity by circumscribing Government's ability to interfere in the lives of the people. Thus, our Government is termed one of limited powers.

In fact, I believe that the structure of the Constitution—the separation of powers, checks and balances, and federalism—and not the system of courts, is the best protection of our liberties.

The salient fact is that the Constitution itself was designed to be, in the words of Alexander Hamilton in the Federalist No. 84, ''in every rational sense, and to every useful purpose, a bill of rights.''

One such constitutional mechanism to protect liberty is limiting Congress' legislative authority to only those laws that are reasonably derived from its enumerated powers contained in Article I of the Constitution, which in practice means that such laws must be consistent with the meaning of the Constitution's provisions and the Bill of Rights. As such, Congress has a special role in defending the Constitution and safeguarding our liberty by policing itself and by controlling its own appetites.

I wholeheartedly agree with the sentiment of Justice Oliver Wendell Holmes, who in 1904 gave the opinion that, ''It must be remembered that legislatures are the ultimate guardians of the liberties and welfare of the people in quite as great degree as the court[s].''

So this is why we are having this debate—to exercise our authority to ensure that any legislation that is passed is, in fact, constitutional. Let us confound the cynics by doing the right thing.

I pray that the Senate will consider the constitutionality of the floor vehicle and any other bill offered as a substitute. To skirt this issue would be to violate our very oaths of office.

I believe that the bill now being considered in this chamber suffers from a number of serious constitutional problems.

These problems permeate the bill.

Besides jurisprudential concerns, there are significant practical considerations, because passage of the bill could result in constitutional challenges that, if successful, will nullify the key sections of the bill. This is true for the bill as reported, the bill as rewritten over the weekend, and the bill as modified on the floor on Monday. Removal of many ''consensual'' items to a new title XIV has not addressed these concerns.

Mr. President, if key provisions in the bill are nullified, the efforts of Congress to enact an effective and truly comprehensive antismoking, antisnuff, plan will be severely impaired and virtually nothing will have been done to effectively reduce youth smoking.

I want to stress that the constitutional problems primarily arise because the Commerce version and several other major bills have moved from being a codification of the June 20, 1997, proposed agreement—which contemplated voluntary participation of the tobacco companies—to tax-and-spend and command-and-control legislation.

Without the voluntary participation of the tobacco companies—and the State attorneys general—both the so-called ''look-back'' provisions and advertising restrictions contained in this Commerce bill become constitutionally problematic. These and other constitutional problems raise first amendment, bill of attainder, takings clause, and due process clause issues.

More specifically, without the voluntary cooperation of the parties, the advertising ban contained in S. 1415 as amended will probably fall. This is a shame, because almost all health experts believe that restricting advertising is necessary in order to reduce teen smoking. The advertising restrictions in the Commerce bill are contained in both the protocol and in a section that codifies an FDA rule that also restricts otherwise lawful tobacco advertising.

The Supreme Court, in the 1996 decision 44 Liquormart, Inc. v. Rhode Island, emphasized that any restrictions on truthful advertising must receive the highest scrutiny, and be narrowly tailored to meet the statutory goal. They required that other less restrictive alternatives be employed to resolve problems before speech is censored.

The majority of scholars and lawyers who have looked at the issue agree that unless the tobacco companies voluntarily waive their constitutional rights, which is what they did in the June 20, 1997, agreement, most restrictions on the advertising of a lawful product, such as tobacco, would run afoul of the first amendment.

Indeed, most conclude that the restrictions contained in the protocol and FDA rule are not narrowly tailored and that other alternatives exist to reduce teen smoking.

Experts from the left to the right agree. Professor Laurence Tribe of Harvard Law School; Judge Robert Bork; Floyd Abrams, one of the most notable first amendment lawyers; the liberal ACLU and the conservative Washington Legal Foundation, all oppose these advertising restrictions as unconstitutional. It does not matter whether the restrictions arise from the codified FDA rule or in the settlement itself, both are unconstitutional. Let me just read to you some of their views.

Let us take the testimony of Floyd Abrams before the Senate Judiciary Committee on February 10, 1998:

> Any legislation of Congress which would purport to do by law what the proposed settlement would do by agreement in terms of restricting constitutionally protected commercial speech, is, in my estimation, destined to be held unconstitutional. . . . It is unlikely that, at the end of the day, the FDA's proposed regulations could survive First Amendment scrutiny.

That was given before the Senate Judiciary Committee on February 10, 1998.

Let me go to the next chart here. These are quotes by the American Civil Liberties Union to the Senate Judiciary Committee on February 20, 1998.

Both the legislation and proposed regulation by the Food and Drug Administration. . .are wholly unprecedented and, if enacted, will most likely fail to withstand constitutional challenges.

There are solid arguments.

Let us go to the next one.

The next chart is of Judge Robert Bork, dated January 16, 1996, when he said:

The recent proposal of the FDA to restrict severely the First Amendment rights of American companies and individuals who, in one way or another, have any connection with tobacco products [is]. . .patently unconstitutional under the Supreme Court's current doctrine concerning commercial speech as well as under the original understanding of the First Amendment.

Those are very strong arguments from well-established constitutional authorities.

I also have a letter, dated March 17, 1998, from Floyd Abrams, to Senator MCCAIN, concluding that the FDA restrictions are as violative of the first amendment as the somewhat broader advertising restrictions contained in the protocol of the Commerce bill. I ask unanimous consent that letter be printed in the RECORD.

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

CAHILL GORDON & REINDEL,
NEW YORK, NY, MARCH 17, 1998.

Re proposed restrictions on cigarette advertising.

Hon. JOHN MCCAIN,
U.S. Senate,
Washington, DC.

DEAR SENATOR MCCAIN: I take the liberty of writing to you with respect to the questions you posed to the Clinton Administration concerning its views about and general support of S. 1415. In my view, your questions were particularly well taken given that any ban on truthful advertising of products that may lawfully be sold to adults—whether of cigarettes or any other product—raises very serious First Amendment issues. Regrettably, the same cannot be said of the Administration's response to you by letter dated February 27, 1998. In that letter and its attachment, the Administration claims that the ''significant constitutional concerns'' and ''difficulties'' it believes are raised by S. 1415 are not presented by the proposed FDA regulations on tobacco product advertisements. That is not the case, not in my view nor that of many others who have studied the FDA rule and opined on its constitutionality.

The expansive sweep of the proposed FDA rule makes it no less constitutionally infirm than the advertising restrictions in S. 1415. The scope of the rule tells the story. All cigarette advertising would be banned in any media other than ''permissible outlets'' such as newspapers, magazines, periodicals and billboards. Those outlets would, in turn, be liable to criminal prosecution and the entry of civil injunctions if they published any cigarette advertisements other than ones in black and white text containing a second warning statement in addition to the current Surgeon General's warning. The only exception to the text-only requirement would be for certain ''adult'' publications, a category that apparently would exclude such mass-circulation magazines as Better Homes and Gardens, Life, National Enquirer, Newsweek, People, Popular Science, Sports Illustrated, and TV Guide. Adults, of course, comprise the vast majority of the readers of these publications.

That the proposed FDA rule's extreme breadth and rigidity would serve to all but ban cigarette advertising to adults should be indisputable. What else can be said of a proposed regulation which would ban all outdoor advertising within 1,000 feet—over three football fields in every direction—from any playground or school anywhere in the nation? The 1,000-foot rule seems particularly gratuitous in view of the fact that it would ban advertising that FDA, by virtue of its proposed text-only requirement, already has sought to strip of the features FDA claims make it appealing to young people. The unbridled sweep of these restrictions is in no manner tailored to their supposed aim. This is particularly true given the availability of far less speech-restrictive alternatives to an ad ban, including stricter enforcement of existing underage sales restrictions and enactment of tougher new laws against sales of cigarettes to minors.

The Administration cannot seriously quarrel with the reality that by so severely limiting the placement and the nature of ''informational messages'' that advertise tobacco products to adults, those messages will no longer reach them. That result, the Supreme Court repeatedly has held, is unconstitutional—the government may not ''reduce the population . . . to reading only what is fit for children.'' *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957), *see also Reno* v. *American Civil Liberties Union*, 117 S. Ct. 2329, 2346 (1997); *Sable Communications Inc.* v. *FCC*, 492, U.S. 115 (1989); *Bolgar* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 71–72 (1983). In short, the FDA rule is no constitutional panacea. It, too, suffers the same fatal flaws evident in any scheme seeking broadly to ban truthful, nondeceptive advertising for a legal product.

In sum, I respectfully submit that the proposed FDA regulation could not withstand judicial scrutiny under the First Amendment.

Sincerely,

FLOYD ABRAMS.

Mr. HATCH. There are other provisions of the bill that are constitutionally infirm.

The look-back penalties in the Commerce bill, which are imposed on the tobacco companies if teen smoking does not meet certain goals for reduction, are subject to constitutional challenge unless they are voluntarily agreed to by the tobacco companies.

I must add that the Commerce bill now terms the penalties ''surcharges,'' but this simply is an attempt to elevate form over substance. No matter how it is termed, these payments are the functional equivalent of fines.

Chief among the grounds for challenging this provision is due process.

The Supreme Court has held that imposed penalties must be related to the objective of the legislation. Penalties should not be imposed without a showing of fault. I refer you to the Vlandis v. Kline case (412 U.S. 441) in 1973 which held that penalties without fault create an ''irrebuttable presumption.''

Given what we know—or do not know—about how teens react to advertising, it is possible that even if the tobacco industry does all that it can to prevent teen smoking, the target will not be met.

Moreover, besides the look-back penalties, the Commerce bill contains an additional provision that companies lose their liability cap protection if underage smoking exceeds the targets by a set amount. This is also done without a showing of fault.

Thus, it is clear that a court would interpret the Commerce bill's penalties as punitive. It is possible, then, that the look-back provisions could fall under the provision in the Constitution that prohibits Congress from passing a bill of attainder.

I refer my colleagues to the Cummings v. Missouri case (71 U.S. 277) in 1867. George III and the Parliament had used bills of attainder to punish their political enemies, and the framers of the Constitution wisely forbade Congress from doing the same.

Certain payments made by the industry raise fifth amendment takings clause issues. For instance, it could be argued that some of the payments made by the industry constitute a forced seizure of money. The initial $10 billion up-front payment and the first six annual payments are owed regardless of whether there are any tobacco-related incomes and regardless of whether there are any tobacco sales.

I might also direct my colleagues attention to a new provision which extends liability to the parent companies of tobacco subsidiaries, such as R.J. Reynolds and Philip Morris, just to mention two. The effect of that provision would be to extend the penalties to the conglomerates' food business, for example, even though they have independent operations and no fault on their part has been shown.

These payments can neither be characterized as a tax or a licensing fee and would constitute uncompensated takings under the fifth amendment. I refer, for example, to *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith* (499 U.S. 155, 162–163), a 1980 case where cash and bank account seizures were held to be uncompensated takings under the fifth amendment.

The current version of the Commerce bill requires all tobacco manufacturers to release attorney-client and work product documents to the FDA and establish, finance, and run a document depository. Now, while this is a worthwhile goal,

I believe that the wrongdoings of the tobacco companies have been hidden for far too long and this information should be brought to the light of day to help the FDA in regulating tobacco and assuring the public health.

What some of my colleagues fail to appreciate is that it must be done in a constitutional manner, or it is all for naught.

We must remember that the June 20 settlement agreement presupposed voluntarily participation by the tobacco companies in releasing proprietary documents and in establishing and financing the document depository.

While litigation documents already made public can be forwarded to the FDA, it is problematic that the industry could be required to release additional documents, especially work product, confidential, or privileged documents. Such documents are properly defined by the fifth amendment. I refer you, for example, to the Nika Corp. v. City of Kansas City (582 F.Supp. 343 (W.D.Mo.)), a 1983 case, where the corporation's documents were held to constitute property under the fifth amendment.

Moreover, pursuant to the same theory, the forced funding by the industry of the depository—the leasing of the building, the salaries of the personnel—indeed as for any confiscation of cash or other valuable assets, would constitute a taking under the fifth amendment requiring compensation. I refer you to Webb's Fabulous Pharmacies, Inc.

Let me conclude my remarks by saying unless we have the voluntarily participation of the tobacco industry, I doubt that a comprehensive bill like the present Commerce bill could be implemented. Such a bill will undoubtedly be successfully challenged in the courts, and I believe the litigation and the inevitable appeals could take years to resolve.

In other words, I make the case that if this bill passes in its current form, without the cooperation of the tobacco companies, which will be the case, then it will be litigated for at least 10 years.

And in the end, I believe, it is likely to be overturned because it will be found unconstitutional. If that is so, then we are risking the lives of 10 million more kids who will become addicted to tobacco and die prematurely as a result of our failure to do the right thing, right now, on the floor of the Senate and in the House of Representatives.

It is important that these constitutional issues be addressed. It is important we not ignore the Constitution. It is important that we uphold the Constitution.

I know that the health of our children is of paramount concern to all of my colleagues. So let us at least do the right thing and pass a bill that is constitutional. The protection of the Constitution and the promotion of public health are not inconsistent goals. The American people demand both and we should give it to them.

I hope all who are here today will pause a moment to consider this.

This total cost of this bill has been estimated by some to be $516 billion, although I believe it is far higher.

It is estimated that the bill will result in a price per pack cost increase of $1.10 per pack, although this is at the manufacturers' level and I believe it will go higher.

There are a whole raft of other add-on costs not included in the $1.10 figure: the wholesaler and retailer markups; the impact of growing contraband sales which divert revenues; possible triggering of the look-back provisions; and new state excise taxes. That is why several analysts who have done detailed economic models have concluded that the cost will be over $5 per pack, or over $50 per carton, of cigarettes.

These are important considerations.

If we do not rectify the situation and approve a constitutional measure, then I think everybody who votes for this bill would deserve a great deal of criticism for what has happened. What really bothers me, to be honest with you, is how some who represent the public health community choose to ignore these issues. Their motives seem to be directed more at punishing the tobacco companies than at securing a tough, workable bill.

Nobody dislikes the tobacco companies more than I do, and nobody has fought harder to try to get the tobacco companies put in line.

But frankly, unless they come on board, unless we can bring them to the table, this whole thing could amount to an exercise in futility. The constitutionality issue is key here, and I just don't see how we can continue to ignore it.

Mr. DASCHLE addressed the Chair.

The PRESIDING OFFICER (Mr. SMITH of Oregon). The Democratic leader.

Mr. DASCHLE. Mr. President, I know we are about to come to a vote on this amendment. I begin simply by complimenting the sponsors of the amendment for what I know is a well-intended effort to address one of the most consequential of all the issues we must face. I certainly don't deny a very strong case can be made for following through with what is described as the intent of this amendment. I happen to come down on the other side, and I am going to try to explain the reasons why I believe this amendment ought to be defeated. But it is not without high regard for the sponsors, both Senator GREGG and Senator LEAHY, and the effort they are making.

Let me just say, as to the question of immunity, one thing that I think needs to be said is that there is no immunity in this bill, period. There is none. No one should be misled. There is no immunity in this legislation. There are ways with which we deal with the tobacco companies and their legal standing, but no one should say that the bill provides immunity for the tobacco companies. On the issue of immunity, I think the managers of the bill have made great progress over the course of the last week. Working with the administration, they have improved dramatically what was done initially in the Commerce Committee. What the Commerce Committee itself did, in my view, is raise serious concerns that I, frankly, felt had to be addressed if, indeed, we were going to resolve the overall issue of how we approach tobacco policy in the future.

There were special protections for the tobacco industry that were written into the committee bill originally, which I believe were very, very seriously in error as a matter of public policy. For example, allowing parent companies of tobacco companies total immunity would have been wrong. To say that we are going to ban all claims based on addiction would have been wrong. To say that we were going to prevent State courts from hearing all claims would have been wrong.

Mr. President, I want to make sure that all of our colleagues understand that every one of those special provisions has now been eliminated. All of those special provisions no longer exist. The managers' amendment, which is now part of the bill, has eliminated all of them. The only remaining provision is a cap on yearly payments, and that cap has been raised from $6.5 billion to $8 billion. So before any Senator is called upon to make their vote, I hope they understand that simple fact—perhaps I should say those simple facts. There is no immunity in this bill; there are no special protections, unlike what was reported out of the Commerce Committee. What is left is a cap that has been raised by $1.5 billion annually.

Let me emphasize something else about that cap. The cap is available only to those companies that agree to additional advertising restrictions beyond what is contained in the FDA rule. They have to commit never to challenge the entire bill to be eligible to come under that cap. They can't advertise and they can't challenge the provisions of this legislation just to be eligible. And then there is one more thing. Everybody needs to understand that in order just to be able to do that, they have to pay out an upfront payment of $10 billion. So here is what we are offering the tobacco companies: You pay the country $10 billion; you agree to limit your advertising way beyond what the FDA rule will provide. You also agree not to challenge the provisions within this bill, and then we will fit you under an $8 billion liability cap. And only those companies which make those commitments are eligible. Only those companies that make those commitments will have State suits settled.

Any company that says, ''Wait a minute, that is too high a price. You are asking me to limit my advertising way beyond what FDA is going to tell me. You are telling me that I have to accept every provision in this legislation. You are telling me I have to pay forth $10 billion, and if I don't do that, you are saying I still have to face all those court suits in the States''—well, companies that refuse to sign the provisions under this bill get absolutely nothing. So a tobacco company is faced with the prospect of coming under an $8 billion liability cap by agreeing to all these additional provisions or getting nothing, under this legislation. They will continue to face lawsuits in the States if they don't sign onto the provisions that we have laid out in this legislation.

But it even gets more complicated for tobacco companies. We are not giving anything away by putting in an $8 billion cap. We are getting something we can't get through our own legislation. We can't legislate the advertising restrictions that go beyond the FDA rule without raising first amendment questions. And we could not prevent the tobacco industry from challenging other provisions of the bill. That is a problem. The cap is our way of addressing that particular, very serious problem.

Let me remind my colleagues of what the tobacco companies have to do to come under that $8 billion yearly cap, beyond what I have already mentioned. Of course, I have mentioned the advertising restrictions. I have mentioned the upfront payment. I have mentioned that they have to agree not to challenge the terms of the legislation, not to challenge the FDA authority. They cannot challenge the look-back surcharges. That is, they can't challenge the provisions that hold them accountable for reducing youth and teenage smoking. They can't challenge those look-back provisions or any of the payments, for if they challenge any of that, it is all over and they are back right where they started. They fall outside the cap and they are subject to every single state lawsuit and the unlimited liability that they are facing right now.

Let me also remind my colleagues that the tobacco companies will lose the protection of the cap if they fail to comply with any one of the terms—not all of them; all they have to do is miss on one of them.

So, Mr. President, I don't know how you get any tougher than that. Even if the companies comply with all of those provisions, they could lose the cap for other reasons: If they miss the youth smoking targets by 20 percent or more, if they are caught smuggling or aiding and abetting smuggling, and if they fail to make an annual payment within the year that it is owed. All of those additional criteria are locked in with this bill.

So I don't know, Mr. President. It sounds to me like that is about as tough as it gets. First of all, they have more restrictions than they have ever had in any other set of circumstances. They are required to pay more money. They are subject to discipline each and every year with regard to an array of very tight provisions. And what they get in return is an $8 billion cap on liability.

Mr. President, I will oppose the Gregg amendment because I believe the managers' amendment approaches the issue in the right way.

It gives protection only to those tobacco companies that go further than we legislate, that acknowledge the need to limit advertising in a way that we can't legislate in this bill. The other tobacco companies, those that do not sign up, will have no cap and will continue to fight it out in the courts in all of the States where these cases are being contested.

I think we have to do all we can to reduce teen smoking. Additional advertising restrictions and a commitment made by tobacco companies not to challenge the law will increase our likelihood of success—not decrease it, increase it.

Mr. President, for all those reasons, as well-intended as this amendment is, I hope my colleagues will think very carefully and very conscientiously about how important this question before the Senate truly is. We must do what we can to ensure passage of this legislation, to ensure that we stay tough on these companies, that we make them to do what we know they must do to reduce teen smoking, and to comply with the intent and the spirit of our objectives in this law.

I yield the floor.

Mr. GREGG addressed the Chair.

The PRESIDING OFFICER. The Senator from New Hampshire.

Mr. GREGG. Mr. President, I understand the regular order is that I am recognized, and then the Senator from Arizona is to be recognized for a tabling motion.

The PRESIDING OFFICER. The Senator is correct.

Mr. GREGG. Mr. President, a lot of folks have spoken today, and I reserved commenting on each speech until this time. I recognize that we want to get on with a vote—I don't want to delay that process—but I believe a few points need to be made to clarify the ground, to blow the smoke away, if I may use that metaphor, from the issue.

Let's begin with the question of immunity and whether or not immunity is granted in this bill.

Immunity for the purposes of this debate has become a term of art. Like so many terms that we use here in the Senate, it may not be the most precise term but it is the term that accurately from the political standpoint defines the event here.

The fact is that under this bill the tobacco industry is going to be given a special preferential position in the order of American commerce, a position which no other industry will have, a position which is totally outside of the traditional manner in which we have managed our marketplace under our capitalist system.

The limitations in this bill on the ability of individuals who have been harmed by the tobacco companies are considerable. They are significant and they will impact people. Pure logic tells you this, because, obviously, if the argument is being made that the only way you can get the tobacco company to come back to the table is if you give them these protections, there must be something pretty darned substantive to these protections.

So very obviously the limitations which are being placed on the capacity of the American consumer to recover for the damage that has been caused to him or her by the tobacco companies are significant, if this bill passes. Let me list a few of them.

There will be limitations on the amount of recovery on punitive damages because there is a cap. There will be limitations on the amount of damages recovered from compensation damages because there is a cap. There will be a preemption of actions by States, municipalities, and counties for future claims. There will be immunity for wholesalers, retailers, insurers, and the ingredient suppliers for past and future claims. There will be, most importantly, a structure set up where the tobacco companies will pick who is going to be the winner and who is going to be the loser on the issue of lawsuits brought against them.

What an ironic situation, as I have said before on this floor.

The way this cap works, it is the first person to the courthouse to get a settlement who gets the money. And the tobacco companies, since they are the ones being sued, can pick who is going to win. If they are sued by three different groups—a group of schoolteachers from New Hampshire, a group of kids from Pennsylvania, a group of friends from Ohio, and another group of friends from Illinois—they can settle with the friend from Ohio, and the friends from Illinois. If the cap is used up, the schoolteachers and the kids are out of it. They are out of it for that year, and they well may be out of it forever depending on how much the cap is used up, and in the next year, also.

So the people who are injured who have brought the lawsuit find themselves in the impossible position, or the ironic position, at a minimum, of having to go to the tobacco companies on bent knees and say, ''Please settle with me first so I can get into the fund before somebody else,'' which means that you inevitably create not an adversarial relationship but a supplicant relationship between those who are suing and those who are being sued, which is not in the tradition of the American jurisprudence system, to say the least.

Equally important, the concept that an industry will have protection from lawsuits in the marketplace is antithetic to the American concept of a free market. The protection that consumers have today, no matter what product they buy, is they can go into the courtroom, if they are harmed by that product, and get redress. There are a lot of other ways they can get redress, too. But the primary redress is that they can go into that courtroom or one of the primary redresses, if they have been physically damaged, or if somebody in their family has been killed, and they can get a recovery, if they can make their case. That is called the free market system. It is called the capitalist system. Under this proposal, that doesn't work.

Mr. KERRY. Mr. President, will the Senator yield for a question?

Mr. GREGG. No, I am going to make my statement. I know the Senator from Massachusetts has made his on a

series of occasions, and then we are going to go to a vote. I am not going back and forth carrying this on any further. I am going to make my statement. I have maintained a fair amount of reservation. So I didn't extend this debate for a lengthy period. I would like to get us to a vote.

Mr. KERRY. Fair enough. Might I ask, Mr. President, if the Senator would give me some idea of the length of time he expects to speak?

Mr. GREGG. I expect to speak for about another 10 minutes.

Mr. KERRY. I thank the Senator.

Mr. GREGG. So the marketplace is being fundamentally changed for one industry alone, the tobacco industry. That, in my opinion, is obviously a mistake.

Why is this being done? Representation as to why it is being done was made by a number of Senators, and I think they are accurate to their theories as to why it is being done. It is being done, to quote the Senator from Rhode Island, because they hope to bring the tobacco companies back to the table by putting in this significant benefit, which is protection from liability, immunity, or a form of immunity at a minimum.

It was interesting that the Senator from Utah, who is very familiar with this issue, said that even the caps, as it is presently structured, aren't strong enough to bring—they aren't enough protection to the tobacco industries to bring them back to the table, that they don't do enough, that they don't go far enough. That is an interesting comment, because what we do know is that the tobacco companies are not at the table right now. In fact, we know from the statement of the chairman of one of the tobacco companies that they have walked away from the table, and to quote him, ''There is no process which is even remotely likely to lead to an acceptable comprehensive solution this year.''

So they are not planning to come back to the table. Yet, here we have this deal which has been made, as I mentioned earlier, a deal with the devil, the producers of this product, which kills people and addicts people, and the devil walked away from the table. And now we have the unseemly situation of the U.S. Congress chasing after the devil saying, ''Please take my plan. Please take it. Take it, please. Please, please take this protection that we are offering.'' It really is unseemly. It is inappropriate. More importantly, it doesn't make any sense.

Why, if they are no longer participants in this process, would we want to give them a protection which no other industry in this country has today—it makes no sense—on the wish and the prayer that they are going to come back to the table someday in the future? I don't think so. I think it makes absolutely no sense that we should be making such a fundamental change in the way we manage our market, such a fundamental way in the way we manage our jurisprudence system, on a wish and a hope and a prayer that an industry, which has shown itself to be so endemically irresponsible, will for some reason suddenly become responsible and return to the table. I find that to be a concept which holds very little validity.

But the most substantive reason to support the amendment which has been offered by myself and the Senator from Vermont and to change the language in this bill—remember the language which we are offering here was the original language of the healthy kid amendment, which was supported by the President. I must say somebody should ask the President why he has changed his position on this because he did support this language initially. He formally and bluntly supported it.

But the primary concern here for supporting this language is this. We have an industry which produced a product that they knew killed people, and the evidence is conclusive on that. We have an industry which produced a product that they knew was addictive. Not only did they know it was addictive, but they increased the contents of that addictive part of the process, the nicotine, in order to increase the addictiveness of the product. They produced a product that was addictive, and they knew it was addictive. And then they took this product which killed people, which they knew killed people, which was addictive and which they knew was addictive, and they targeted the sales of it on our kids.

This is not an industry which deserves special protection from the U.S. Congress. Call it immunity, call it limited liability, use whatever term of art you want to use, but the fact is, this is an extraordinary step of special protection for an industry which has produced a product which is fundamentally bad, which they knew was bad, and which they targeted on kids.

While this Congress refuses to give that type of protection to other industries which are producing products which save lives—we do not give protection to medical devices which save lives; we do not give protections to automobile manufacturers that improve the style of life; we do not give protections to the computer manufacturer that improves the style of life; we don't give protections to the drug manufacturers that improve the style of life—we are going to give protection to the cigarette manufacturer, the tobacco producer that produced a product that kills you, that is addictive, and that was targeted on kids.

The choice I think here is pretty clear. We can stick with a system that has worked for 200 years, called the marketplace, where the consumer has the right to go into the court system and defend themselves and get a reasonable recovery, or we can structure a brand new system to protect an industry which has proven itself beyond any test to be a dishonorable industry, which has tried to destroy the lives of many Americans in order to sell its product.

From my standpoint, the choice should be simple. I hope the Members of the Senate will join with me and a fair number of other folks and Senator LEAHY, who has been a strong advocate—and I very much appreciate his participation as a cosponsor of this amendment—in passing our amendment to eliminate this liability limitation by defeating the motion to table which is going to be made by the Senator from Arizona.

I would like to say at this point before we go to the motion, I thank the Senator from Arizona for his courtesy and the Senator from Massachusetts for his courtesy in moving this amendment to a vote. I appreciate their courtesy. They have been more than fair in allowing us the opportunity to bring this forward and do it in a timely manner. I thank them for that.

I yield the floor.

The PRESIDING OFFICER. The Senator from Arizona is recognized.

Mr. MCCAIN. Mr. President, I move to table the Gregg amendment.

Mr. KERRY. Mr. President, before the Senator so moves, I would just ask him if he might answer one question.

Mr. MCCAIN. I will be glad to yield for a question from the Senator from Massachusetts.

Mr. KERRY. Mr. President, without prolonging this, I would ask the Senator from Arizona if he would agree—since there is no immunity and no liability limitation but only a cap on how much liability—that voting to sustain the cap and against the Gregg amendment is, in fact, completely consistent with the budget amendment vote?

Mr. MCCAIN. That is a very articulate and enlightening question. The answer is, the Senator is exactly right. Actually, it is a very important point.

I move to table the Gregg amendment and ask for the yeas and nays on amendment No. 2433.

The PRESIDING OFFICER. Is there a sufficient second? There appears to be a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is on agreeing to the motion to table the underlying Gregg amendment No. 2433. The yeas and nays have been ordered. The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. LOTT (when his name was called). Present.

Mrs. BOXER (when her named was called). Present.

The result was announced—yeas 37, nays 71, as follows:

[Rollcall Vote No. 145 Leg.]

YEAS—37

Akaka	Daschle	Frist
Bennett	DeWine	Glenn
Biden	Dodd	Gorton
Breaux	Faircloth	Graham
Byrd	Feinstein	Harkin
Chafee	Ford	Hatch

Helms	Landrieu	Robb
Hollings	Levin	Rockefeller
Hutchison	Lieberman	Sessions
Inouye	Mack	Stevens
Jeffords	McCain	Thurmond
Kerry	McConnell	
Kohl	Murkowski	

NAYS—61

Abraham	Durbin	Murray
Allard	Enzi	Nickles
Ashcroft	Feingold	Reed
Baucus	Gramm	Reid
Bingaman	Grams	Roberts
Bond	Grassley	Roth
Brownback	Gregg	Santorum
Bryan	Hagel	Sarbanes
Bumpers	Hutchinson	Shelby
Burns	Inhofe	Smith (NH)
Campbell	Johnson	Smith (OR)
Cleland	Kempthorne	Snowe
Coats	Kennedy	Specter
Cochran	Kerrey	Thomas
Collins	Kyl	Thompson
Conrad	Lautenberg	Torricelli
Coverdell	Leahy	Warner
Craig	Lugar	Wellstone
D'Amato	Mikulski	Wyden
Domenici	Moseley-Braun	
Dorgan	Moynihan	

ANSWERED ''PRESENT''—2

Lott	Boxer

The motion to lay on the table the amendment (No. 2433) was rejected.

Mrs. BOXER. Mr. President, I wish to inform the Senate of the reason I voted ''present'' on the Gregg amendment related to liability limits for tobacco companies.

I abstained on this vote because my husband's law firm is co-counsel in several lawsuits against tobacco companies filed in California state court by health and welfare trust funds.

The Ethics Committee has advised me that voting on an amendment such as this ''would not pose an actual conflict of interest'' under the Senate Code of Conduct.

However, I decided that this vote could create the appearance of a conflict of interest and therefore I abstained by voting ''present.''

Mr. MCCAIN addressed the Chair.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. GRAMM. Could we have order, Mr. President? I can't hear.

The PRESIDING OFFICER. The Senate will come to order.

Mr. MCCAIN addressed the Chair.

Mr. LEAHY. Mr. President, the Senate is still not in order.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. MCCAIN. The Senator from Massachusetts seeks recognition.

The PRESIDING OFFICER. The Senator from Massachusetts.

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

Mr. GRAMM. Parliamentary inquiry, Mr. President.

No amendment is in order.

The PRESIDING OFFICER. An amendment to the bill is in order. Is this an amendment to the bill?

Mr. MCCAIN. It is a second degree amendment.

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

Mr. MCCAIN. Mr. President, I am recognized, I believe.

The PRESIDING OFFICER. The Senator from Arizona is recognized.

Mr. MCCAIN. No one else can suggest the absence of a quorum.

Mr. President, is it in order to send a second-degree amendment?

The PRESIDING OFFICER. A second-degree amendment is already pending.

Mr. MCCAIN. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

The Senate is not in order.

The Senator from Arizona.

Mr. MCCAIN. Mr. President, I know of no further debate on the Gregg second-degree amendment.

Mr. GRAMM addressed the Chair.

The PRESIDING OFFICER. The Senator from Texas.

MOTION TO RECOMMIT WITH AMENDMENT NO. 2436

Mr. GRAMM. I send a motion to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report the motion.

The legislative clerk read as follows:

The Senator from Texas, [Mr. GRAMM] moves——

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

Mr. LEAHY. I object.

The PRESIDING OFFICER. Objection is heard.

The clerk will read the amendment.

The legislative clerk read as follows:

The Senator from Texas [Mr. GRAMM] moves to recommit the bill, S. 1415, to the Committee on Finance with instructions to report back forthwith with all amendments agreed to in status quo and with the following amendment No. 2436 for [Mr. GRAMM], for himself and Mr. DOMENICI.

SEC. 1406. RESOLUTION OF AND LIMITATIONS ON CIVIL ACTIONS.

(a) STATE ATTORNEY GENERAL ACTIONS.—

(1) PENDING CLAIMS.—With respect to a State, to be eligible to receive payments from the State Litigation Settlement Account, the attorney general for such State shall resolve any civil action seeking recovery for expenditures attributable to the treatment of tobacco related illnesses and conditions that have been commenced by the State against a tobacco product manufacturer, distributor, or retailer that is pending on the date of enactment of this Act.

(2) FUTURE ACTIONS BASED ON PRIOR CONDUCT.—With respect to a State, to be eligible to receive payments from the State Litigation Settlement Account, the attorney general for such State shall agree that the State will not commence any new tobacco claim after the date of enactment of this Act (other than to enforce the terms of a previous judgment) that is based on the conduct of a participating tobacco product manufacturer, distributor, or retailer that occurred prior to the date of enactment of this Act, seeking recovery for expenditures attributable to the treatment of tobacco induced illnesses and conditions against such a participating tobacco product manufacturer, distributor, or retailer.

(3) APPLICATION TO LOCAL GOVERNMENTAL ENTITIES.—The requirements described in paragraphs (1) and (2) shall apply to civil actions commenced by or on behalf of local governmental entities for the recovery of costs attributable to tobacco-related illnesses if such localities are within a State whose attorney general has elected to resolve claims under paragraph (1) and enter into the agreement described in paragraph (2). Such provisions shall not apply to those local governmental entities that are within a State whose attorney general has not resolved such claims or entered into such agreements.

(b) STATE AND LOCAL OPTION FOR ONE-TIME OPT OUT.—

(1) IN GENERAL.—The Secretary shall establish procedures under which the attorney general of a State may, not later than 1 year after the date of enactment of this Act, elect not to resolve an action described in subsection (a)(1) or not to enter into an agreement under subsection (a)(2). A State whose attorney general makes such an election shall not be eligible to receive payments from the State Litigation Settlement Account. Procedures under this paragraph shall permit such a State to make such an election on a one-time basis.

(2) EXTENSION.—In the case of a State that has secured a judgment against a participating tobacco product manufacturer, distributor, or retailer in an action described in subsection (a)(1) prior to or during the period described in paragraph (1), and such judgment has been appealed by such manufacturer, distributor, or retailer, such period shall be extended during the pendency of the appeal and for an additional period as determined appropriate by the Secretary, not to exceed one year.

(3) APPLICATION TO CERTAIN STATES.—A State that has resolved a tobacco claim described in subsection (a)(1) with a participating tobacco product manufacturer, distributor, or retailer prior to the date of enactment of this Act may not make an election described in paragraph (1) if, as part of the resolution of such claim, the State agreed that the enactment of any national tobacco settlement legislation would supersede the provisions of the resolution.

(4) LOCAL GOVERNMENTAL ENTITY OPTION FOR ONE-TIME OPT OUT.—

(A) IN GENERAL.—The Secretary shall establish procedures under which the attorney for a local governmental entity which commenced a civil action prior to June 20, 1997, against a participating tobacco product manufacturer, distributor, or retailer seeking recovery for expenditures attributable to the treatment of tobacco related illnesses and conditions, not later that 1 year after the date of enactment of this Act, may elect not to resolve any action described in subsection (a)(3). A local governmental entity whose attorney makes such an election shall not be eligible to receive payments from the State Litigation Settlement Account. Procedures under this paragraph shall permit such a local governmental entity to make such an election on a one-time basis.

(B) EXTENSION.—In the case of a local governmental entity that has secured a judgment against a participating tobacco product manufacturer, distributor, or retailer in a claim described in subsection (a)(3) prior to or during the period described in subparagraph (A), and such judgment has been appealed by such manufacturer, distributor, or retailer, such period shall be extended during the pendency of the appeal and for an additional period as determined appropriate by the Secretary, not to exceed one year.

(C) APPLICATION TO CERTAIN LOCAL GOVERNMENTAL ENTITIES.—A local governmental entity that has resolved a claim described in subsection (a)(3) with a participating tobacco product manufacturer, distributor, or retailer prior to the date of enactment of this Act may not make an election described in subparagraph (A) if, as part of the resolution of such claim, the local governmental entity agreed that the enactment of any national tobacco settlement legislation would supersede the provisions of the resolution.

(c) ADDICTION AND DEPENDENCY CLAIMS; CASTANO CIVIL ACTIONS.—

(1) ADDICTION AND DEPENDENCE CLAIMS BARRED.—In any civil action to which this title applies, no addiction claim or dependence claim may be filed or maintained against a participating tobacco product manufacturer.

(2) CASTANO CIVIL ACTIONS.—

(A) IN GENERAL.—The rights and benefits afforded in section 221 of this Act, and the various research activities envisioned by this Act, are provided in settlement of, and shall constitute a remedy for the purpose of determining civil liability as to those addiction or dependence claims asserted in the Castano Civil Actions. The Castano Civil Actions shall be dismissed to the extent that they seek relief in the nature of public programs to assist addicted smokers to overcome their addiction or other publicly available health programs with full reservation of the rights of individual class members to pursue claims not based on addiction or dependency in civil actions in accordance with this Act.

(B) ARBITRATION.—For purposes of awarding attorneys fees and expenses for those actions subject to this subsection, the matter at issue shall be submitted to arbitration before one panel of arbitrators. In any such arbitration, the arbitration panel shall consist of 3 persons, one of whom shall be chosen by the attorneys of the Castano Plaintiffs' Litigation Committee who were signatories to the Memorandum of Understanding dated June 20, 1997, by and between tobacco product manufacturers, the Attorneys General, and private attorneys, one of whom shall be chosen by the participating tobacco product manufacturers, and one of whom shall be chosen jointly by those 2 arbitrators.

(C) PAYMENT OF AWARDS.—The participating tobacco product manufacturers shall pay the arbitration award.

(d) RULES OF CONSTRUCTION.—

(1) POST ENACTMENT CLAIMS.—Nothing in this title shall be construed to limit the ability of a government or person to commence an action against a participating tobacco product manufacturer, distributor, or retailer with respect to a claim that is based on the conduct of such manufacturer, distributor, or retailer that occurred after the date of enactment of this Act.

(2) NO LIMITATION ON PERSON.—Nothing in this title shall be construed to limit the right of a government (other than a State or local government as provided for under subsection (a) and (b)) or person to commence any civil claim for past, present, or future conduct by participating tobacco product manufacturers, distributors, or retailers.

(3) CRIMINAL LIABILITY.—Nothing in this title shall be construed to limit the criminal liability of a participating tobacco product manufacturer, distributor or retailer or its officers, directors, employees, successors, or assigns.

(e) DEFINITIONS.—In this section:

(1) PERSON.—The term ''person'' means an individual, partnership, corporation, parent corporation or any other business or legal entity or successor in interest of any such person.

(2) SECRETARY.—The term ''Secretary'' means the Secretary of Health and Human Services.

SEC. ___. ELIMINATION OF MARRIAGE PENALTY.

(a) IN GENERAL.—Part VII of subchapter B of chapter 1 of the Internal Revenue Code of 1986 (relating to additional itemized deductions for individuals) is amended by redesignating section 222 as section 223 and by inserting after section 221 the following new section:

''SEC. 222. DEDUCTION FOR MARRIED COUPLES TO ELIMINATE THE MARRIAGE PENALTY.

''(a) IN GENERAL.—In the case of a joint return under section 6013 for the taxable year, there shall be allowed as a deduction an amount equal to the excess (if any) of—

''(1) the sum of the amounts determined under subparagraphs (B) and (C) of section 63(c)(2) for such taxable year (relating to the basic standard deduction for a head of a household and a single individual, respectively), over

''(2) the amount determined under section 63(c)(2)(A) for such taxable year (relating to the basic standard deduction for a joint return).

''(b) LIMITATION BASED ON MODIFIED ADJUSTED GROSS INCOME.—

''(1) IN GENERAL.—No deduction shall be allowed under subsection (a) if the modified adjusted gross income of the taxpayer for the taxable year exceeds $50,000.

''(2) MODIFIED ADJUSTED GROSS INCOME.—For purposes of this subsection, the term 'modified adjusted gross income' means adjusted gross income determined—

''(A) after application of sections 86, 219, and 469, and

''(B) without regard to sections 135, 137, and 911 or the deduction allowable under this section.

''(3) COST-OF-LIVING ADJUSTMENT.—In the case of any taxable year beginning in a calendar year after 1999, the $50,000 amount under paragraph (1) shall be increased by an amount equal to such dollar amount multiplied by the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, except that subparagraph (B) thereof shall be applied by substituting 'calendar year 1998' for 'calendar year 1992'. If any amount as adjusted under this paragraph is not a multiple of $5,000, such amount shall be rounded to the next lowest multiple of $5,000.''

(b) DEDUCTION TO BE ABOVE-THE-LINE.—Section 62(a) of the Internal Revenue Code of 1986 (defining adjusted gross income) is amended by adding after paragraph (17) the following new paragraph:

''(18) DEDUCTION FOR MARRIED COUPLES.—The deduction allowed by section 222.''

(c) EARNED INCOME CREDIT PHASEOUT TO REFLECT DEDUCTION.—Section 32(c)(2) of the Internal Revenue Code of 1986 (defining earned income) is amended by adding at the end the following new subparagraph:

''(C) MARRIAGE PENALTY REDUCTION.—Solely for purposes of applying subsection (a)(2)(B), earned income for any taxable year shall be reduced by an amount equal to the amount of the deduction allowed to the taxpayer for such taxable year under section 222.''

(d) CLERICAL AMENDMENT.—The table of sections for part VII of subchapter B of chapter 1 of such Code is amended by striking the item relating to section 222 and inserting the following new items:

''Sec. 222. Deduction for married couples to eliminate the marriage penalty.

''Sec. 223. Cross reference.''

(e) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 1998.

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

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

Mr. DASCHLE. I object.

The PRESIDING OFFICER. Objection is heard.

The clerk will continue calling the roll.

The assistant legislative clerk continued calling the roll.

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

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

AMENDMENT NO. 2437 TO AMENDMENT NO. 2436

(Purpose: To provide a substitute for provisions relating to reductions in underage tobacco usage)

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

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from South Dakota [Mr. DASCHLE], for Mr. DURBIN, for himself, Mr. DEWINE, Mr. WYDEN, Mr. CHAFEE, Mr. HARKIN, Ms. COLLINS, Mr. KENNEDY, Ms. SNOWE, Mr. DASCHLE, Mr. CONRAD, and Mr. REED proposes an amendment numbered 2437 to amendment No. 2436.

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

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

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

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

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

AMENDMENT NO. 2438 TO AMENDMENT NO. 2437

(Purpose: To provide a substitute for provisions relating to reductions in underage tobacco usage)

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

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from South Dakota [Mr. DASCHLE] for Mr. DURBIN, for himself, Mr. DEWINE, Mr. WYDEN, Mr. Chaffee, Mr. HARKIN, Ms. COLLINS, Mr. KENNEDY, Ms. SNOWE, Mr. DASCHLE, Mr. CONRAD, and Mr. REED proposes an amendment numbered 2438 to amendment No. 2437.

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

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

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

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

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. MCCAIN. Mr. President, I thank my colleagues for a very enlightening and informative debate. It has been an important discussion, not on the amendment just voted on, but on the bill itself. Obviously, we attempted to table the Gregg amendment, and it is something that is unfortunate, in my view, for the entire bill. At the same time, just like with the attorneys' fees and other aspects of this issue, we will revisit this issue again. I believe it is important for us to continue to work through the bill and get it through the U.S. Senate.

I think the American people expect us to do that, and I think it is important that we continue to work on the many amendments of significant importance to the bill. I believe this aspect of it not only will be revisited, but it is another chapter in a very long saga. Yesterday, we had two very significant victories. Today, we had a defeat. There will be more victories and more defeats as we go through this very difficult process.

But at the end of the day, I am totally confident that this body and the Congress will act in a responsible manner and adopt a comprehensive piece of legislation that will attack the nationwide problem of 3,000 children beginning to smoke every day and 1,000 of them being caused to die early as a result of tobacco-related illnesses. I thank all those who voted in favor of the amendment. And for those who opposed it, I respect the opposition. But I believe we will move forward with a comprehensive piece of legislation.

I yield the floor.

Mr. KERRY addressed the Chair.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KERRY. Mr. President, I will be very brief. I join my colleague in saying that I think what Senator MCCAIN and I and others hoped for was the opportunity to be able to come to the floor and fight these tough issues. That is what we did. We just had a tough vote. Clearly, some of us had hoped that the outcome would be different, because we had a different view of where the bill might travel. But this by no means prevents us in any way from continuing forward in the process of molding this legislation. This is precisely what the Senate ought to be doing. It ought to be fighting hard over these votes. We ought to be able to come to an understanding of where the 51 votes lie. And then, ultimately, we all know that hopefully we can come together with a piece of legislation that finds a conference committee and, ultimately, both Houses of Congress.

So I thank my colleagues for this spirited debate and for the fact that we have voted on two of the most critical issues with respect to this legislation. I thank Senator DURBIN for now bringing to the floor, through the leadership, an amendment on the issues of the look-back, one of the other very important issues that needs to be resolved. I am confident that we will have another healthy round of debate on that. I look forward to continuing to proceed.

Mr. GRAMM addressed the Chair.

The PRESIDING OFFICER. The Senator from Texas is recognized.

Mr. GRAMM. Mr. President, I think we have had a defining moment in this debate. Throughout this debate, our colleagues, who have brought to the floor of the Senate a bill that will raise $700 billion in taxes, have said that they are not interested in the money, that the money is incidental, that what they want to do is raise the price of cigarettes.

We have made the point that this increase in the price of cigarettes, this tax, will fall very heavily on blue-collar workers. Those making $15,000 or less will pay 34 percent of the cost, the taxes that are built into this bill. Those making $22,000 or less will pay 47 percent of the cost. Those making $30,000 or less will pay 59.1 percent of the cost of the taxes embodied in this bill.

Even if this bill only raised the price of a pack of cigarettes by $1.50—and most estimates are that it will raise it by $2.50 at a minimum—it would mean that an average smoker in America would pay $356 of additional taxes as a result of this bill, and a blue-collar family where both the husband and wife smoke, would pay $712 a year more in Federal taxes. In fact, the table put out by the Joint Committee on Taxation shows something that, over and over, those who support the bill have tried to deny or neglect, which is that for those Americans who make $10,000 or less, their Federal taxes will rise by 41.2 percent as a result of the taxes embodied in this bill.

Now, what Senator DOMENICI and I did earlier was send an amendment to the desk that tried to give some of this money back to blue-collar workers in the form of a tax cut. Our colleagues say, it is not the money we want; they say, we just want to raise the price of cigarettes. So Senator DOMENICI and I took them at their word, sent an amendment to the desk that said raise the price of cigarettes; but since this is going to impose a bone-crushing tax on moderate-income Americans, let's take at least $1 out of every $3 that will be collected in this tax increase and let's give it back to working families by repealing the marriage penalty for families that make $50,000 or less. In other words, it gets the impact on smoking that may come from a higher price as a result of the taxes in this bill but with our tax cut we avoid lowering the real income or living standards of blue-collar Americans who, after all, are the victims here. The whole objective of the bill is to basically say people who smoke have been induced to smoke by the tobacco companies, and yet, paradoxically, the tax we are imposing is being imposed on the very people who have been exploited. In fact, the bill before us has an incredible provision which says every penny of the tax has to be passed through, and it is illegal if a tobacco company absorbs any of this tax increase. Every penny of it, 59.1 percent of the tax increase, is on families that make less than $30,000 a year. The victims of the smoking campaign by the tobacco companies are the people who are paying the taxes.

What Senator DOMENICI, Senator FAIRCLOTH, and I have said in our amendment is this: Raise the tax, but give a third of the money back to working families by repealing the marriage penalty for couples who make less than $50,000 a year. So you get the price impact on smoking, but you don't end up brutalizing economically moderate-income people.

I think it is very instructive that after 3 days of debate where our colleagues have said don't accuse us of wanting this money, we just want to raise the price of cigarettes, that we sent an amendment to the desk asking that $1 out of every $3 we are collecting in taxes be given back to moderate-income working families, and the Senate reacts in a convulsion, and the leadership uses right of privileged recognition to amend our amendment and to deny us the ability to offer a tax cut for the very people who are going to find themselves crippled economically as a result of this tax.

So let me just suggest two points:

No. 1, I think this is further evidence this bill is about money. Our amendment is hardly a far reaching amendment. We are just simply asking that roughly one out of every three dollars of the tax be given back.

Second, it also suggests, it seems to me, the objective here is to prevent us from having an opportunity to vote on a tax cut.

I want to assure my colleagues—and I know Senator DOMENICI feels exactly the same way—that there is no way we are going to be denied the right to offer this amendment. This won't be the last tax cut amendment that we are going to have. Quite frankly, I don't understand if those who are for the bill are saying what they really mean, why there isn't overwhelming support in both parties for giving a third of this tax increase back to working families.

Let me say very briefly what the amendment does and then yield the floor so that Senator DOMENICI, the cosponsor of the amendment, will have an opportunity to speak.

Under current law if two individuals, a man and a woman, both of whom are working in the economy outside of the home, fall in love and get married, under current law they pay on average an additional $1,400 a year in income taxes. So that, for example, if you had

two single people, and they didn't get married, and they filed an income tax return jointly, they don't pay taxes on any income of less than $10,200 a year. But if they fall in love and get married, even if they file separately, they have to pay taxes on income of above $6,900 a year. So we have an incredible provision of law that, in terms of deductions, penalizes working people who fall in love and get married by taking away $3,300 of deductions from them.

Mr. President, I think it would be a general bipartisan consensus that the family is the most powerful institution for progress and human happiness in history. Yet our Tax Code penalizes people who get married. If you want to state it in a dramatic way, you can say that the tax code provides an additional $3,300 of deduction by simply living in sin rather than getting married.

This has been much discussed. There is a strong basis of support for repealing it.

What we could do is simply this: Eliminate the marriage penalty imposed by the tax code for all families that make less than $50,000 a year—and those families will pay about 75 percent of this tobacco tax. Smoking is primarily a blue-collar, moderate-income phenomenon in America today. What we will do for couples that earn less than $50,000 a year is give them the additional $3,300 deduction so that there will be no economic penalty for people getting married. We will also allow those who get an earned income tax credit to take the deduction before they figure their eligibility for the earned income tax credit. So that even people who make very modest incomes will benefit from this tax cut.

This tax cut will take roughly $1 out of every $3 raised in taxes by the tobacco tax and give it back to working families. So those who want the higher price for tobacco to discourage consumption will get it, but we will not crush economically moderate income people who have become addicted to nicotine and who smoke. We will not have the terrible paradox that while talking about firing bullets at these big tobacco companies our bullets are actually hitting the victims who have become addicted to nicotine.

So on that basis, Mr. President, I yield the floor.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Senator from New Mexico.

Mr. DOMENICI. Mr. President, I have not but for a few minutes spoken about the issue before the Senate.

I want to make it very clear that I understand the difficulty in managing a bill of this size. It is an enormous and contentious issue, and Senator MCCAIN should be commended for taking on such a difficult task. I have nothing but admiration for those who are attempting to develop this legislation.

But I can say to the Senate that I cannot imagine that the rules of this Senate are going to preclude Senators like GRAMM and DOMENICI from offering amendments to this bill. We want to vote on whether we want to have a tax cut as part of this new tax increase. Sooner or later we will vote. I don't know what the two amendments offered by Senator DASCHLE are. Whatever they are, in due course we will vote on them. If by chance one of them wipes out ours, we will be back to offer other amendments.

Let me talk about the history of imposing taxes on cigarette and related tobacco products. I am sure that I am not as good of a historian as my friend from Texas is, but is he aware the first reported effort to put a tax on tobacco was done by King James I in 1604.

King James just didn't like the odor of tobacco. He wasn't a U.S. Senator and he wasn't part of a democracy. He simply issued a proclamation. ''Smoking is a custom loathsome to the eye, hateful to the nose, harmful to the brain, and dangerous to the lungs.''

In 1604, King James said that. Now I used to be a smoker and I enjoyed it. I am just reporting on what King James said so I don't want the smokers listening to this debate to get mad at me.

Then he proceeded to put a 4,000 percent increase on imported tobacco.

He didn't pretend that he wanted to accomplish some worthy public purpose. He just wanted to raise revenue—and a lot of it. He was a dictator, king, benevolent, whatever they call them. But he didn't have to worry about what we have to worry about. And that is the impact on our citizens of this huge tax and the size of government. Frankly, there is not a word in history about this which said he was concerned about kids. He just said what I had described to you, and put the tax on and spent the money.

Frankly, people were no better off in those days. Even with a 4,000-percent increase people continued to smoke.

It is most interesting that without all of our science—I really think our science is great to find cures for cancer—King James I said that smoking was harmful to the brain and dangerous to the lungs. Having said that, he wasn't concerned about teenagers or about cancer because he didn't know about cancer.

But as we proceed to work on this bill, I want to ask myself and ask those who are working on this bill:

What do we really want to accomplish?

First, we contend that too many young people are starting to smoke. And we want to stop that. Make no bones about it. When we offer our substitute bill, we have done the best we can with a reasonable amount of money to try to stop teenagers from smoking. Too many young people are using drugs, and we want to try to stop that. And we want more research on serious illnesses, including cancer, so that someday we will stop them in their tracks.

Now, that is the kind of substitute amendment we are going to offer. But nowhere can anybody tell the Senate or the people of the United States that you need over the next 25 years $868 billion in new revenue from cigarette-related products.

Where do I get that number?

I don't think it has been said this way, but I want to make it simple.

The current Federal excise tax on tobacco is 24 cents a pack. It is scheduled to go to 39 cents a pack under current law. This bill includes an increase equal to $1.10 cents. That is 1.49 in straight arithmetic. And then the $1.10 is indexed for inflation or 3 percent, whichever is greater.

Frankly, we are not really sure how much this bill raises, but an acceptable number is $868 billion, I say to my friend from Texas.

Now, I want to try to put that in perspective. The biggest program we have taking care of the most people committed to monthly checks is the Social Security Program. $868 billion would pay for Social Security for 2 full years. $868 billion would pay for the entire Defense Department of America for 3 years.

This proposed tax increase in the McCain bill is bigger—when you put it into one basket, it is bigger than the gross domestic product of any of the following countries: Belgium, Austria, Canada, Denmark, Finland, Switzerland, et cetera.

Now, where did anybody come up with the idea that we needed every single penny of that to be spent on programs related to reimbursement to the States, to research, or to whatever? Where did the miraculous relationship of $868 billion, the total receipts, to the need for programs come from? There is no reason to it. There is no magic. I can assure you of that, if you only had a $300 billion tax increase, everyone would get by with $300 billion for this anti-smoking program.

But now we have gotten so grandiose about it that it is going to raise, over 25 years, over $868 billion under this bill.

Now, frankly, I believe it is only reasonable that part of this tax increase be given back to the American people, and I am going to have a lot more to say about that.

But a tax is a tax. This tax has a good motive: to stop kids from smoking. It may work—raise the price of cigarettes, and certain parts of the population may not buy them as much or may stop buying them. There is not conclusive evidence as to what price point you have to raise the price to, to have the most effect. But I can tell you, in our substitute we are going to propose 75 cents, period—no increases, just 75 cents. We believe that will keep the black market from going rampant and has as good a chance as any other number, by way of a tax, of deterring young people from starting smoking or encouraging them to quit smoking from the economic standpoint.

Having said that, I want to tell you that there is nothing more onerous in the United States than the marriage

penalty. Every once in a while, you will hear about a couple—it is not very frequent, but it gives you the dimension of this penalty—who will go to Mexico and get divorced the day before Christmas, and then they will go to Las Vegas and get married after New Year's. And guess what. They don't have to pay the marriage tax penalty. I am not sure if 500 do that, but we know some used to. I am not sure if it is 5,000. But imagine that you have a law on the books of America that invites that kind of conduct.

In the extreme, the marriage penalty is punitive. And it is just wonderful to hear Senators and political leaders say, ''We are for the family.'' I assume that when you say, ''We are for the family,'' without regard to one's philosophy, I guess you would have to say marriage is pretty important, too, because I think in some way it is related to the families. It used to be 100 percent related, but it is still very important.

Now, why would you impose a tax that would say to those two people who are married, ''You pay more if you are both working than if you are both working and living together and not married''? Frankly, I will tell you that I have heard, personally, in my own ear somebody say, ''We are not getting married because, after all, we love each other, but we would have to pay $2,800 more in taxes, and it is just crazy, so we are not going to get married.''

Now, I don't like to say that, but that is the case. And there are worse examples because they are much broader in terms of impact. The average marriage penalty in this country is $1,400. In some cases, it is much higher; in other cases, it is somewhat lower.

In fact, if you look at comparable countries, Mr. President, 27 of the OECD countries—they are tied together in terms of economic evaluations and assumptions and the like—19 countries tax husbands and wives separately, so there is no marriage penalty. What keeps the United States from doing that? Frankly, what has kept us in the past is that we had too big a deficit, and if we cut taxes, then we figured we were losing money and we would take it easy and careful and not fix everything in the Tax Code.

We have balanced the budget. Senator GRAMM and I do not intend to change a bit that approach to more and more surpluses. But when you impose a brand new tax—and it is inconceivable that you would need every penny of that tax for a program that deals with tobacco—frankly, there are organizations running around that have never seen so much money. I have stopped some in the hall with buttons saying, ''Cigarette Tax Now,'' and have asked them, ''Which one?'' Well, they said, ''We like Senator MCCAIN's improved.'' I said, ''Oh, but what's the goal?'' ''Well, the goal is the highest tax we can get and the biggest program we can get to spend money on teenagers and all kinds of health programs.''

Growing a big government is not why we are raising the cigarette tax. I thought our big goal was to try to stop our young people from smoking. Increasing the price of cigarettes plus a pro-active advertising campaign against smoking and drugs could be effective. We also need an attitude change at the cigarette companies. We also need a little more research. We need new penalties against those who sell to teenagers when they should not, and even to teenagers who smoke three or four times and they should not and know they are wrong. That is provided for in the GRAMM DOMENICI substitute. We would like to increase the budget DEA, FBI, Customs, and DOD drug interdiction programs.

But beyond that, what do we need all this money for? It is absolutely logical—I have been here a long time. I have worked on appropriations. Every year the chairman of the appropriations subcommittee comes to the floor. I will say, ''You can't imagine, fellow Senators, how many requests I had for money from my bill that I could not comply with.'' In fact, I have seen some where you take out a batch of letters and say, ''This is what I was asked to do that I can't do.'' But there is no relationship between the country prospering and being a great country and that pack of letters.

But now, look, here we have concluded—some have—that we would be remiss if we didn't dream up an expenditure for every penny of these tax dollars. Right? Now, why is that rational? Why should those of us say, how about one-third of it going back to the taxpayers and going back to fix the most onerous, discriminatory tax against an institution that we cherish and respect, one-third of the money.

I have not heard anybody say—and I hope, when we finally vote on the marriage penalty, and that is not going to be the only tax cut amendment offered, because if this one does not pass, there will be an amendment to cut 1 percent from the lower brackets. There will be a tax cut amendment to expand child care credits. There will be a number of tax cut amendments that should be considered.

But how can anybody stand up in the Senate and say, if you take a third of this huge tax increase the tobacco program for kids is not going to work?

I defy anybody to come up here and say, out of this pot of money and all these programs, if you don't keep them all, if you take one-third of the money and say, look, let's give it back to the taxpayers so we begin to get rid of this marriage penalty, at least for those families with $50,000 of income and under, I cannot imagine somebody will stand up and say:

''But we won't be doing what we must do for our kids.'' I mean, if it is $868 billion, and you have $650 billion instead of $868 billion, can you not put an effective anti-smoking and anti-drug program together?

Mr. FORD. Mr. President, will the Senator yield for a question, and I am on your side. I am on your side.

Mr. DOMENICI. I am just about finished and then I will be glad to yield.

Mr. FORD. I apologize.

Mr. DOMENICI. So, from my standpoint, as I told some of my friends to whom I said I was not in a hurry to pass this legislation, I said, why don't we continue to work on this bill until we get back. I said that because it is very contentious and Senators ought to have a chance to vent their positions and let the American people try to understand.

I have not been able to come to the floor because I been trying to help finish the ISTEA bill. I have noticed that the Senate floor time has been filled with Senators talking about this bill. There have been no long quorum calls. I do not think there has been anything dilatory.

But, frankly, I have a number of amendments that I believe should be offered. This is our best opportunity to consider tax cuts. I intend to talk about this bill.

I have dedicated 20 years of my career in the Senate getting our Government's size under control. I have had Senators congratulate me, saying we are finally getting Government down a reasonable in size; it is not going to be so big. And then all of a sudden I see this bill that will supersize Government—and I will gather more information for you so I can do more comparisons—but this bill will add probably as much in new programs to this Government as we have been able to cut from this Government in our deficit reduction programs of the last 4 or 5 years combined.

Government is government. Taxes are taxes. And, in our system, there is a relationship between the two. The higher the taxes, the bigger the government. And the higher the taxes, the less free are people.

I will commit that we ought to tax cigarettes to discourage kids from buying and smoking cigarettes. Senator GRAMM and I will propose taxing cigarettes at 75 cents a pack in our substitute. But I do not believe there is any magic formula as to how much you have to spend to try to dissuade kids from smoking.

If $600 billion is not enough, and we need $886 billion over 25 years, then you cannot give anything back to the taxpayers.

But what if $500 billion is enough?

Or $400 billion is enough?

Then I believe that some of the money should be given back to the people? That is essentially the issue.

It is as big an issue as any issue before us, because we do not need all the money called for in the McCain bill I have just told you about—a dollar and a dime plus 49 cents plus 3 percent added on every year. We do not need all that money for a cigarette program so we ought to not use it all.

Senator GRAMM and I are going to offer the Senate an opportunity to give some of the money back to people in the form of a tax cut.

I will be glad to yield for a question.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Senator from Kentucky.

Mr. FORD. Mr. President, I appreciate the Senator from New Mexico yielding to me. I have a piece of legislation in to eliminate the marriage penalty, already having been introduced. I found, to my surprise, that 52 percent of married couples get a marriage bonus. Not many people know that. There is a marriage bonus for 52 percent. I forget how many million couples get a marriage bonus of about $1,300-plus. The marriage penalty is about $1,400-plus. If you wipe out the penalty and the bonus, we have a surplus of about $4 billion. If you take the marriage bonus away and wipe out the marriage penalty, it is almost a $4 billion surplus.

In the Senator's proposal here, what does the Senator propose, to make up the difference in the marriage penalty and you leave the marriage bonus in place?

Mr. DOMENICI. I am not aware. Maybe Senator GRAMM can help me. I am not aware we changed the marriage bonus if there is one on this.

Mr. BRYAN. Parliamentary inquiry, who has the floor?

Mrs. HUTCHISON. I have the answer to that question.

Mr. GRAMM. No, we did not change the marriage bonus.

The PRESIDING OFFICER. The Senator from New Mexico has the floor.

Mr. FORD. What was the answer?

Mr. GRAMM. The answer was ''no.''

Mr. DOMENICI. We don't change the marriage bonus.

Mr. FORD. The marriage bonus still stays there at $32 billion? The bonus is $32 billion?

Several Senators addressed the Chair.

Mrs. HUTCHISON. If the Senator will yield, the marriage bonus was put in place for single-income-earning families years ago. At that time, under 50 percent of the families in this country had two incomes. But today, 69 percent of the families in this country have two incomes. So the bonus became a penalty, because people were not able to get married remain in the same tax bracket as two singles earning the same combined amount. My colleague from Texas and the Senator from New Mexico are doing here what I have done in another bill, which I introduced with Senator FAIRCLOTH of North Carolina. Our bill allows married persons to choose to file as they do now or to file as single persons. That way, marriage versus single status will not have any tax consequences whatsoever. What we want in this country is fairness and equity in our Tax Code.

Mr. FORD. I am trying to find out an answer here. I understand the marriage penalty. I am opposed to it, and I am trying to find an answer to it and the unfairness of it.

In 1986, we repealed the two-earner deduction, but increased the standard deduction for married couples, and reduced the number of tax brackets from 15 to 2. The combination of these changes reduced the marriage penalty considerably.

Now it appears the EITC gets involved here, and I understand the distinguished senior Senator from Texas is eliminating that, or is he keeping that in?

Mr. GRAMM. Will the Senator yield?

Mr. DOMENICI. I will be glad to yield.

Mr. GRAMM. First of all, I want to make it clear—and I assume both the Senator from Texas and the Senator from New Mexico agree with me—I am sure not ashamed of trying to let working families, moderate-income families, keep more of what they earn. What we are doing here on the EITC is saying—let's say that you have two very low-income people, both of whom work. They fall in love. They get married. What we are saying is, to see whether they are eligible for the earned-income tax credit, which they will be. In another example, a single mother with two children——

Mr. BRYAN. Mr. President, parliamentary inquiry, who has the floor? As I understand the rules, no Senator can yield to another Senator.

The PRESIDING OFFICER. The Senator is correct.

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

Mr. DOMENICI. I still have the floor, Mr. President. I yield for a question.

Mr. GRAMM. Is the Senator aware that a waitress who had three children, and made $9,000 a year, and her prayers were answered and she met a janitor who made $12,000 a year and his prayers were answered and they got married, not only would she lose a $3,000 tax deduction, but she would lose her earned-income tax credit?

Mr. DOMENICI. That is correct. I understand that.

Mr. GRAMM. Is the Senator aware that under the amendment that we have offered, that same couple would be able to lower their income by $3,300, before they measured whether they qualified for the earned-income tax credit, so that the net result would be that moderate—people who make such a low income that they don't pay any income taxes, potentially, would still benefit from the provision in our amendment, so that people who are paying as much as $712 as a couple in these tobacco taxes would get some of that money back through lower income taxes?

Mr. DOMENICI. That is exactly right. I yield the floor.

The PRESIDING OFFICER (Mr. COATS). The Senator from Nevada.

Mr. BRYAN. Mr. President, I ask unanimous consent that upon my yielding the floor—it is my understanding the junior Senator from Texas requests 10 minutes, and I request that she be recognized. Following that, the junior Senator from Illinois? I propound that in the form of a unanimous consent request.

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

Mr. BRYAN. I thank the Chair for his courtesy, as well as his parliamentary ruling.

Mr. President, as we debate this historic tobacco legislation today, 3,000 children across the country will try smoking for the first time. Of those 3,000 children, one-third, or 1,000, will become addicted is the only way to describe it, addicted to nicotine and will face a future of diminished health. The health consequences of the use of tobacco products is our country's most preventable public health problem, and our goal in this legislation is to stop underage smoking.

Our debate on this tobacco legislation is, indeed, a historic event. Less than a year ago, with the announcement of the June 1997 settlement reached between the States' attorneys general and the tobacco industry, few would have foreseen that we would have comprehensive legislation to address the national problem of underage use of tobacco products on the floor of the U.S. Senate. I give particular commendation to the Nation's attorneys general who deserve much credit for putting this issue in the forefront of public debate.

A year ago, the conventional wisdom may very well have been that the Senate would be incapable of debating comprehensive tobacco legislation. It was then said the tobacco industry was too strong, its grip upon the Congress too powerful. Mr. President, a different force arose.

The sustained efforts of the public health community, and in particular the former Surgeon General of the United States, Dr. C. Everett Koop, and the former FDA Commissioner, Dr. David Kessler, these two, as well as other public health advocates, have kept the focus on a common goal: a major reduction and hopefully the eventual elimination of underage smoking.

This legislation may not be perfect, but it does represent an extraordinary accomplishment. The initial Commerce Committee bill offered by Senator MCCAIN was a crucial step in ensuring that the tobacco industry would not be allowed to stop the effort to protect our Nation's children. After the Commerce Committee reported out its bill—and I am proud to say as a member of that committee I joined with a great majority of my colleagues in voting to report that bill out of committee—the tobacco industry walked away from the legislative process and then began an orchestration by the industry to end our efforts to protect our children.

The tobacco industry badly miscalculated again. Instead, our resolve to protect our children's future has been strengthened. This effort is of vital importance for the children of our Nation and for their future health.

In the 11 months since the proposed 1997 settlement, 990,000 underage children have become smokers. One-third,

or approximately 330,000, of those children will eventually die prematurely because of tobacco-related illnesses. This is a tragic statistic. This undermining of our children's future health must end.

If a child begins smoking before he or she reaches the age of their 18th birthday, there is an 80 percent likelihood that child will continue to smoke into adulthood. For these young children, the decision to try smoking has ramifications far beyond their understanding at such a tender age. These young people view themselves as I suppose all generations of young people have—as being indestructible. They do not realize, nor fully comprehend, the significance of their decision. That is a condemnation to a possible future of lifetime addiction to tobacco and a possible lifetime threatening health condition.

I keep using that word ''addiction'' because that is what we are talking about, Mr. President, addiction. How urgent our efforts are to reinforce these efforts have been highlighted by the recent report from the Centers for Disease Control, a report which indicates that the increase of tobacco usage by underage youth has increased by alarming proportions.

Just 7 years ago, 27.5 percent of all high school students in America smoked. In 1997, that number had risen to 36.4 percent. At the same time, the number of adult smoking was declining. Young African-Americans historically have been able to resist the tobacco industry's advertising reach and had relatively low levels of underage tobacco use. Unfortunately, that is no longer the case. Smoking by African-American students has almost doubled in the past 7 years, the fastest growth rate of any youth group over the past 6 years. White youth smoking has increased by 28 percent, and Hispanics have increased by 34 percent over the same time period.

Overall, 5.5 million of our Nation's 15 million high-school-age children are smokers. This report's findings are most distressing. Rather than gaining, we are losing ground in our effort to protect our children's health.

The decision to smoke or not to smoke is, we are told, an adult choice, and I share that perspective. But we have learned that the tobacco industry has systematically focused its marketing strategies on underage smokers and then lied about it. They lied to the American people. They lied to the Congress.

To get middle-school-age children—these are youngsters who are not yet in high school—to try smoking and then to get them hooked on nicotine is the key to the tobacco industry's future markets and profits. To hook these children at this early age means these young people will have been smoking for 3 to 5 years before they have reached the legal age to make that decision, the age of majority or adulthood at 18. What the tobacco industry has done is tantamount to a crime.

Let me be clear I strongly believe underage children also bear responsibility when they attempt to use, purchase or possess tobacco products, and they need to be held accountable for their illegal activity. I am pleased that at my request this legislation includes provisions to require States to have penalties so that underage youth who do try to purchase a tobacco product will know it is illegal and that it carries consequences. These penalties can include community service, fines and suspension of driver's license privileges. But holding young people responsible for illegal smoking or possessing tobacco products in no way excuses the tobacco industry for its shameless efforts to encourage underage smoking.

Our underage children have been the premeditated focus of the tobacco industry's effort to ensure there is a future, and I use their terminology, ''replacement market'' for their products. This industry has for years strategized as to the methodology to entice our youngest children to identify tobacco product brands with the sole purpose of getting them to try smoking as early as possible. This industry knew the earlier a child tries smoking, the greater the likelihood will be that child will continue to smoke and become addicted to nicotine. Once addicted to nicotine, that child will very likely continue smoking into adulthood, and then the industry will have accomplished its goal: the creation of a future replacement market for its products.

In the tobacco industry documents recently made public, this is manifestly clear. An R.J. Reynolds document states:

> This young adult market, the 14 to 24 group. . . represent[s] tomorrow's cigarette business. As this 14 to 24 age group matures, they will account for a key share of the total cigarette volume—for at least the next 25 years.

Yesterday, Mr. President, I was privileged to attend the White House Campaign for Tobacco-Free Kids. I was impressed with the more than 1,400 youngsters who gathered, representing America's youth, who made a determination not to be fooled by the tobacco industry. These young people have already made a choice, and that choice is to say ''no'' to the tobacco industry's attempt to take their future health away from them.

The tobacco industry has tried to manipulate the legislative process by intimidation. But the industry's saber rattling about its ability to win trials has been seriously undermined by its own actions.

The tobacco industry, among other criticisms of this bill, has consistently maintained that any legislation not limited to the $386.5 billion originally negotiated amount by the attorneys general and the tobacco industry in their June 1997 settlement would result in the bankruptcy of the industry.

The legislation we debate today is estimated to cost over $516 billion over 25 years, and the tobacco industry is asserting that such an amount would result in their bankruptcy.

However, I think it is noteworthy to point out that during the course of the congressional deliberations on the attorneys general-industry settlement, the tobacco industry itself has settled that it has voluntarily entered into an agreement with the State of Mississippi for $3.4 billion, the State of Florida for $11.3 billion, the State of Texas for $15.3 billion, and, most recently, the State of Minnesota for $6.6 billion.

Now, the tobacco industry's willingness to pay these multibillion-dollar judgments in just 4 of the 41 States makes two very important points. First, the industry's contention with respect to bankruptcy has been proven to be specious. These four settlements extrapolated to the remaining State lawsuits would cost the industry approximately $500 billion, nearly the same amount as the cost of the McCain legislation.

A further note. This industry was prepared, as a consequence of the June 1997 settlement that it voluntarily entered into, to decrease youth smoking by approximately 40 percent. The industry did not seem too concerned in June of 1997 that a loss of 40 percent of their market would bring about bankruptcy. And it does seem logical to believe that the industry would not have voluntarily negotiated a settlement if they believed that settlement would put them out of business.

A second point, if I may, Mr. President. The magnitude of these settlements only served to verify the industry's determination not to allow any lawsuit to go to a jury because they are fearful of the outcome—just what a jury might do once a jury fully understands the egregious misconduct of this industry and the impact it has had upon our Nation's children.

So the tobacco industry has also pulled out another old scare tactic, that this legislation creates a monster, convoluted, massive new bureaucracy. Quite to the contrary, this legislation does not. All administrative efforts need to assure that the proper implementation of this historic legislation will be done by currently existing agencies.

This legislation does provide for a very strong Food and Drug Administration role in the efforts to stop underage tobacco use and to assure the public of our Nation that its safety and the safety of our young people will be its paramount concern.

Now, I have consistently supported the FDA's efforts to reduce underage smoking. I am pleased that this bill will reinforce and, indeed, strengthen the ability of the FDA to continue to protect the public health of our citizens. The legitimate concerns raised by convenience store retailers who had feared they could, as a retail group or class, be prevented from selling tobacco products under the proposed

FDA regulations have been addressed. These retailers have now expressed their support for the proposed State licensing of business entities selling tobacco products as a means of further controlling access of these products to underage children. Under the revised FDA regulation section, the FDA will be able to revoke a retailer's license, on an individual basis, to control those retailers who do not abide by sale restrictions. This will protect those responsible retailers who are committed to preventing underage access to tobacco products, and to punish those who irresponsibly do not do all they can to prevent young people from illegally purchasing tobacco products.

Mr. President, equally ridiculous to the bureaucracy ''scare'' is the assertion that a massive black market will emerge. On the floor, we have heard over and over again the black-market warnings of Jim Pasco, the executive director of the Fraternal Order of Police. What tobacco supporters fail to tell us is that this same gentleman is on the payroll of Philip Morris, this country's largest tobacco company.

So I conclude, Mr. President, by observing that the arguments made by the opponents of this legislation are pure smokescreens. The issue is really simple: Will Congress have the courage to vote on the side of America's youngsters and to protect our youngsters from the possible lifetime health-crippling afflictions that are attributed to the use of tobacco that cause the premature death of hundreds of thousands of people each year or will it support the tobacco industry?

I hope my colleagues will take the courageous and historic step to vote for this legislation and to protect the young people in America.

I thank the Chair and yield the floor.

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

Mrs. HUTCHISON. Thank you, Mr. President.

Mr. DEWINE. Will the Senator yield?

Mr. President, I ask unanimous consent that I be allowed to speak after Senator DURBIN. We have an amendment that we are offering together, and I would like to be able to speak right after his speech.

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

Mr. GRAMM. Would the Senator yield before she starts for a unanimous consent request?

Mr. President, I ask unanimous consent that the Senator might yield to me for 1 minute.

Mr. FORD. I object.

The PRESIDING OFFICER. Objection is heard.

Mrs. HUTCHISON. Mr. President, everyone agrees that children should not smoke. They do not have the maturity or judgment to understand the risks of their decision.

Mr. FORD. May we have order?

The PRESIDING OFFICER. The Senate will be in order.

Mrs. HUTCHISON. Where we differ is, how do we achieve this result? Forty States have now filed lawsuits to engage the tobacco industry in accepting the responsibility for its actions. Recent evidence demonstrates tobacco companies targeted children in their advertising, and the industry may have manipulated scientific research in its favor. This, obviously, is outrageous.

We have a historic opportunity to limit youth smoking and to disclose all the information concerning the health risks of adult tobacco use.

Four States have moved forward and reached settlements. My State is one of those. As a member of the Commerce Committee, which drafted the first version of the legislation before us, my principal concern was to ensure that nothing we did at the Federal level would undermine the agreements that have been reached by the individual States.

I appreciate Senator MCCAIN for his support of my amendments in the committee, most of which are in the bill before us, that would hold those States harmless.

In my view, the most critical aspect of the Texas settlement and of the State attorneys general agreement that was reached with the industry was the restrictions on advertising and marketing that the industry accepted. These restrictions were tacit admission by the industry that its practice of marketing to teens was unacceptable.

These restrictions are critical to our cause of reducing teen smoking. According to the Congressional Budget Office, if the tobacco industry did reduce its advertising, the greatest effect would probably be among teens. This report notes that studies show that teens are more sensitive than adults to brand-specific advertising.

I voted for the original version of this bill in the Commerce Committee in large part because of the testimony of the attorneys general. They said the industry acquiescence in a ban on advertising, combined with a limit on industry liability, was the critical policy mix needed to attack the problem of teen smoking. That is why I voted against the Gregg amendment that was just before the Senate. That amendment will remove the liability limits.

The reason a limit on liability was deemed important by the attorneys general was that the tobacco companies are the source of funds for the smoking cessation programs in this bill. If tobacco companies are sued out of business, new ones that aren t held to the standards of this bill will replace them and we will have the worst of all worlds. We will have new tobacco companies that do not have liabilities because they haven't advertised to teens and committed the other misdeeds of the present ones. They will not be bound by the restrictions on advertising. I am afraid we will do more damage if we pass a bill that has no limitations on liability and no restrictions on advertising. This balance between advertising restrictions and liability limitations is what the attorneys general put forward, and I think we must recapture it.

In the Texas agreement and in the State attorneys general agreement, the tobacco companies are partners in the effort to stop teen smoking. Largely through the voluntary advertising and marketing restrictions in the legislation that was before the Commerce Committee, we would be able to achieve our result to stop teen smoking. The tobacco companies have now walked, and I am afraid this is not a good development. I hope we can restore the balance and, in our zeal to punish the tobacco companies, that we do not destroy the very companies we expect to pay for the programs in our bill that can end teen smoking.

Without the advertising restrictions, I believe what we have before the Senate is a tax bill. We have to decide if raising the price of cigarettes would have the effect of stopping teens from buying them.

Now, most parents would be experts in answering the question: Will the demand for cigarettes by teenagers go down if we raise the price? They know, for example, that a $200 pair of tennis shoes or a $75 pair of sunglasses sound perfectly reasonable to a teenager. To those teens, there probably isn't much difference between a pack of cigarettes that costs $2.25 or $3.75. Unfortunately, the Congressional Budget Office study tends to support this common sense observation. According to the CBO study that said teens are sensitive to advertising, teens are not very responsive to tobacco price changes. In fact, studies show that, under some circumstances, there is no impact on teen demand when cigarette prices rise.

I have spoken to teens about this. I have asked them, Will raising the price from $2.25 to $3.75 make a difference? What I have found is that teens do think this is a pocketbook issue. But it is not the one you think. It is not the money in their pocketbooks that will make the difference to teens; it is their driver's license. Teens say that what will really deter them from smoking is the threat of losing their driving privileges. In fact, a study by the Texas Department of Health found that 64 percent of teenagers said they would not smoke if they thought they would lose their driver's licenses. This was compared to 48 percent who said a $250 fine would deter them. My State legislature passed legislation that imposed tough penalties on tobacco use for underage Texans, including suspension of their driver's licenses.

I am very concerned about what I consider to be essentially a tax bill, because we have lost the balance that we had in the attorneys general agreement. If it is going to be a tax bill, let's be honest; it is a tax bill on lower- and middle-income people. It may also lead to a black market problem.

Before I came to the U.S. Senate, I was the treasurer of the State of Texas. In Texas, the treasurer was the tobacco tax collector. I have dealt with the black market. I have seen how differences in tobacco taxes between states affect the black market. My agency did raids on flea markets and roadside sales of illegal cigarettes that didn't have stamps on them, and I can tell you something: We stopped truckloads coming from Louisiana into Texas and into the flea markets because there was a significant difference in taxes between Louisiana and Texas—it s a 21 cent a pack difference today. In fact, the estimates of the nonpartisan Tax Foundation show that my State of Texas loses $172 million in revenue annually due to the black market in tobacco. That is because we live next to a State that has a 21-cent lower tax and next to a country, Mexico, where cheaper cigarettes are available.

In Canada, they had the exact same experience when they increased the cigarette tax in 1991. Smuggling became such a problem that many provinces cut their own taxes to make it less lucrative. What did that lead to? Instead of smuggling, there was a black market between the Provinces. The government of British Columbia estimates losses of as much as $100 million a year.

This is the reason that the National Association of Police Organizations has asked us to be very cautious with the legislation before the Senate. According to the executive director, Mr. Robert Scully, this bill could lead to an increase in cigarette smuggling beyond the control of organized law enforcement.

All of us are struggling to try to do the right thing. I believe that I can truthfully say every Member of the U.S. Senate has the same goal: To stop teen smoking. However, how we get there is the question, and I don't think we are close to agreement on what is the right path to that goal.

I am not going to vote for taxes that will run out of business the tobacco companies that can pay for the health and smoking cessation programs. This would result in the emergence into the market of new companies not bound by our restrictions because they would have no history of wrong-doing. Then we would have no funding for the health programs, no voluntary restriction on the advertising, and we will never reach the goal of stopping teen smoking.

I am not going to vote for a tax increase that is so high that it causes a black market in my State of Texas as well as Arizona, New Mexico, and California, that borders Mexico, or where the price of cigarettes is very cheap. I am not going to vote for a bill that does not have a reasonable chance of a balance that will achieve the goal of stopping teen smoking.

We are going to have a lot of votes. I hope we can come up with a bill that I believe will reach that reasonable balance. I have not seen it yet. I hope that in the end we will not pass a bill that will create a black market, that will create more crime, that will take away the source of revenue that could help us pay for ads to stop teen smoking. And I hope we will not, in our zeal to punish the tobacco companies, have them walk away from the restrictions on advertising which they can only do voluntarily because it is their first amendment right to do so.

I hope I can vote for a responsible bill, Mr. President. I hope everyone in the Senate will come together to try to achieve an agreement that will produce the result of stopping teen smoking.

The PRESIDING OFFICER. Under the previous order, the Senator from Illinois is recognized.

Mr. DURBIN. Mr. President, I believe the Senator from Oregon has a unanimous consent request. Would he be able to make that request without jeopardizing my time?

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

Mr. WYDEN. Mr. President, I ask unanimous consent at this time—I have offered an important look-back amendment in the Commerce Committee and worked with Senators DURBIN and DEWINE—that I be allowed to address this amendment after Senators DURBIN and DEWINE this afternoon.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

The Senator from Illinois.

Mr. DURBIN. Thank you, Mr. President.

Mr. President, for those who are following this debate, I hope they will understand that we are genuinely trying to move this bill to final passage. This bipartisan bill is the product of the Commerce Committee, crafted by Senators MCCAIN, KERRY, HOLLINGS, and others in an effort to do something historic to reduce the number of teenagers and children in America who are lured into the addiction of smoking.

We have tried to establish a procedure on the floor, which occasionally we have been able to hold to, and occasionally we fail. But that procedure was to allow each side to offer an amendment. Of course, Senator GREGG had offered his amendment, and, after some motions, then Senator GRAMM of Texas offered his amendment. At that point, I was supposed to have been next. But as it stands, now I am coming up with this look-back amendment in this fashion. It is an amendment which I am happy to sponsor with Senator DEWINE of Ohio, as well as Senator WYDEN of Oregon, Senator CHAFEE of Rhode Island, Senators HARKIN, COLLINS, KENNEDY, SNOWE, DASCHLE, CONRAD, and REED. This is truly a bipartisan amendment. I hope that those who are following this debate will understand the significance of this amendment.

The look-back provisions in the bill are really important in terms of enforcement. This term look-back is a relatively new term. It is not one created by the Congress. It is, in fact, a term of art which came about as a result of negotiation after the State attorneys general sat down with the tobacco companies. This is really an effort to make certain that the tobacco companies keep their word and reduce the number of young people in America who are smoking.

We have talked about imposing a new tax, or fee, on tobacco products with the belief that it will reduce teen smoking. But we are not certain. We don't know how much we will be able to achieve by increasing the tobacco fee by $1.10 a pack. We believe it could be significant. But it may not be enough.

That is why we have what is called a look-back provision. This is how it works. In years to come, we will do a survey of teenagers across America, and we will take a look particularly at children who are smoking. We will try to determine how many are smoking. We will also be able to determine what brands of tobacco they are using. With that information, we will be able to measure the effectiveness of the goal of this bill. We will look back on a periodic basis to determine how many children have been taken from the ranks of smokers or have not been recruited in the first place, and we will take a look at what they are smoking.

The look-back provisions are an important part of the agreement with the States' attorneys general. The tobacco companies knew this had to be part of the bargain. They couldn't walk away from the table with all of the things they hoped for, walk away from liability in a State suit, for example, without some assurance that they were in fact going to be genuine in their efforts to reduce teen smoking. The look-back language that is included in the McCain bill which came from the Commerce Committee is a very good start, but only a start.

That is the reason I am offering this amendment with Senator DEWINE and others. We want to construct an effective look-back provision that will change companies' behavior and give them incentives to stop marketing to children.

Our look-back amendment does two very important things. First, it shifts the emphasis on any look-back assessment so that it will fall primarily onto tobacco companies that are the worst offenders rather than primarily on the industry as a whole. That is a major element in this debate.

If you were to ask what is the difference between the Durbin and DeWine amendment as opposed to the Commerce Committee bill, it is the fact that when we look back and determine whether or not the tobacco companies are keeping their word, whether in fact they are no longer marketing and selling to children, we believe at least in this amendment that we should hold individual companies responsible. The McCain bill, the Commerce bill, as good as it is—I think it

is a good bill—looks at it primarily from an industry viewpoint. I will try to spell out here in more detail why I think that is not the way to go.

The second thing we do that is very important is, we restore the smoking reduction targets that were originally agreed to by the tobacco industry in their proposed settlement with the States' attorneys general last June. On both scores, this amendment is about accountability. Will these companies change their behavior? Will they stop their insidious marketing practices? Will they get honest in terms of the retailing of their product? We can find out. We can measure it. We can hold them accountable. If they don't live up to the reduction levels proposed in the legislation, they will face financial incentives to create the right climate and the right results.

Why do we need look-backs? Effective look-back provisions can help achieve the goal of reducing youth tobacco use and change the current incentives that drive tobacco companies to market to children. Make no mistake. We have gone through this debate over and over. You will recall that for years the tobacco companies used to say, ''This isn't fair. We are not trying to sell to kids.'' Then, of course, lawsuits were filed across the Nation. We required them to disclose the documents they were using. Along come these documents. It turns out that these tobacco company executives were not as honest as they should have been.

You all may recall this great scene that occurred about 4 years ago in the U.S. House of Representatives when the eight tobacco company executives came before the Commerce Committee in the House of Representatives. This ''gang of eight'' raised their hands and solemnly said under oath that nicotine is not addictive. America laughed, because they knew that once again the tobacco companies had made an incredible statement, literally one that had no credence whatsoever. When the tobacco companies told us nicotine wasn't addictive, that they were not adding nicotine or manipulating it in cigarettes, that they were not trying to sell to kids, it turns out they were wrong on all counts. So much for the credibility of the ''gang of eight.'' Incidentally, they are no longer the managers of these companies. But, nevertheless, their successors still have to be held accountable.

Today, each new child who starts to smoke represents a new profit opportunity for tobacco companies. Tobacco companies have a tough go of it. Think about it. If you were running their business—every year they lose 2 million of their best customers. But a half a million people will die from tobacco-related diseases. Another 1.5 million will finally be able to quit and break the habit, or will die of other causes.

If you are running a company losing 2 million customers a year, you need new ones. Where will you turn? You know adults are not your most likely market. They are usually smarter, a little more mature, and they know the danger of tobacco. They are not easily lured into the addiction. You have to go after the kids, and get the kids in their rebellious youth when they are willing to try anything and think they are going to live forever, and get them started on tobacco. If you can get a kid to start smoking cigarettes or chewing tobacco, it will develop into an addiction. The drug in that tobacco will go into that child's system and create a craving for this product that is very tough to stop. For those children who think that it is an easy thing to quit this addiction, it is not. The earlier they try to stop, the better. But the tobacco companies know that.

Since most smokers start as children, children are the only available replacement smokers to take the place of these 2 million lost customers. In addition, we know that smokers are generally very loyal to the first brand that they smoke. We all know people who will only smoke certain brands—Marlboros, the cancer cowboy's cigarette, or Kools, Camels, whatever it happens to be. Many people who started with the brand when they were kids stay with it for a lifetime, albeit a shortened lifetime.

These facts and the desire to give their shareholders steady profits lead the tobacco companies to market to children to ensure their future markets. The strong look-back provisions will totally reverse the economic incentives for marketing to children. It will say to the industry and to each company that they have an incentive to prevent their products from appealing to children. Manufacturers will start using what they have learned about teenage tobacco use to avoid having children use their products because every new child who picks up a cigarette or pockets a can of snuff will be an economic loss to the company.

Our goal is not to punish the companies or gain revenues. If this never generates a cent, that would be fine. But basically what we are trying to do is meet the smoking reduction targets. Our goal is to create the incentives which help achieve actual reductions in underage tobacco use so companies might never have to pay a penny of these look-back assessments. We are going to do our part. We are going to have youth access restrictions, counteradvertising, public education, and other governmental efforts to reduce youth smoking. We expect the tobacco manufacturers to do their part as well. And that is what this amendment is all about—accountability.

Why focus on company-specific assessments? In the bill that is pending, a much greater share of the look-back assessments are imposed on the whole industry rather than on specific companies. There is a $4 billion annual cap on industry-wide payments that is much greater than the company-specific assessment. Although the company-specific charges could be as much as $3 to $4 billion in extreme cases, it is more likely they are going to be a lot smaller. If all the companies miss their target by 10 percentage points, the company-specific surcharges would only equal $640 million. If they miss by 20 percent, it would be $1.3 billion compared to nearly $4 billion for the industry as a whole.

Let me show a chart here which gives you an idea of the difference between the look-back provisions that we are discussing.

Consider the fact that we are setting these targets to reduce youth smoking, and these targets say that over a 10-year period of time we are going to bring down smoking among kids by a certain percentage.

What happens, let's say, in the fifth year after this legislation passes when the tobacco companies as an industry are supposed to reduce the number of kids smoking by 40 percent? What happens if the largest company misses it by 20 percent, if instead of having a 40-percent reduction, they only have a 20-percent reduction?

Look at what occurs. Under this comparison of the Commerce Committee bill, and this amendment by Senator DEWINE and myself, the industry as a whole would face a penalty of 10 cents a pack and the individual company 9 cents a pack if they miss it by 20 percent under the Commerce Committee bill.

But look at the other side now if our amendment prevails—6 cents for the industry per pack, but 29 cents for the offending company. Doesn't that make more sense? If we know as a result of our surveys that the kids are smoking Camels, for example, shouldn't R.J. Reynolds be held accountable? They are the company that makes the brand. They market the brand. They retail the brand. They have an obligation under this law to reduce teen usage of their brand of cigarettes.

If you don't do that, think of the perverse situation where one company is trying its best to reduce teen usage and youth usage and another company ignores it. Under this bill, the penalty is spread across the industry by and large, and there is not that much of a forfeiture of funds for the individual company as would occur under the DeWine and Durbin amendment. We want to make this more company-specific.

This approach, which currently is in the bill, risks creating incentives for some company to keep building future market share. There is money to be made here. As long as these kids are smoking, these companies are making money. We want to make sure the profit is taken out of this. Our amendment increases the company-specific payments, reduces the industry-wide payments.

This amendment will not necessarily increase the price of cigarettes. I want to really pause for a moment on this point because I think it is so important. We have had a lengthy debate

over the last several days about whether or not we are imposing, at least indirectly, new taxes on lower income individuals, whether by raising the price of a package of cigarettes we are passing along to lower income and middle-income individuals more of a tax burden.

Think about this for a moment. Assume we have two companies and the Durbin-DeWine amendment is enacted. One of the companies is doing a good job; it is reducing its sales to minors—very happy with the results. The other company has made a calculation. The other company says we are not going to be so tough or restrictive. We will, frankly, look the other way. We are going to continue to do some marketing that we know appeals to kids. We are going to kind of tell our retailers we are not going to enforce the law that stringently, and so look what happens. If that occurs under the existing bill, they are both going to be treated equally in the industry-wide assessments; both will be facing these additional costs per pack equally.

Under our approach, it will be significantly different and the company that is a bad actor, the company that is not trying to reduce sales to kids is a company that will face a much, much larger charge per pack. Now, what do you do? If you are the company that has been selling to kids, it turns out kids are smoking your brand, you are facing this kind of payment. You can't add this price to the package of cigarettes because your competitor isn't doing the same. You have to absorb this cost in your bottom line. So the consumers are protected from the price increase, and basically the company really pays a price for what they have done.

This bill presently before us also reduces youth smoking reduction targets relative to what the industry agreed to last year. This second and very important element in the bill is one I would like us to pause and reflect on. Just last year, these tobacco companies came together, and with the State attorneys general said we agree to the following targets to reduce the number of smokers each year.

Well, a year has passed. The issue has come to Capitol Hill. We debated it back and forth and now we have a chance to enact this legislation. What has happened during the course of that year? The tobacco companies have done very well. They have done very well in luring more children into this addiction. In fact, since 1991, we have seen a dramatic increase in the percentage of kids who are smoking. That is a sad commentary. It is a sad fact of life.

What Senator DEWINE and I are doing in our amendment is going back to the original targets the tobacco companies set in their agreement with the attorneys general. So instead of the McCain or Commerce Committee bill reducing smoking by 60 percent of kids over 10 years, we hit a target of 67 percent in the equivalent course of time, getting them to quit or sparing more kids from the possibility of becoming smokers and of facing disease and premature death. Four-hundred and fifty thousand more children will be protected with the Durbin-DeWine amendment by the year 2008 than in the underlying bill. There will be 450,000 fewer smokers if the tobacco companies continue to meet their reduction targets of 67 percent instead of 60 percent; 150,000 fewer premature deaths—we know that about a third of smokers are going to die young as a result of this habit; $2.8 billion in lifetime social costs are avoided; and we have the same real target as the original proposed settlement. I think that makes sense.

The next question is the constitutionality question. The tobacco companies claim that these look-back provisions are unconstitutional. But both the Department of Justice and the Congressional Research Service have studied the issue and concluded they are wrong. Just as we hold companies responsible for clean air attainment standards, we can hold them responsible to help reduce youth smoking rates.

The courts have required that there be a rational basis for this type of program, and this amendment is based on a very rational consideration. If companies' assessments or surcharges raise their cost of doing business as usual, they will consider it an incentive to change their behavior and use the knowledge they have gained over the years in terms of selling to kids, to stop selling to kids.

With regard to the argument that this might violate due process, the purpose of the look-back assessments is to supplement the other measures in the bill designed to reduce youth smoking rates, including the bill's price increases, and to encourage the industry, which is uniquely able to develop innovative strategies, to take the action to minimize youth smoking.

The look-back provisions don't violate the Constitution's bill of attainder. All of us who studied the Constitution over the years wondered if we would ever run into a case where somebody would start talking about a bill of attainder. I didn't think I would ever face that in my life on Earth, and here we are on the floor of the Senate talking about a bill of attainder.

The bill of attainder in the Constitution prohibits singling out particular individuals or entities for legislatively mandated punishments. The tobacco companies have said: Oh, this look-back provision is a bill of attainder. The Department of Justice states the look-back provisions apply to all manufacturers of tobacco products, not a single company, and would operate as one component of a comprehensive industry-wide reform. Additionally, look-back provisions are not penalties for industry misconduct so much as an affirmative step to reduce youth smoking.

I think the tobacco industry's constitutional argument is a weak one, designed to shift away the attention from their marketing to kids.

Let me respond quickly to a few other items, and then I will be happy to defer to my colleague and cosponsor, Senator DEWINE.

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

Mr. DURBIN. I will be happy to yield for a question.

Mr. FORD. I understand where you are going with this, and it is beginning to take hold. But in this piece of legislation, does HHS have the ability to put on the educational programs that would reduce youth smoking and the tobacco industry would have no control over that?

Mr. DURBIN. Yes. I thank the Senator for raising that.

Mr. FORD. But the point here, then, is that I am putting out all this information, and it doesn't work; then you get fined. I am a little bit concerned about that. I understand where the Senator is coming from. But I think we need to cover one more base, that if the tobacco industry is going to be responsible for the percentage reduction, and, if it isn't, then they pay, they ought to be able to be charged with advertising, or something, rather than letting HHS do it. And if it doesn't work, they get penalized.

As we say down home, ''Something about that ain't right,'' and I hope the Senator, with all his knowledge of this area, would look somehow to be sure that, if you are going to be charged with a penalty here, somehow you ought to have some input on how it is completed. You might be able to clear me up on that.

Mr. DURBIN. The Senator from Kentucky raises a dilemma, and that is: How much could we trust the tobacco industry coming up with the goal?

Mr. FORD. They can't.

Mr. DURBIN. I think it is more likely a public health agency will try to reduce those numbers. I can recall a few years ago the tobacco companies said, ''We are going to stop marketing to kids, and we are going to tell these kids we don't want their business.'' And they delivered their message by buying full-page ads in the Wall Street Journal. There may be some kids who read the Wall Street Journal, but not a lot of them. It is far better to take that information and message and put it on a television show the kids are likely to watch.

Mr. FORD. I say to my friend, I take this as if they were doing it to me as an individual and saying that you are going to be penalized—I am going to be penalized if your program doesn't work. And some companies, a brand only has about 1 percent of youth. They don't like it, and they don't use it. But if you reduce it down, if it is 1 percent, which one brand is, then you have to reduce that to six-tenths of 1 percent. That becomes very difficult when it is all adults.

I agree with what you are trying to do. I hope somehow or another we can make it fair rather than unfair.

Mr. DURBIN. I thank the Senator for his question, and I hope what we are doing is a coordinated effort. It is an effort which increases the fee on a package of cigarettes, which we have been told by economists, in and of itself, will reduce youth usage. It is an effort to change the advertising so that, by and large, children are not affected by the lure of that advertising. It is an effort by the Government—and the Senator is right—through HHS and others, to deliver this message effectively. But finally it comes down to the tobacco companies themselves who make the product and market the product and sell the product. And they bear a responsibility, too, a responsibility which, if they don't live up to it, is going to result in a charge against each package of cigarettes.

Let me just conclude with two or three points before deferring to the Senator from Ohio. Some say the 67 percent reduction figure over 10 years is too high. I don't believe it is. Marijuana use by 12- to 17-year-olds declined 76 percent from the late 1970s to the early 1990s. The smoking rate among black 12th graders in the late 1970s was the same as the rate for all teenagers today. It declined by 76 percent from the late 1970s to the early 1990s, without advertising restrictions, education, and counteradvertising envisioned in the current legislation.

Mr. President, 80 percent of adult smokers and 70 percent of adolescent smokers regret ever starting to smoke. I think we have a situation here where 67 percent is a figure that can be reached, and the actual number of young people who would then stop smoking is one that was agreed to by the tobacco companies when they met with the attorneys general just last year.

Why do we want to strengthen this bill? Because, frankly, we believe that unless the industry is held to this standard on a specific company basis, the results will not be what we hope they will be. Some people say the amount of the payment here is more than the lifetime profit from each new young smoker.

First, let's not get caught up in the debate of what is a lifetime profit from a new smoker. Is it only $500 or $1,000 or $1,500? I am not sure we accept these claims.

Second, these companies are not just profit maximizers; they want volume. Why? Why would the tobacco industry want volume over profit? Because they are dealing with people who are addicted to nicotine, who will have to follow them up the track as the price increases. So they do not focus just on profits but also on volume. And we have to find a way to reduce the volume when it comes to children.

Third, even this calculation does not get to the true cost of addicting a child on tobacco. The American Medical Association has estimated we would have to increase the surcharges to $400 million per percentage point—more than 6 times what the bill does in its company-specific look-back—to cover the societal cost of each additional smoker. It is about more than tobacco company profits; it is about the cost to America and American families as a result.

I think what we are setting out to do here is create a payment structure that is reasonable. Under the bill, companies will pay an industry-wide payment of $80 million for each of the first 5 percentage points by which they missed the targets, $160 million for each of the next 5 points, $240 million for the next 12, maxing out at $4 billion. Each company that misses the target will pay a company-specific surcharge of $1,000 multiplied by the number of children by which a company falls short of in its target. There is no maximum for the company-specific surcharge, which could reach as much as 3 to 4 billion dollars in an extreme case.

Under our agreement, companies will pay an industry-wide payment of $40 million for each of the first 5 percentage points by which the industry as a whole misses the targets, plus $120 million for each of the next 15 points, with a maximum of $2 billion. Each company that misses the targets will also pay a company-specific surcharge equal to the company's share of youth smokers multiplied by $80 million for each of the first 5 percentage points, $240 million for each of the next 19 points, with a maximum of $5 billion.

The potential maximum surcharges are similar in the aggregate. Ours is weighted towards companies as opposed to towards the industry as a whole.

Let me close by saying that I am happy that this is, in fact, a bipartisan amendment. For those who have argued on the floor over the last 2 days that they want to make certain that we don't increase the price of the product too much for lower-income groups, the Durbin-DeWine amendment addresses that directly. When you go company-specific, the money comes off the bottom line. For those who say that the targets that the State attorneys general agreed on to reduce the number of kids smoking were reasonable, as those tobacco companies said then, this bill returns to those targets. We think this is sensible. Let us reward those companies which are engaged in good conduct, reducing youth usage. Let us make those pay who do not engage in good conduct.

I am happy to have this amendment offered today in the Senate, and I am proud to have as my cosponsor the Senator who will be speaking next, my friend who served in the other body with me and now is the Senator from Ohio, Senator MIKE DEWINE.

At this point, I yield back the remainder of my time.

The PRESIDING OFFICER. Under the previous order, the Senator from Ohio is recognized.

Mr. DEWINE. I thank the Chair.

Mr. President, I am pleased to join with my friend and colleague from Illinois, Senator DURBIN, to offer this amendment, an amendment to make the tobacco companies more accountable in our collective effort to reduce youth smoking.

Specifically, our amendment would make a few improvements—a few improvements, but significant ones—to the so-called look-back provisions of this current legislation. The look-back provision in the current bill sets targets for the reduction of teen tobacco use. And, then, it imposes assessments, or surcharges, on individual tobacco companies and the entire tobacco industry if these reduction targets are not met.

Our amendment would make two simple modifications to Chairman MCCAIN's look-back provision.

No. 1, our amendment, like the McCain bill, would impose a surcharge on specific companies as well as the entire industry, if reduction targets are not met. Both our amendment and the McCain amendment are blends of those two formulas. They are different, a different blend, as I will talk about in a moment.

Our amendment puts a larger emphasis, though, on the company-specific surcharge. We do this because we believe the threat of a surcharge against specific companies will give them a much stronger incentive to limit teen tobacco use. In a sense, it is sort of the American way. We hold people accountable. We hold them accountable—we give them the benefit of what they do as well as the detriment if they do something wrong.

(Mr. BENNETT assumed the Chair.)

Mr. DEWINE. Second, Mr. President, our amendment will increase the targets for reduction of youth tobacco use over what is in the McCain bill. But actually with our amendment, we are restoring, as Senator DURBIN has pointed out, the original reduction targets that were agreed to by the industry last year in the global settlement. The net effect of our amendment is to restore what the tobacco companies said and agreed to last year and said that they could do.

Let me repeat, we are not increasing the final reduction targets. Rather, we are simply restoring the original targets that were agreed to in last year's settlement.

Before getting into the specifics of this amendment, I first congratulate my good friend, JOHN MCCAIN, who has put together a very credible, a comprehensive, a good bill. He has faced a very difficult challenge and has crafted an excellent piece of legislation. This is a comprehensive package that attacks teen smoking in a variety of ways. I believe this thorough approach, when all the pieces of the puzzle are finally put together, will significantly reduce teen smoking. Let's make no mistake about it, that is our objective—to reduce teen smoking; to reduce the number of young people every day in this country who start smoking.

I have followed the policy evolution of the look-back provisions since they

were first proposed in that global tobacco settlement announced last June, announced by the attorneys general and by the leading tobacco companies' executives. That settlement contained a look-back provision. That settlement contained this brand new and innovative idea—the idea that we could enlist the tobacco industry in our fight to reduce teen smoking by simply giving them a disincentive to hook young people on tobacco.

The look-back provision in the original settlement called on the companies to work with us to reduce youth smoking by 60 percent after the passage of 10 years. That 60 percent was to be phased in at several intermediate levels. The settlement negotiators, including the tobacco industry, all agreed to these reduction targets. They obviously believed that they were achievable.

The settlement then gave the tobacco industry a big shove, a big shove to meet these targets by calling for an industry-wide surcharge in any year the targets were missed. The amount of the surcharge was to be based on how much the industry missed the reduction targets, up to a maximum or limit, a cap of $2 billion.

While I look at this, I recognize really from the beginning, the look-back could be a tremendously useful tool in reducing youth smoking. The tobacco industry, driven by a profit motive, has been incredibly effective in convincing our children to start smoking. If the financial disincentive was strong enough, we would have a way to put the industry's expertise to prevent youth smoking and to turn this whole thing around.

After studying the settlement's look-back proposal, I have two basic concerns: First, I was concerned that the proposed surcharges were not high enough to work as a significant deterrent to the tobacco companies. Second, I had some concerns about the settlement's way of distributing the surcharges across the entire industry; in other words, how they determined who was going to pay what. This was an issue I explored in several committee hearings, both in the Judiciary Committee and in our Labor and Human Resources Committee.

This approach, frankly, if I can use the term, seems almost socialistic to me, the provision that was originally agreed to. The provision calls for looking back first at the end of 3 years and periodically after that to see how well the tobacco industry had done in reducing youth smoking, and then once we found that out, irrespective of how an individual brand did or individual company did in reducing youth smoking, to then say, ''OK, we're going to spread it out in the industry; in fact, we are going to spread it out, not based on the percentage of youth who were smoking a particular brand, we are going to take that penalty and spread it out among adult users.''

So if a particular company had 20 percent, for example, of the youth market, but 60 percent of the adult market, then, in fact, that company would end up taking 60 percent of the burden of the look-back penalty. It is, in effect, socialism. It is something I think that should offend every Member of the Senate. It is not right, it is not fair, and that is why we are changing it in this amendment. Frankly, that is why Senator MCCAIN put together an amendment, a compromise, that did, in fact, begin to go down this road. Our amendment simply goes a little further.

Any company under the original settlement that did its job in reducing youth tobacco use would have to share the benefit of this good behavior with its fellow tobacco companies. Likewise, a company that failed to reduce youth smoking would not bear the brunt of the resulting surcharges because the payments would be spread across the industry.

This approach would have the effect really of diluting the incentive for individual companies to work as hard as they can to prevent teens from using their products. After all, why would a company try to prevent kids from smoking its cigarettes, perhaps creating a competitive disadvantage for itself in the larger adult market when other companies would share in the reward for whatever success they had in reducing teen smoking? It just doesn't make sense.

The way the payments are allocated to the specific companies in an industry-wide approach on the basis, as I pointed out, of the adult market share, would also dilute the incentive for companies to do a good job. Let's take a quick look at the example of Philip Morris, the maker of Marlboro.

This company, through the use of the Marlboro Man and other marketing campaigns, has been unbelievably successful in selling cigarettes to our underage smokers, to our kids, to our children. In 1993, 60 percent—60 percent—of all teen smokers used Marlboro, when in the overall market for adults, Marlboro only had 23.5 percent of the market share.

Let's look at how the industry-wide look-back approach would affect Philip Morris. After all, Philip Morris is responsible for a majority of youth smoking. This is the main company at which look-back incentives should be aimed.

Industry-wide look-backs allocate the industry-wide assessments to each company based on its adult market share. So if the company misses its reduction targets and is then required to pay, Philip Morris is only responsible for 23 percent of that total, because that is the total market they have, even though Philip Morris is responsible for 60 percent of youth smoking.

In the case of Philip Morris, under these statistics, if in a year the tobacco industry did not meet its targets and there was a penalty that had to be assessed under the law, the division clearly would not be equitable. Philip Morris is responsible for 60 percent of the problem, 60 percent of the kids smoking, and yet they would only pay 23 percent under this straight provision.

Let me again point out that Senator MCCAIN has changed this and moved it in the right direction. Our amendment moves it even further towards more emphasis on company-specific penalties.

Mr. President, what do we think Philip Morris will do under this industry-wide look-back? Will the look-back do what it is supposed to do, get Philip Morris to try to reduce the number of children who it sells to? Mr. President, to me it is pretty obvious what would happen. Because this industry-wide look-back forces other companies to pay for the sins of Philip Morris, I would expect Philip Morris would simply ignore the look-back. The industry-wide look-back in this particular case would fail to do what it is supposed to do. In the case of Philip Morris, it would fail to give the proper incentive to the very company with the most responsibility for stopping kids from using its products.

That is why, Mr. President, I started calling for a tougher look-back than the original settlement and for one that would be imposed on individual companies that fail to reach the targets rather than on the entire industry. In other words, an effective look-back proposal is one that would commit each company, each tobacco company to feel the impact—whether good or bad—of its own behavior.

And let us not kid ourselves, Mr. President. The tobacco companies will be able to, through marketing techniques, through their dealings with their dealers, through what advertising they will still be able to do, they will be able to have a substantial impact on youth smoking.

Yes, the Government is going to come in under this bill and we will have some anticigarette campaigns. The Government will be involved in other things. This will not be brand specific. This will be across the industry. It will, we hope, have the effect we intend it to have. But the fate of each company will still remain in each company's hands. And they should be accountable for what they do. They should be given—sort of the American way, Mr. President—they should be given an incentive to do what is right and they should be, if I can use the term, ''punished'' if they do not do what is right. It is the right way to approach the problem.

Mr. President, I worked with the chairman of the Labor and Human Resources Committee, Senator JEFFORDS, to include a tough company-specific look-back in this legislation. Prior to the Commerce Committee's markup of S. 1415, I wrote to Chairman MCCAIN to request that his legislation's look-back surcharges be higher than the original settlement, and that they be assessed against individual companies.

Mr. President, by the time this legislation reached the Senate floor, Chairman MCCAIN and the Commerce Committee had improved the bill's look-back provisions, and they had done it in two very significant ways. I commend them for it. In the version of this bill that came out of the Commerce Committee, Senator MCCAIN increased the level of the industry-wide surcharge and the overall cap in the look-back. This served to provide a stronger incentive for tobacco companies not to target youth.

Further, the Senator from Arizona went even further in this regard in the managers' amendment he offered this week. Specifically, Senator MCCAIN added a company-specific look-back surcharge in addition to the industry-wide surcharge.

Mr. President, by including both a company-specific look-back and surcharges stronger than those in the settlement, Senator MCCAIN's look-back provision represents a clear improvement from last year's settlement. It will be more effective. It will be fair.

What the Senator from Illinois, Senator DURBIN, and I are doing as we offer this amendment is to simply refine and improve the McCain look-back provisions. And we do this in two fundamental but necessary ways.

Mr. President, the most important modification included in the Durbin-DeWine amendment is a stronger company-specific look-back. The argument for this is simple. The higher the company-specific surcharge is, the more powerful an incentive each company has to prevent children from using its products. By putting more of the burden on individual companies, we can provide a much more powerful incentive for tobacco companies——

Mr. BYRD. Mr. President, may we have order in the Senate?

The PRESIDING OFFICER. The Senator's point is well taken. The Senate is not in order.

The Senator from Ohio.

Mr. DEWINE. I thank the Chair and my colleague from West Virginia.

By putting more of the burden on individual companies, Mr. President, we can provide a more powerful incentive for tobacco companies to meet these reduction targets, especially among those companies that have gained the most from the youth market.

Basically, the Durbin-DeWine amendment would direct more of the surcharge amounts to be paid on a company-specific basis. The initial assessments—ones that are charged if a company misses its reduction target by a few percentage points—in our amendment would be higher than in the McCain amendment. In addition, unlike the McCain bill, our amendment would also bump up the surcharge once a company misses its reduction target by more than 5 percentage points.

Let us look at one specific example to demonstrate the differences of the two approaches. Suppose we had two cigarette manufacturers—company A and company B. Each controls, let us assume, half the market, including half of the youth market. Let us say company A has succeeded in meeting its reduction goals for reducing youth use, but company B failed to reduce its targets and failed, in fact, by 10 percentage points.

Company A has done the job. Company B has not. Here is how the total surcharges, to take a specific example—including both the company-specific and the industry-wide assessments—would break down under the McCain bill and the Durbin-DeWine amendment.

Under McCain, company A, the good actor, the good company, is responsible to pay $200 million, but would only pay $100 million under the Durbin-DeWine amendment.

Company B, on the other hand, the company that saw the increase, caused the increase in youth smoking, would be charged $750 million under McCain, but would pay $900 million under Durbin-DeWine. That is a 20 percent higher payment under the Durbin-DeWine amendment for the company that failed. More equitable.

So, as you can see, our amendment would shift the financial burden toward the company or companies that are responsible for the continued youth smoking, but also away from companies that do the right thing. Because companies will know that they are on the hook for how well they do, they have that much more incentive to prevent children from using their products.

Another way to demonstrate this, Mr. President, and to demonstrate the shift we are asking for in our amendment is to look at the overall bottom line. The McCain bill would impose an industry-wide cap, a potential maximum of $4 billion. This cap represents the maximum amount which would be assessed against the entire industry under these provisions.

Although there is no cap in McCain for company-specific surcharges, let us assume each and every company missed its target by, say, 25 percentage points. In that case, the surcharges would all add to about $1.6 billion. So that is the bottom line for McCain—$4 billion imposed across the entire industry, shared among all the companies, and about $1.6 billion for the individual companies that had not met its goals.

The Durbin-DeWine bottom line is as follows: The industry-wide cap is $2 billion, and the total amount of company-specific surcharges, under similar circumstances, would be $5 billion. That is only for that specific example.

Mr. President, the real story I am trying to convey with these numbers is simple: Our amendment has a greater focus on the company-specific look-back and thus provides a stronger incentive for tobacco companies to prevent children from using their products.

Mr. President, our amendment makes one other fundamental change to the McCain bill. Our ultimate reduction target—10 years hence—is a 67-percent drop in the number of teens who smoke. In the McCain bill, the end goal or target is 60 percent. On the surface, the McCain target appears to be the same as the 60-percent target in the original settlement the attorneys general reached last June.

Again, I remind my colleagues, this is a settlement that everyone agreed to. And the tobacco companies said, ''Yes, we will be held accountable. And, yes, we can get these targets.'' So it seems as if it is the same under the current McCain language.

But actually, on closer examination, the McCain target falls a little short of that original target in real terms. The reason why it falls short is the McCain and settlement reduction goals—although the same on the surface; appear the same—each use different starting points or different baselines.

The McCain bill calls for a 60-percent reduction from a higher baseline figure than was used in last year's settlement. Because of this, the McCain youth reduction targets are easier to meet than the original settlement. Again, not a great deal of difference. But all our amendment does, very simply, is take us back effectively to that original settlement, which I think was our original intent of what we should do.

What the Senator from Illinois and I are doing is restoring the original reduction goals from youth tobacco use from the settlement. The Durbin-DeWine amendment sets a reduction target of 67 percent, but after accounting for the different baselines—our reduction goal is equivalent to what is in the settlement. It is exactly what the tobacco industry last year agreed was reasonable and that they said they could reach.

Again, I want to thank my friend from the land of Lincoln, Senator DURBIN, and his staff for their work in putting this proposal together. Let me also thank Senator WYDEN, who will speak in a moment, Senators CHAFEE, WYDEN, DASCHLE, SNOWE, and COLLINS for joining us as original cosponsors of this amendment. This is truly a bipartisan amendment. I also appreciate the work of the Campaign for Tobacco-Free Kids and others in the public health community for their assistance and support. This amendment also has had the active support of former Surgeon General C. Everett Koop—and I certainly appreciate that. Finally, I am pleased that the New York Times has expressed its support for the amendment in an editorial in yesterday's edition.

Mr. President, the choice before us is simple—we have the opportunity here to vote on an amendment that will improve the one basic purpose of this legislation: to reduce youth smoking. By holding individual tobacco companies more accountable for failing to reduce youth smoking, and by restoring the original targets set by the tobacco

companies themselves, the Durbin-DeWine amendment will make a real difference in young lives. I urge my colleagues to join us on behalf of our young people and support the Durbin-DeWine lookback amendment. It is the right thing to do.

The PRESIDING OFFICER. The Senator from Oregon.

Mr. WYDEN. Thank you, Mr. President.

Mr. President, I offered the amendment in the Senate Commerce Committee to toughen the look-back penalties for one reason. I believe that stronger look-back penalties provide a powerful tool to actually change the course of history and hold the tobacco companies accountable when they pursue youthful customers.

A brief review of the history indicates that the tobacco companies won't change on their own. For example, if you look at every previous effort, every single previous effort on the part of the Congress to hold the tobacco companies accountable, the tobacco companies, in fact, have found a way to get around those efforts. That is what happened when the Congress sought to go forward with restrictions on advertising. That is what happened when the Congress legislated warning labels. And that is what happened when the Synar amendment was enacted.

Many will remember our colleague who served in the other body. Mike Synar wrote very tough legislation that would, in effect, require that the States carry out the laws to protect our kids when they were targeted. The tobacco companies found a way around that.

So the tobacco companies have found a way around every single previous legislative effort on the part of the Congress to hold them accountable. Those who would like to know more about this history can learn about it simply from the documents that have come out since the 1994 hearings in the Health Subcommittee on the other side of the Capitol.

Now, the tobacco companies would like us to believe that they will change the course of history and their behavior on their own. Many of the Senators will remember after the original attorneys general settlement the tobacco companies took out very large advertisements in both the Nation's newspapers and in the electronic media. The basic message of those ads that were taken out by the tobacco industry when they were encouraging support for the original settlement, was their message that it was a new day. Tobacco companies said it is a new day. There will be improved corporate citizenship on the part of the tobacco industry, and that the sordid history that came out after 1994 in those various documents was a part of the past.

I think the inclination of every Member of the U.S. Senate is to say industry can change. Our colleague, Senator DURBIN, made mention of the fact that many of the executives who testified in 1994 aren't alive today. So a number of us were very hopeful that it would be a new day in terms of tobacco industry behavior. But when the Senate Commerce Committee held hearings earlier this year under the leadership of Chairman MCCAIN, we received powerful evidence that things really had not changed.

I will cite one example in which I was personally involved. In 1994, when I was a member of the Health Subcommittee on the other side of the Capitol, HENRY WAXMAN brought the Nation's tobacco executives before the Health Subcommittee. It came to light that the Brown & Williamson company at that time was genetically altering nicotine, genetically altering nicotine to give it a special punch and to hook their customers. This was, of course, a flagrant example of subverting the public interest. It was documented by the Food and Drug Administration. At that time, the Brown & Williamson company assured the country that they would not engage in that conduct again.

During the course of our preparation for the hearings in the Senate Commerce Committee 4 years later, I and other members of the committee learned from news reports and others that there was evidence that, in fact, Brown & Williamson was again genetically altering nicotine and again engaging in this detrimental conduct that they pledged to the country they would never engage in again in 1994.

So when the CEO of the Brown & Williamson company came to the Senate Commerce Committee with the other executives, I asked specifically about what kinds of practices the company was engaged in with respect to genetically altered nicotine. The CEO of that company said, in fact, that they were again selling this product, and in their words, in response to a question I asked that day, they admitted that they were working off ''a small stockpile of genetically altered nicotine,'' engaging in conduct that they pledged the country in 1994 that they would never engage in again.

The reason I bring this example up is that if a tobacco company will engage in that kind of brazen conduct, in that kind of conduct when they are under the hot spotlight of the U.S. Congress, as they have been for many months, what are they going to do when the attention of the Congress and the country turns elsewhere? This isn't about conduct of 20, 30, 40 years ago. We know that took place in the past. A number of us were very interested in knowing whether the companies really did want to change of their own accord. Many of those who have opposed tough look-back penalties have used this argument in the past. Companies are changing. These kind of tools of big government are certainly unnecessary, at best.

The Brown & Williamson example where they are working off a small stockpile of genetically altered nicotine at this time is certainly strong evidence that these companies have not really changed and it is not the new day that the Congress and the country were told about after the original settlement from the attorneys general.

Given that past history, over 20, 30, 40 years, and the most current history, the Brown & Williamson example which, by the way, the Justice Department is now conducting a criminal inquiry into, there have already been pleas in this regard—given that past history and the history present, many of us are not willing to say that it is actually a new day in the tobacco industry.

Mr. President, I want the Senate to know why I am particularly skeptical. I was a member of the Health Subcommittee of the other body in 1994, Chairman WAXMAN, the late Mike Synar, and others, did an extraordinarily good job of questioning the executives. But when it came to my turn during those hearings, I recognized that it had not yet been put on the public record whether these executives believed that nicotine was addictive.

So, in 1994, at those hearings, I went down the row with each of the executives, one by one by one, each of them, and asked them whether nicotine was addictive. And each of them under oath at that time said that nicotine was not addictive.

I like to think that moment contributed in some way to the important legislation we have before us, contributed to our positions for enacting strong legislation. But it seems to me that set of hearings and the documents that have come to light will only make a real difference over time if we now follow up on those early efforts and pass the strongest possible look-back legislation. That is why I offered a very tough set of additional penalties when companies don't meet their specific targets for reducing youth smoking under the Commerce Committee bill. That is why I am pleased to be able to join Senators DURBIN, DEWINE, CHAFEE, and others this afternoon.

The bottom line, with respect to our amendment—many of the details have been addressed—but the bottom line is if you do not have aggressive look-back penalties, look-back penalties that really zero in on aggressively the companies in a specific way, you effectively penalize the companies that try to change their behavior twice. You penalize them once through the industry assessment and second through the loss of market while other companies continue to market to children and a future market share.

This amendment represents a fairer approach. It does not allow the Congress, in effect, through loopholes in this look-back set of provisions, to place a company that does try to clean up its act, does try to change history, we make sure under our amendment that company wouldn't be placed at a competitive disadvantage when they said, now we are going to change and not seek out children.

Let me also say that because the number of teen smokers has actually grown since the original settlement was announced last summer, the changes that we offer today will essentially hold the industry to a reduction level to which they have already agreed. So, in fact, this amendment is stronger than what came out of the Senate Commerce Committee on the 19-to-1 basis. But given what we have seen with, again, the number of teen smokers actually increasing, this, in effect, simply ensures that the industry is held to a reduction level to which they have already agreed.

Mr. President, and colleagues, Senators DURBIN and DEWINE went into a number of the details with respect to how the look-back legislation works. I don't think all of that needs to be belabored at this time. But I would like to say that to me what this amendment is all about is reversing the course of history. History shows that in the past when we would write these laws, the tobacco companies would bring their entrepreneurial and advertising talents to the task then of getting around them. And the tobacco companies have more of that kind of advertising and entrepreneurial talent than anybody else around. They would always find a way to evade the law.

Learning from past history with respect to the warning labels, with respect to electronic ads, with respect to the way in which the industry got around the Synar amendment, we are making it clear that we are going to have the tools to rein in the scoff-law companies, those that do not clean up their acts as they have pledged to do. We do so in a realistic way. We do so in a fashion that makes sure that companies that really have changed won't be put at a competitive disadvantage.

I would say, finally, Mr. President, and colleagues, to those of you who have talked to me personally about those 1994 hearings, and what happened during the course of those 7 hours where the executives said that cigarettes were like Hostess Twinkies, cigarettes weren't addictive, and they never preyed on children, if you really want to reverse the course of history, if you really want to hold the companies accountable, if you really want to rein in the conduct that we saw demonstrated again in the Senate Commerce Committee when Brown & Williamson admitted that they are now using genetically altered nicotine, if you want to change that behavior, vote for this bipartisan amendment, because this is something that is going to change the course of history and make sure that these companies don't prey on our youngsters in the years ahead.

Mr. President, I yield the floor.

Mr. NICKLES addressed the Chair.

The PRESIDING OFFICER. The Senator from Oklahoma.

Mr. NICKLES. Mr. President, I want to respond to my colleagues who are proposing this amendment. But, first, I would like to make some general comments about the bill to complement some of the comments I made earlier today, some of which were related to a statement from the Joint Tax Committee which I inserted into the RECORD, the chart that they put together on the net cost of the bill. They have now added a line to their estimate. I want to include that in the RECORD as well. This is the price per pack of cigarettes under this bill with all these new taxes and surcharges and look-backs.

I will tell my colleagues that for 1998, the year that we are in right now, before this bill goes into effect, Joint Tax assumes the price of cigarettes is $1.98. They assume for 1999—I want our colleagues to hear this—Joint Tax says the cost of a pack of cigarettes goes up to $2.88, a 90-cent increase. The next year, $3.24; the next year, $3.41; the next year, $3.66; the next year, $3.83; by the year 2004, it is over $4, $4.06 per pack. The next year it is $4.12; the next year, $4.78; by the year 2007, 9 years from now, the price per pack, $4.48. The price today is less than $2.

This isn't coming from Don NICKLES. This came from Joint Tax. I haven't agreed with everything that Joint Tax has done in estimating this bill. But in this estimate, they have added some of the other aspects of the bill, including the look-back.

I ask unanimous consent to have this printed in the RECORD.

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

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

[In billions of dollars]

Provision	Fiscal year—											
	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	1998–2003	1998–2007
1. Calendar Years:												
1. Federal revenues from S. 1415 general tobacco indusry payments as adjusted for inflation (by calendar years as in S. 1415)	$10.0	$14.4	$15.4	$17.7	$21.0	$23.6	$24.3	$25.0	$25.8	$26.6	$102.1	$203.8
2. Calendar year volume adjustment	.....	.....	.....	.....	−3.6	−5.0	−5.4	−5.8	−6.2	−606	−8.7	−32.7
3. Calendar year payments	10.0	14.4	15.4	17.7	17.4	18.6	18.9	19.2	19.6	20.0	93.4	117.1
II Fiscal Years:												
1. Adjustments:												
a. Convert Federal revenues from S. 1415 general tobacco industry payments to Federal fiscal years	.....	−20.8	15.2	17.1	17.5	18.3	18.8	19.1	19.5	19.9	88.9	166.2
b. Change in the net revenues from Fedeal income and payroll taxes (because of the impact of S. 1415 general tobacco industry payments on aggregate taxable income	–	−5.2	−3.8	−4.3	−4.4	−4.6	−4.7	−4.8	−4.9	−5.0	−22.3	−41.7
c. Change in net revenues from present-law Federal tobacco excise taxes (because of price increases from S.1415 general tobacco industry payments)	–	−0.8	−1.2	−1.5	−1.9	−2.1	−2.2	−2.2	−2.2	−2.2	−7.5	−16.3
d. Net revenue effect of replacing State by State tobacco settlements with S. 1415 payments	–	0.5	0.9	1.1	1.4	1.6	1.9	2.2	2.4	2.7	5.5	14.7
2. Net Federal revenues from S. 1415 general tobacco industry payments (JCT May 19, 1998 estimate)	–	15.4	18.0	12.5	12.7	13.2	13.8	14.3	14.8	15.4	64.6	122.9
Nominal Calendar Year Price Per Pack With Youth Look Back	$1.98	$2.88	$3.24	$3.41	$3.66	$3.83	$4.06	$4.12	$4.78	$4.84	.....	.....

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

Mr. NICKLES. Mr. President, I wish to address the amendment by my friends and colleagues from Illinois, Ohio, and Oregon dealing with increasing the look-back penalties.

I made a statement earlier today that I think the look-back provision in this bill is one of the most unworkable provisions that anybody could dream up. I say ''unworkable.'' I don't think it will work. But I would like to maybe bring to my colleagues' attention how they propose that it should work.

To make the look-back penalties work, they say we are going to empower the Secretary of the Treasury to do a poll. It says to conduct a survey. The survey is on a national basis. They are going to measure the type of tobacco product used in the last 30 days. They are going to conduct this survey with methodology that he determines is appropriate. They are going to identify the name brand that the youngsters use. They are going to be surveying kids. They are going to be surveying people from ages 11 to 17. And they are going to ask them a question: ''Did you smoke, and what brand did you use?'' Then they are going to put all this information together. I don't think they are going to ask this of every teenager in America. So it is going to be a random survey.

Then they are going to compare the results of this survey to the mandates in the bill. If we don't meet the targets, or if the consumption of tobacco by teenagers is higher than what this bill says they should be, the tobacco companies are going to be assessed penalties. And the penalties are very large. The penalties in the look-back provision under the negotiated settlement with the attorneys general went up to $2 billion. The penalties that came out of the Commerce Committee were $4 billion—$3.96 billion.

And then the penalties which were rewritten by the administration and introduced on Monday came out $4.4

billion maximum, and now the amendment that we have in the Chamber says take that to $7.7 billion, and also increase the target rate to 67 percent.

Why do rates make a difference? Well, for every point you are out of compliance, you are assessed a penalty, and the penalty is large. The penalty for not making the target under the attorneys general negotiated agreement was $80 million per point missed.

Well, the penalty under this bill is $240 million per point missed. It is three times as large as that proposed under the original settlement. That is just the industry-wide look-back. There is also a segment that applies to the product, and it has a penalty that is $200 million per point missed.

If this sounds confusing, it is because it is, and it is in this bill. My point is it is not going to work very well. You are telling the Secretary of Treasury to take a poll, and then we are going to deem that this poll is correct.

Now, all of us have used surveys. We have all had polls. But this bill has language that I guess people want to become law which says the survey using the methodology required by this subsection is deemed conclusively to be proper, correct, and accurate for the purposes of this act.

So we are saying, whatever the Secretary says, it is accurate. It is a done deal. And then they are going to and ask the kids, did you smoke? Now, they don't ask them, did you smoke 10 times? Did you smoke a pack a day? They can smoke one cigarette during that 30-day period and they are counted. And if this thing worked just right, a tobacco company would have to pay $1,000 because a youngster smoked one cigarette. I find that to be pretty high. And I might mention, this is really supposed to go after young people who are smoking illegally. They are smoking illegally. Let's put the penalty on the young person for breaking the law. Instead, we are going to do a random survey, a random survey that has to determine every single percentage for every single tobacco product. There is a de minimis level. We are not going to hit the smallest companies, I guess. I don't know how many different tobacco products there are. I don't know them very well. I don't smoke. I can only think of three or four cigarette brands. I don't smoke. And my guess is there is probably a lot of teenagers who don't either, but they can remember maybe the biggest name brands. I can remember Marlboro and Winston and maybe Virginia Slims. So if somebody said, do you smoke? I might be able to remember those name brands.

Mr. FORD. Mr. President, could I help the Senator with the names of some packs of cigarettes?

Mr. NICKLES. In a minute. That youngster taking the survey, if they mention a name brand, whether that was the brand they smoked or not, it comes out in the calculation of this data which is deemed accurate, proper, and correct. Then, that company can be subjected to enormous fines.

In the proposal, in the amendment that we have pending, the fines that are brand specific go up to $5 billion. They are also indexed for inflation. That is a pretty big penalty.

Then there is a $2.2 billion look-back that applies industry-wide. The Secretary of Treasury takes this survey and tries to determine what percentage of young people are smoking each brand in the country, and if each one of them by brand product missed this target, then they are assessed penalties that can go up to $7.7 billion and even higher in the outyears.

This is not a good plan. This is not a workable plan. I tell my colleagues, if you want to do something to reduce teenage smoking, come up with something else. If you want to come up with higher taxes, just increase the tax. I have heard some people say you don't need $1.50 because we have a big look-back and it's really $1.50 anyway. If you want to make it a $1.50, make it a $1.50, but call it a tax. Make it clear. Make it honest. This is a scheme. We are going to deem a poll to be accurate, and authorize the Secretary to assess enormous penalties, in the billions of dollars.

That doesn't make sense. Now, if you really want to reduce teen smoking, do something else. Say to teenagers, if you are caught smoking, we are going to slap your wrist. The second time we are going to make you clean up a park, the third time maybe a financial penalty. We don't have that in this bill. And I don't want the Federal Government to do it because I don't want to federalize these actions, but instead we should encourage the States to enforce the law.

It is against the law for teenagers below the age of 18 to smoke in any State. If you don't want anybody to smoke that is 18 years old, try and increase the age to 20 or 21. You have that right. But to come in——

Mr. FORD. Mr. President, may I correct the Senator?

Mr. NICKLES. Yes.

Mr. FORD. I don't believe it is unlawful to smoke. It is unlawful to purchase.

Mr. NICKLES. I appreciate the correction. Let me make the comment, Mr. President. In every State in the Nation it is unlawful to purchase cigarettes.

Mr. FORD. Now.

Mr. NICKLES. And if we want to decrease teenage consumption, maybe we should encourage the States to pass laws it is against the law to consume and put some responsibility back on the individual. Instead, we are allowing this massive growth of government.

It doesn't make sense. It is not workable. It is not fair. And I don't think it will be effective. I also don't think parts of it will be constitutional, and I don't think we have willing participants by the tobacco companies. So it is just not a good deal. For people who want to raise taxes, raise taxes. Be up front, be honest. If you want to do something else, do something else to get teen consumption down. But this bill is not going to work. It is just not a workable plan. Frankly, if it wouldn't work at $4.4 billion, it won't work at $7.7 billion.

I urge my colleagues examine this look-back provision, see how complicated it is, see how confusing it is to give the Secretary this power, and to decide this is not the right way to legislate. It is not the right way to tax, and let's come up with something better. I hope something better would include some personal responsibility and accountability for people who are breaking the law. If a teenager purchases, it is against the law if they are under the age of 18. And if you really don't want them to smoke, maybe we should encourage the States to have laws against the consumption as well.

I appreciate my——

Mr. DOMENICI. Will the Senator yield?

Mr. NICKLES. I will be happy to yield.

Mr. DOMENICI. I have a question. Is the Senator saying that tobacco companies do everything they are supposed to do and yet when we take the survey, we are not as successful as we hoped to be and so we are going to impose a fee on them?

Mr. NICKLES. The Senator is exactly right. You know, I am sure if this survey was taken during the Fourth of July break, it would have a little higher incidence of teen smoking than it would at some other time in the year. But if they smoke a cigarette, they are counted in the affirmative and the penalty would be $1,000.

Mr. MCCAIN. Will the Senator yield for one more question?

Mr. NICKLES. I will be happy to yield.

Mr. MCCAIN. Is the Senator aware that as part of the original agreement between the industry and the attorneys general, the industry itself was the one that agreed to this? All they are doing here is increasing it. Is the Senator aware of that? And is the Senator aware that this puts him in a position which is far different even from the industry by attacking a proposal that was agreed to by the tobacco industry itself, who would——

Mr. NICKLES. I will be happy to answer the question.

Mr. MCCAIN. Have experienced these penalties, who would have been subject to them and obviously must have had some confidence in the survey the Senator is deriding; otherwise they never would have entered into the agreement because the penalties would have accrued to them. Is the Senator aware of that?

Mr. NICKLES. I will be happy to tell my colleague from Arizona that he makes a good point but he is absolutely wrong. What the industry agreed to, according to the settlement, is that they would pay $80 million per point of noncompliance, up to a total of $2 billion. What we have before us is two

surveys, penalties up to $4.4 billion, and an amendment to go to $7.7 billion.

Does my colleague from Arizona realize there is a difference between $7.7 billion and $2 billion? and that $5.5 of this new penalty is product-specific? and the industry did not agree to a product-specific penalty? These provisions were not in the industry settlement, as I am reading it right now.

Mr. GRAMM. Will the Senator yield?

Mr. MCCAIN. Did you ask me a question?

Mr. NICKLES. No.

Mr. MCCAIN. You didn't.

Mr. GRAMM. Will the Senator not agree with me that whether the tobacco companies agreed to it or not, that article I of the Constitution gives the Congress the power to tax? and that we ought not to be delegating that power to a poll?

Mr. NICKLES. I agree totally. And I also tell my colleague and friend from Texas, I wasn't part of the tobacco companies' deal. I am part of the Finance Committee. And I think if we are going to legislate on taxes, we ought to do it right. This is not the right way to tax.

I will also tell my colleague from Texas, I have heard people say the tobacco industry is confident they can challenge these look-back assessments and win in court and have it thrown out as unconstitutional. Regardless of the constitutional argument, I say this is a crummy way to tax. I don't want to give the Secretary of the Treasury the authority to conduct a poll and then determine that the poll is accurate, proper, correct for purposes of this act, and be able to make assessments. Under the agreement the tobacco companies agreed to, it was up to $2 billion. Under the bill that came out of the Commerce Committee, it was $3.96 billion. Under the bill the administration wrote and introduced on Monday, it came up to $4.4 billion. And on the amendment we have pending now, it is $7.7 billion, also indexed for inflation.

The industry did not sign off on any $7.7 billion look-back.

Mr. GRAMM. Will the Senator yield further?

Mr. NICKLES. Yes.

Mr. GRAMM. Just two questions. No. 1, you are not here to represent the industry, are you?

Mr. NICKLES. No, sir. I could care less——

Mr. GRAMM. Second, when you put your hand on the Bible and you swore to uphold the Constitution of the United States against all enemies, foreign and domestic, you were not saying, well, I'll uphold the Constitution and article I, the power of Congress to tax, only in those cases where the tobacco companies didn't agree to let a pollster raise taxes, did you?

Mr. NICKLES. The Senator is absolutely right.

Mr. McCAIN. A ''pollster''?

Mr. NICKLES. I got on the Finance Committee because I did not like the way our tax system was structured. I want to work with our colleagues from Mississippi and Texas, to take the Tax Code and rewrite it and come up with something that is fair, flat, and simple. This is tobacco bill just the opposite. This is a mess. We could clean this bill up a lot if we went through the conventional process, if we had the Finance Committee mark up this bill on the tax side and call a tax a tax.

Instead, we have this unbelievably complicated system, and the look-back is maybe the most complicated. Delegating to the Secretary of the Treasury to take a poll, and then, if they don't meet the targets that we set, we are going to assess them billions of dollars, up to $7 billion or $8 billion, I find to be ludicrous. It doesn't make sense. It is not a good way to legislate.

That is the reason that the Commerce Committee doesn't have taxation power, in the Senate. In the Senate, the Finance Committee has the power to raise taxes.

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

Mr. NICKLES. And not the attorneys general and not the Commerce Committee.

I will be happy to yield.

Mr. MCCAIN. I thought the Finance Committee did take up this issue and ended up raising taxes, and doing all kinds of other havoc to it in 24 hours. I wonder what they would have done in 72.

Mr. NICKLES. I will tell my friend and colleague, the Finance Committee did consider this bill for 24 hours. I didn't support their $1.50 tax increase, but I think their $1.50 tax increase is a lot more honest, is a lot more plain, a lot more doable. We have excise taxes on tobacco today of 24 cents. Congress last year, when we passed the kid-care bill, increased that another 15 cents. So, tobacco taxes are going to 39 cents already in present law.

People say that the Commerce Committee bill, the administration bill, increases that another dollar and a dime. That takes the tax to $1.49. But they do not call it a tax, they call it a fee. So we are telling everybody who is in this industry—and we have wholesalers and distributors and so on—that the tax is $1.49 and it is increasing. But that bill, the bill that we have before us, doesn't saying anything about a dollar and a dime. It says put all these billions of dollars into a fund. That is not very workable. It is not very legitimate. I think we should have the committees of jurisdiction take this bill.

The Finance Committee did take the bill, but unfortunately the Commerce Committee and the administration looked at our changes, and they just ignored them. They dropped the changes that the Finance Committee made.

I resent having the Commerce Committee write the tax portions of this bill as well as I resent the Commerce Committee writing the ag portions of the bill. And I think those are two of the more contentious and two of the more difficult things that we have to deal with. The committee that marked it up didn't have, in my opinion, the taxation expertise, they didn't follow the same taxation procedures that we have on every other excise tax in history. And, frankly, I think the Agriculture Committee should have written that instead of the Commerce Committee as well.

The PRESIDING OFFICER. The majority leader.

Mr. LOTT. Is the Senator—has the Senator from Oklahoma completed his remarks? Were you through with your remarks?

Mr. NICKLES. Yes.

MORNING BUSINESS

Mr. LOTT. Mr. President, I know we are having a lot of fun here, but for the information of all Senators, there will be no further votes this evening. The Senate has tried to work out an agreement that would resolve the impasse that we have right now parliamentary, and with regard to the substance of those amendments, but we have not been able to get that worked out yet. There are very strong feelings on both sides of the amendments that are pending, so I can understand that. So, since we haven't worked out an agreement, I now ask there be a period for the transaction of morning business with Senators permitted to speak for up to 10 minutes each.

Mr. GRAMM. Reserving the right to object.

The PRESIDING OFFICER. The Senator from Texas reserves the right to object.

Mr. GRAMM. Would it be possible for us to just have a short final statement on this issue? Or would you prefer we do it—

Mr. LOTT. I would prefer you do it in morning business, because if you had a short final statement, there would need to be a short final reaction. I see the Senator from Massachusetts is anxious to get recognition.

Mr. GRAMM. In that case, it is not worth it.

Mr. LOTT. You can continue in morning business.

Mr. GRAMM. Thank you.

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

ORDER OF PROCEDURE

Mr. LOTT. Mr. President, tomorrow we will convene at 9:30, and there will be 1 hour for morning business, and then we will begin consideration of two items tomorrow, calendar No. 299, H.R. 2709, relative to Iran sanctions, with a total of 3 hours for debate. We already entered into an agreement back before the Easter recess as to how this issue would be considered, on or before May 22. So we will have this issue up tomorrow. There could be an amendment offered by Senator LEVIN. But we hope to get that up tomorrow.