

G.C. Response
(Handled by
Fielding)



HOUSE OF REPRESENTATIVES
WASHINGTON, D. C. 20515

CLAUDINE C. SCHNEIDER
SECOND DISTRICT
RHODE ISLAND

Dear Jim,

I spoke with Jim Baker yesterday about title 9. I fear that the Administration's current position could be another Bob Jones political blunder.

He mentioned his concern with athletics and equal expenditures. I searched for the best rebuttal and I believe my draft amicus brief says it all. Hope you will please read carefully... and reconsider.

Thanks you kindly,
Sincerely,

Claudine
Schneider

Schneider,
Claudine

No. 82-792

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

GROVE CITY COLLEGE, PETITIONER

v.

TERREL H. BELL, ET AL.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

Brief of the Honorable Claudine Schneider, et al., of the United States House of Representatives, as Amici Curiae.

**Karen Syma Shinberg Czapanskiy,
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***INTEREST OF THE AMICI

Amici curiae are *** members of the United States House of Representatives who have

1. cosponsored H. Res. 190, reaffirming congressional intent re Title

IX

STATEMENT

Petitioner is a college which receives no direct federal funding. Grove City College v. Bell, 687 F.2d 684, 689 (3d Cir. 1982). However, one hundred forty of Petitioner's approximately twenty two hundred students are eligible to receive Basic Educational Opportunity Grants (BEOG's) appropriated by Congress and allocated by the Department of Education pursuant to 20 U.S.C. §1070a (1976 and Supp. 1981), and three hundred forty-two students have obtained Guaranteed Student Loans (GSL's). Id. at 388. In July 1976, the Department of Health, Education and Welfare began efforts to obtain an Assurance of Compliance from Petitioner as a means of ensuring its compliance with Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, §§901-907, 86 Stat. 373-75. Petitioner refused to file the Assurance on the basis that it received no federal financial assistance. 687 F.2d at 689.

In the administrative proceedings brought by the Department to terminate grants and loans to students attending the college, an administrative law judge concluded that Petitioner was a recipient of federal financial assistance. He decided further that BEOG's and GSL's could be terminated because of Petitioner's refusal to execute an Assurance of Compliance pursuant to Title IX. An order prohibiting the payment of BEOG's and GSL's to students attending Petitioner was entered. Id.

Petitioner and four student recipients of BEOG's and GSL's sued the Department to declare void the termination of BEOG and GSL assistance and to enjoin the Department from requiring Petitioner to file an Assurance of

Compliance as a condition of preserving its eligibility in the BEOG and GSL programs. The complaint also sought a declaration that the Title IX regulations promulgated by the Department either exceeded the Department's authority or were unconstitutional as applied to Petitioner. Id.

The district court rejected Petitioner's contention that BEOG's and GSL's do not constitute federal financial assistance to the college within the purview of Title IX. However, it granted much of the relief sought by Petitioner because it concluded that the Department could not terminate BEOG's and GSL's based on Petitioner's refusal to execute an Assurance of Compliance. Id.

The court of appeals reversed with respect to BEOG's.¹ The court held that under Title IX the Department was authorized to construe the phrase "federal financial assistance" to include educational grants paid to students. Thus, institutions that received aid only indirectly, that is, through the tuition paid by students, properly were found to be within the purview of Title IX. 34 C.F.R. §§106.2(g)(1)(ii), 106.2(h) (1982). 687 F.2d at 691.

The court began its analysis by stating that the language of section 901(a) "extends Title IX's coverage to

'any educational program or activity receiving Federal financial assistance....' Hence, by its all inclusive terminology the statute appears to encompass all forms of federal aid to education, direct or indirect."

Id. Relying on this Court's decision in North Haven Board of Education v. Bell, 456 U.S. 512, 520 (1982), the court rejected the narrow reading of Title IX urged by Petitioner on the ground that a broad reading of the statute is required by its remedial purpose of eliminating sex discrimination from American education. 687 F.2d at 691.

¹No appeal was taken with respect to the GSL's.

The court pointed out that the legislative history of Title IX reveals that it was patterned after Title VI of the Civil Rights Act of 1964, which proscribes discrimination by reason of race, color, religion, or national origin. The drafters of Title IX intended that Title IX would be interpreted and applied as Title VI had been. Id. Like Title VI, therefore, Title IX prohibits the use of federal money "in any fashion" which would subsidize discrimination on the basis of sex, irrespective of whether the use is direct or indirect. The court stressed that during the floor debates on Title IX, which comprise the most authoritative source of its legislative history, Senators Bayh and McGovern specifically described one purpose of Title IX as prohibiting the use of federal money by institutions receiving aid under the provisions of S. 659, the bill that established the BEOG program as well as Title IX. Id. at 692.

The court also found support for its conclusion in the post-enactment history of Title IX. The Department's regulations were submitted to Congress for review pursuant to Section 431(d)(1) of the General Education Act, Pub. L. 93-380, 88 Stat. 567 (1974), [codified as amended, 20 U.S.C. § 1232(d)(1)(1976 and Supp. 1981)]. During the hearings on the regulations, then HEW Secretary Weinberger specifically advised the House Committee of the Department's interpretation that Title IX coverage extends to indirect recipients of aid. A number of resolutions were introduced to reverse this interpretation specifically as well as to reject the entire set of regulations. None passed. The Department's interpretation was the subject of Congressional debate again in 1976 when Senator McClure proposed an amendment to Title IX to limit its coverage to institutions receiving aid "directly from the federal government." 122 Cong. Rec. 28,144 (1976). The debate on this resolution made clear that the Department's interpretation of Title IX as requiring comprehensive coverage of recipients of any type

of federal funding correctly reflected the intention of Congress in passing Title IX. The McClure amendment was defeated. 687 F.2d at 695.

As its final basis for deciding that Title IX's coverage extends to institutions such as Petitioner, the court pointed to the decision in Bob Jones University v. Johnson, 396 F.Supp. 597 (D.S.C. 1974), aff'd mem., 529 F.2d 514 (4th Cir. 1975), in which the University was found subject to Title VI solely on the basis that some of its students received Veterans Administration educational benefits. In light of the clear congressional intention that Title IX follow in the path of Title VI, this precedent could not be ignored.

Having concluded that the receipt by students of BEOG's rendered the college subject to Title IX, the court next considered the extent of the coverage. It again determined that the broad remedial purposes of Title IX to prevent sex discrimination in education require a comprehensive approach to interpretations of the statute. Accordingly, it concluded that the "program-specific" language of Title IX means that where students receive federal aid, the entire College is benefitted. Therefore, the entire institution constitutes the "program" to which Title IX applies. 687 F.2d at 697-700.

The court noted that to hold otherwise would have the absurd result of subjecting a college that receives earmarked federal funding for a particular program to a greater degree of federal scrutiny than would be true for a college that receives indirect federal funding which the college is then free to use to the benefit of any part of its program. The court discussed the legislative controversy over whether Title IX applies to the type of athletic program that is typical in American educational institutions, that is, one that receives no earmarked federal funding.

Congress defeated numerous attempts to amend Title IX to exclude athletic programs from Title IX coverage, while at the same time amending it to exclude from coverage social fraternities and sororities. The court concluded from this congressional activity that Congress believed that programs not receiving earmarked federal aid were nonetheless covered by Title IX so long as the institution sponsoring them received some form of federal funding. Otherwise, it would have been futile even to consider whether to exclude from coverage activities such as athletics and social fraternities and sororities which typically receive no earmarked federal funds. Id. at 699-700.

Finally, the court noted that effective enforcement of Title IX would be impossible unless enforcement efforts could be directed against an entire institution which is receiving indirect or non-earmarked aid from the federal government. Id. at 700.

SUMMARY OF ARGUMENT

Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a), provides in pertinent part that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance...." Congress intended this language to be applied comprehensively to prohibit gender discrimination in all aspects of the American educational system, to include entire institutions where students receive federally funded tuition assistance.

The broad intention of the Congress was expressed initially in the broad language used in Title IX. During the initial Title IX debates, furthermore, numerous members of Congress manifested their expectation that Title IX would apply to institutions whose students receive BEOG's, a

program established by Title I of the bill.

The Title IX regulations promulgated by the Department of Health, Education, and Welfare, interpreting the Act as covering an entire institution where students receive federally-funded tuition assistance, are consistent with the broad Congressional intention. Congress has been made aware that Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq., after which Title IX was patterned, has been interpreted consistently with the HEW regulations. The regulations have been subjected to a comprehensive congressional review, both on the floor and in committee hearings. Numerous bills have been introduced with the purpose of overruling the Department's interpretation. None has been enacted.

A resolution recently introduced into the House of Representatives with *** cosponsors restates the unaltered Congressional intention that Title IX and its regulations not be "amended or altered in any manner which will lessen the comprehensive coverage of such statute in eliminating gender discrimination throughout the American educational system." H.Res. 190, 98th Cong., 1st Sess. (1983).

ARGUMENT

Congress Intended Title IX to be Applied Comprehensively to Prevent Sex Discrimination in Education

From the time it first considered Title IX, Congress has viewed the statute as a broad prohibition on sex discrimination in education. The intervening decade has seen no change in the Congressional intention that the statute be interpreted and applied comprehensively to eliminate all gender discrimination from educational institutions that receive federal funding, whether that funding be "direct" or "indirect," to all or some of the recipient's programs. See, e.g., H.Res. 190, supra.

When he first introduced the bill in the Senate, Senator Bayh focused on the broad purpose which was to be served by Title IX: the elimination of sex discrimination from American education. He said:

[A]s we seek to help those who have been the victims of economic discrimination, let us not forget those Americans who have been subject to other, more subtle but still pernicious forms of discrimination. As we turn our attention to these provisions of the Higher Education Act, let us ensure that no American will be denied access to higher education because of race, color, religion, national origin, or sex. Today, I am submitting an amendment to this bill which will guarantee that women, too, enjoy the educational opportunity every American deserves.

117 Cong. Rec. 30155 (Aug. 5, 1971).

Representative Edith Green, who chaired the hearings that preceded the introduction of Title IX, emphasized the broad purpose of Title IX in the debate on the bill in the House:

The purpose of Title [IX] is to end discrimination in all institutions of higher education...across the board....

117 Cong. Rec. 39256 (Nov. 4, 1971).

This Court consistently has interpreted the language of Title IX in light of the broad Congressional intent. Thus, in Cannon v. University of Chicago, 441 U.S. 677 (1979), the Court identified the Congressional purposes as follows:

First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices. Both of these purposes were repeatedly identified in the debates on the two statutes [Title VI and Title IX].

Id. at 704. In order to serve the second purpose, this Court found that Title IX created a private right of action to remedy sex discrimination in education. Id. at 705-706.

More recently, in North Haven Board of Education v. Bell, 456 U.S. 512 (1982), this Court upheld the Title IX regulations prohibiting federally funded education programs from discriminating against employees on the

basis of gender. The Court reiterated that:

There is no doubt that "if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language (citations omitted)."

Id. at 521.

The question in this case is whether Congress intended that Title IX be given the comprehensive interpretation necessary to eliminate sex discrimination from educational institutions. The answer clearly is yes, irrespective of whether an institution receives direct or indirect aid to all or some of its programs.

In its decision in the case before this Court, the Third Circuit correctly determined that Congress intended that Title IX apply comprehensively to prevent sex discrimination:

[W]e believe that Congress intended that full scope be given to the non-discriminatory purpose that Title IX was enacted to achieve....

Grove City, supra, at 697. As the court stressed, the language of Title IX is the primary evidence of Congress's intent that Title IX apply comprehensively to proscribe sex discrimination in education:

[B]y its all inclusive terminology the statute appears to encompass all forms of federal aid to education, direct or indirect.

Id. at 691.

The 1971 and 1972 debates on the legislation that ultimately became Title IX are replete with evidence that Congress intended that the words of the statute be given their broadest application. Its intention included coverage of institutions receiving funds both directly and indirectly.

Title IX was part of the Education Amendments of 1972, which also served to establish the Basic Education Opportunity Grant program. Pub. L. 92-318, 86 Stat. 235. In their debates on the bills that were the basis for the Act, S. 659 and H.R. 7248, both proponents and opponents of Title

IX demonstrated their awareness of this connection and their understanding that passage of Title IX would subject institutions whose students received BEOG's to the coverage of Title IX. Senator McGovern stated the connection quite specifically:

I urge the passage of [Senator Bayh's] amendment to assure that no funds from S. 659, the Omnibus Education Amendments Act of 1971, be extended to any institution that practices biased admissions or educational practices. 117 Cong. Rec. 30,158-159 (1971). Senator Bayh argued that only the passage of Title IX could ensure that the "hundreds of millions of dollars" of educational expenditures authorized by the remainder of the bill would be applied equitably to all citizens, whether male or female. 117 Cong. Rec 30412 (1971).

In the House, opponents of Title IX argued that the increases in aid to higher education included in the bill should not be accompanied by an increase the federal control that would accompany Title IX. Representative Cleveland pointed out, for example:

It is worthy of note that this provision which meddles in the internal operation of our colleges and universities comes in the same bill that is providing billions of dollars for the higher educational institutions. I cannot help but remember some years ago when we were debating whether to establish Federal programs to aid education, a major concern of many of us was whether the Federal aid would be accompanied by Federal interference. Today the chickens are coming home to roost.

117 Cong. Rec. 39,255 (1971).

Representative Steiger stated his reluctance to vote for a bill that provided student aid while tying it to federal control:

[U]nder the bill, under the titles which we have gone over before, we have in effect allowed the local financial assistance officers to have a rather broad sweep of powers in their right to pick and choose those who should receive aid which could work against low-income students, but in this one we now are going to say that it is the Federal policy that you cannot discriminate because of sex. This dichotomy confuses me on one hand we grant latitude and autonomy while on the other limiting autonomy.

117 Cong. Rec. 39,257 (1971).

Thus it was clear to the members of Congress voting on Title IX that

one program that would be affected by the new prohibition on gender discrimination was the Basic Education Opportunity Grant program being established by the same Act, the Education Amendments Act of 1972, supra. Armed with this knowledge, they voted in favor of Title IX, a clear indication of the intent of Congress that educational institutions such as Petitioner are subject to Title IX when its students receive BEOG's.²

As this Court has noted, any interpretation of Title IX must take into account Title VI of the Civil Rights Act of 1964, after which it was patterned. Cannon v. University of Chicago, supra; North Haven Board of Education v. Bell, supra. Congress consistently has viewed both Titles as complementary and comprehensive bars to discrimination; they share parallel prohibitions and enforcement mechanisms. Id. As Senator Bayh stated on reintroducing Title IX in 1972:

Central to my amendment are sections 1001-1005, which would prohibit discrimination on the basis of sex in federally funded education programs. Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by title VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of title VI.

²The Education Amendments Act of 1972 as passed includes one other provision prohibiting discrimination on the basis of sex: Title IV, relating to the Student Loan Marketing Association. Pub. L. 92-318, 86 Stat. 235, at 265-170 (1972). Unlike the other titles in the Act, Title IV applies to private lending institutions rather than to educational institutions. It is worthy of note that, although Title IV contains a specific prohibition against gender discrimination, none of the Titles applicable to educational institutions contains such a specific prohibition. It is fair to conclude that Congress saw no need to include a specific prohibition against gender discrimination in any part of the bill applicable to educational institutions, such as the BEOG program, because it was assumed that Title IX would apply.

118 Cong. Rec. 5,807 (1972). The same history was explained to the House of Representatives by Representative Mink:

[Representative Erlenborn] states that it would be a dangerous precedent to empower the Federal Government to cut off funds from colleges and universities if they adopted discriminatory admissions policies. This precedent was established with the passage of the Civil Rights Act of 1964...I doubt whether we have to tell this House that funds have been stopped in accordance with powers already granted the Federal Government under that Act. This is no new precedent. It is simply an extension of an existing policy not to fund programs with taxpayers' funds which deny any individual equal protection of the laws.

117 Cong. Rec. 39,251-252 (1971).

In the case of Bob Jones University v. Johnson, 396 F.Supp. 597 (D.S.C. 1974), aff'd mem., 529 F.2d 514 (4th Cir. 1975), Title VI was held applicable to an educational institution which received federal dollars only through the tuition of students receiving Veterans Administration educational benefits under the GI Bill. Just as in the case before the Court, the institution argued that it could not be required to sign an Assurance of Compliance because it received no direct federal funding. Senator Bayh anticipated the court's decision during the initial Title IX debates. He noted that Title IX would authorize the Secretary of Health, Education, and Welfare to cut off all HEW funds to an offending institution, including aid to individual students, if the Secretary determined that would be the best course of action. 117 Cong. Rec. 30,408 (1971). Senator Bayh clearly was assuming that in a case such as the one before this Court, Title IX would apply to the institution due to the receipt of funds by its students.

After the decision in Bob Jones, Senator McClure proposed an amendment to Title IX to limit its applicability to institutions that receive federal funding "directly from the federal government." Amend. 390, 122 Cong. Rec. 28,144 (1976). In the debate, Senator Bayh brought the Bob Jones case to

the attention of the Senate. He noted that one result of the McClure amendment would be that Title VI would apply more broadly than Title IX. He argued that Congress had intended the opposite result: that both Titles apply equally broadly to eliminate discrimination in education. He concluded that the interpretation of Title VI in Bob Jones was precisely what Congress intended for Title IX.

The matter before us or the specific vehicle which brings colleges under the regulations; namely, the receipt of direct or indirect Federal financial assistance directly to the university, but the inclusion of students who get Federal assistance is not unique. If we followed this route [passing the McClure amendment to limit applicability of Title IX to institutions receiving direct financial aid] then the next step is to repeal title VI of the Civil Rights Act because the court has held in other civil rights matters that if a student gets assistance from the Federal Government the university itself is assisted.

The case of Bob Jones University against Johnson is a specific case in question....

The House committee studied this interpretation [that of the Bob Jones court]...It is not new law; it is traditional, and I think in this instance it is a pretty fundamental tradition, that we treat all institutions alike as far as requiring them to meet a standard of educational opportunity equal for all of their students.

122 Cong. Rec. 28,145 (1976).

Senator Pell reiterated that the court in Bob Jones correctly interpreted Title IX because the opposite interpretation would effectively exclude from coverage institutions whose students receive BEOG's:

While these dollars are paid to students they flow through and ultimately go to institutions of higher education, and I do not believe we should take the position that these Federal funds can be used for further discrimination based on sex.

122 Cong. Rec. 28,145 (1976). The McClure amendment was defeated. 122 Cong. Rec. 28,147 (1976).

The defeat of the McClure amendment is further evidence that Congress has never abandoned its initial intentions with respect to Title IX. Congress understood that, under the language of Title IX and in light of the history of Title VI, indirect aid recipients would be prohibited by

Title IX from engaging in sex discrimination. After the Bob Jones court reaffirmed this understanding, the Senate declined Senator McClure's invitation to amend Title IX to limit its applicability. Even before the Bob Jones decision, bills to limit Title IX to institutions receiving direct federal funding failed in both the House and the Senate. See, e.g., S. 2146, 94th Cong., 1st Sess., 121 Cong. Rec. 23,845-847 (1975); H.R. Con. Res. 330, 121 Cong. Rec. 21,687 (1975); H.R. Con. Res. 329, 121 Cong. Rec. 21,687 (1975); H.R. Con. Res. 310, 121 Cong. Rec. 19,209 (1975); S. Con. Res. 46, 121 Cong. Rec. 17,300 (1975). This clear and continuing evidence of the support of the Congress for applying Title IX to indirect federal funding recipients cannot be ignored.

The Third Circuit decided in this case that the program run by Petitioner which is subject to Title IX is the entire institution. Grove City College v. Bell, supra, 687 F.2d at 700; see Haffer v. Temple University, 688 F.2d 14 (3d Cir. 1982). This interpretation of Title IX's "program or activity" language is fully consistent with the intent of Congress that all aspects of an integrated institution are within the coverage of Title IX. During the initial Title IX debates, Representative Green was asked essentially the same question by Representative Steiger:

Mr. Steiger of Wisconsin....In title [IX] [another member] asked relating to a program or activities receiving Federal financial assistance, and under the "program or activity" one could not discriminate. That is not to be read, am I correct, that it is limited in terms of its application, that is, title [IX], to only programs that are federally financed? For example, are we saying that if in the English department they receive no funds from the Federal Government that therefore that program is exempt?

Mrs. Green of Oregon. If the gentleman will yield, the answer is in the affirmative. Enforcement is limited to each entity or institution and to each program and activity. Discrimination would cut off all program funds within an institution.

Mr. Steiger of Wisconsin. So that the effect of title [IX] is to, in effect, go across the board in terms of the cutting off of funds to an institution that would discriminate, is that correct?

Mrs. Green of Oregon. The purpose of title [IX] is to end discrimination, yes, across the board..

117 Cong. Rec. 39,256 (1971) (emphasis added).

It would be ironic indeed if Petitioner could use its students' federally funded tuition fees to pay the salaries of faculty and staff who may suffer gender discrimination in employment, contrary to the dictates of North Haven, while an educational institution that receives the same number of federally-supplied dollars through a direct grant could be prohibited from discriminating. The Congressional intent to avoid this result by means of comprehensive application of Title IX is seen nowhere more clearly than in the Congressional response to the argument that athletic programs in educational institutions are not covered by Title IX. In its initial Title IX regulations, the Department of Health, Education, and Welfare took the position that Congress intended athletic programs to be covered. 34 C.F.R. §106.41 (1980). Since athletic programs typically receive no earmarked federal funding, the basis for the regulation lies in the role of athletics as a part of the total educational program of institutions receiving federal funding: discrimination in one part of an educational program cannot avoid infection the rest of the educational programs of the institution. In colleges such as Petitioner's, for example, any discrimination which may exist in one part of an integrated educational program cannot avoid infecting the other educational programs in the institution in which the federally-aided students may participate.

Hearings were held on HEW's Title IX regulations before the House Subcommittee on Postsecondary Education of the Committee on Education and Labor. Sex Discrimination Regulations: Hearings before the Subcommittee on Postsecondary Education of the Committee on Education and Labor of the House of Representatives, 94th Congress, 1st Sess., June 17, 20, 23, 24, 25, 26, 1975 (hereinafter "Postsecondary Hearings"). Chairman O'Hara of the Subcommittee opened the hearings with the statement that their sole

purpose was to review the regulations

to see if they are consistent with the law and with the intent of the Congress in enacting the law. We are not meeting to decide whether or not there should be a title IX but solely to see if the regulation writers have read it and understood it the way the lawmakers intended it to be read and understood.

Id. at 1.

The Department's decision that title IX applies to athletic programs was the most controversial topic aired during the hearings. Secretary Weinberger explained that the decision to include athletic programs within the coverage of Title IX was based on the clear analogy between Title IX and Title VI of the Civil Rights Act of 1964. Since recipients of general, nonearmarked federal funds are subject to the strictures of Title VI in appropriate circumstances, they are also subject to the same extent to Title IX.

[I]f the Federal funds go to an institution which has educational programs, then the institution is covered throughout its activities. That essentially was the ruling with respect to similar language in title VI, and that is why we used this interpretation in title IX.

Id. at 485.

Witnesses on both sides of the issue testified that athletic programs could be covered by Title IX only because the sponsoring institutions receive Federal aid; the athletic programs themselves receive virtually no earmarked federal funding. For example, Representative O'Hara asked the president of the American Football Coaches Association:

Mr. O'Hara....You make the point that you don't believe that the intercollegiate athletic programs of an institution of higher education could be considered an education program or activity receiving Federal financial assistance?

Mr. Royal. Yes, sir.

Mr. O'Hara. In other words, under your interpretation, then, one would have to look at the particular activity of the institution to determine whether or not it was subject to the provisions of title IX and it is your belief that in the case of your activity it is not subject to the provisions of title IX?

Mr. Royal. That is correct. We do not receive Federal funds to support our athletic programs.

Id. at 49. See, e.g., Id. at 90 (statement of Kathy Kelly, President, U.S.

National Student Association); Id. at 98-99 (statement of John Fuzak, President, National Collegiate Athletic Association); Id. at 232-233 (statement of Dallin H. Oakes, President of Brigham Young University and Director and Secretary of the American Association of Presidents of Independent Colleges and Universities); Id. at 284-285 (statement of Norma Raffel, Head of the Education Committee of the Women's Equity Action League); Id. at 324 (statement of Dr. Bernice Sandler, Director, Project of the Status and Education of Women, Association of American Colleges).

Witnesses including members of Congress advised the Committee of their opinion that it was within the contemplation of Congress to include athletic programs within the coverage of Title IX because athletic programs are integral parts of the programs offered by the educational institutions. Discrimination in one part of the institution cannot be severed from the rest. Furthermore, they noted, where a recipient receives the benefits of federal funding for one program, money will be freed for use in other programs of an integrated institution. See, e.g., Id. at 165-67 (statement of Representative Mink; Id. at 169-71 (statement of Senator Bayh); Id. at 199 (statement of Representative McKinney); Id. at 202 (statement of Representative Abzug); Id. at 324 (statement of Dr. Bernice Sandler); Id. at 217-18 (statement of Holly Knox). A good example of how an aid recipient may benefit from the resources that are freed by federal funding is present in the case at bar. If one hundred-forty of Petitioner's students were not receiving BEOG's, they would need scholarship assistance to attend Petitioner's college. Petitioner need not provide the scholarships because the federal government is providing the students with assistance. Accordingly, Petitioner is free to use these resources on some other aspect of its program, such as athletics, if it should so choose.

Chief among the congressional witnesses was Senator Bayh, who had authored and introduced Title IX in the Senate. He summed up the testimony of many of the other witnesses:

This objection to the coverage of programs which receive indirect benefits from Federal support--such as athletics--is directly at odds with the congressional intent to provide coverage for exactly such types of clear discrimination. For example, although Federal money does not go directly to the football program, Federal aid to any of the school system's programs frees other money for use in athletics.

Without Federal aid a school would have to reduce program offerings or use its resources more efficiently. Title IX refers to Federal financial assistance. If Federal aid benefits a discriminatory program by freeing funds for that program, the aid assists it, and I think that is rather clear.

Id. at 175.

Some members of the Committee were explicit in their acceptance of the Bayh testimony. Representative Chisholm, for example, said that athletic programs receiving indirect aid "must follow the guidelines." Id. at 65; see Id. at 153. Representative Buchanan asked why Title VI should apply to athletics if Title IX does not. "Should you say you don't have to have blacks on your football team or your basketball team because they are not specifically federally funded?" Id. at 95.

The Committee heard repeated, clear and unequivocal testimony that, unless amended, Title IX properly is interpreted as covering programs such as athletics in integrated institutions. Nonetheless, the members of the Subcommittee recommended no changes in the Act. In light of the Committee's original intention to review the regulations to determine their consistency with the intent of Congress in enacting Title IX, the Committee's silence can only be interpreted as a decision by the Committee that the writers of the regulations did indeed correctly understand the intent of the Congress.

When the issue came to the floor of the House and the Senate, Congress followed the lead of the Committee. Efforts to disapprove the Title IX

regulations in whole or in part have failed repeatedly. See Grove City College v. Bell, supra, 687 F.2d at 699. As this Court noted in North Haven, where the postenactment history of Title IX shows that Congress was made aware of the Department's interpretation of the Act and of the controversy surrounding that interpretation, the failure of Congress to disapprove the regulations "lends weight to the argument" that the the Department's interpretation correctly reflects the intent of Congress. 456 U.S. at ***. Here, just as in North Haven, Congress was asked to disapprove the Department's regulations on the coverage of athletic activities and, after fully informing itself of the Department's interpretation of the Act and the controversy surrounding that interpretation, Congress refused to reverse the Department's decision.

In short, Petitioner's argument that Congress never intended Title IX's prohibition on sex discrimination to cover an entire institution where students are receiving federal assistance is not a new argument. It was made before the Congressional subcommittee charged with reviewing the regulations that interpreted Title IX. That subcommittee recommended no changes in the regulations and no changes in the statute. Furthermore, despite the fact that it has amended Title IX in other respects, Congress has never given serious consideration to any amendment that would alter this aspect of the Department's interpretation of Title IX.³ This clear

³In fact, the opposite is true. One major amendment to Title IX serves to ratify the argument that Congress intended that Title IX apply to all parts of an integrated educational institution. Congress exempted social fraternities and sororities from Title IX. Pub. L. 93-568, §3(a), 88 Stat. 1862. Senator Bayh argued in favor of the amendment on the ground that Congress never intended social fraternities and sororities to be covered by Title IX. Without the amendment, he noted, they would be covered because they receive relatively low rent from educational institutions. 120 Cong. Rec. 39,992 (1974). Like athletics, however, they receive virtually no earmarked federal funding. Unless Congress believed that all parts of an integrated educational institution were covered by Title IX, therefore, passage of this amendment would have been unnecessary.

evidence of Congressional intent cannot be ignored. See Cannon University of Chicago, supra, 441 U.S. at 687, n. 7.

Title IX, like Title VI, is "program-specific." What that term means in this case is clear: the entire college operated by Petitioner is covered by Title IX. As the Fifth Circuit said in Board of Public Instruction of Taylor County, Florida v. Finch, 414 F.2d 1068 (5th Cir. 1969), Title VI extends to the specific program receiving federal funding and to any program "infected by" the discrimination of the receiving institution. The sponsor of Title VI, Senator Humphrey, described its purpose as the total elimination of racial discrimination from programs funded directly by Federal grants and from programs affected by such grants. 110 Cong. Rec. 6,543 and 6,545 (1964). He noted that the limiting "program or activity" language in Title VI must be seen in light of this purpose: a means for insuring that Title VI's coverage is directed at the program with the racially discriminatory impact, not at the program that has no such impact:

Title VI does not confer a 'shotgun' authority to cut off all Federal aid to a State. Any nondiscrimination requirement an agency adopts must be supportable as tending to end racial discrimination with respect to the particular program or activity to which it applies. Funds can be cut off only on an express finding that the particular recipient has failed to comply with that requirement. Thus, Title VI does not authorize any cutoff or limitation of highway funds, for example, by reason of school segregation. And it does not authorize a cutoff, or other compliance action, on a statewide basis unless the State itself is engaging in discrimination on a statewide basis. For example, in the case of grants to impacted area schools, separate compliance action would have to be taken with respect to each school district receiving a grant.

110 Cong. Rec. 6544 (1964).

It should be noted that the smallest unit mentioned by Senator Humphrey is a school district, not an individual school: any discrimination occurring in a unit of that size must have an impact on or "infect," in the term of the Finch court, every school and program in the

district. The clear analogy in this case is the entire institution run by Petitioner, not any smaller administrative or academic unit. Students paying tuition to Petitioner, it must be assumed, may take any course in the catalogue, use any auxiliary facility, study in any library, live in any dormitory, etc. To make any unit smaller than the entire institution subject to Title IX would be to exclude from coverage numerous aspects of student life in which federally-funded tuition-paying students may face or be affected by gender discrimination. Such an impact on or infection of the student's environment would not be permitted under Title VI. Likewise, it cannot be permitted under Title IX.⁴

The most recent reiteration of the Congressional intent that Title IX be applied comprehensively is H.Res. 190, introduced by the on May 10, 1983. The *** co-sponsors are from both parties and many political backgrounds. They all share the common understanding that eliminating gender discrimination from the American educational environment is crucial

⁴The impracticality of applying Title IX to subdivided parts of colleges such as Petitioner's also suggests that Congress did not intend that result. As Representative Mink testified during the Postsecondary Hearings,

It is difficult to trace the Federal dollar precisely. A narrow interpretation of title IX would render the law meaningless and virtually impossible either to enforce or to administer. For example, the slide projector in one classroom might be purchased with title I ESEA money, while the slide projector in the adjacent room was not. It surely is not the intent of Congress to prohibit sex--or race or national origin--discrimination in the room with the title I projector, while allowing it in the adjacent room. Surely we do not want HEW investigators to be charged with tracing exactly which classes used the federally funded slide projector.

Also, if this narrow interpretation of the scope of coverage were accepted for title IX, it might well be the wedge in the door for cutting back protection of racial and ethnic minorities under title VI of the 1964 Civil Rights Act. Such a narrow interpretation could open the floodgates for reversing 11 years of progress under title VI.

Postsecondary Hearings at 166; see Id. at 198 (Statement of Representative McKinney).

to the future of American democracy and to the ability of women to achieve equity in the marketplace. The Resolution expresses their belief that:

[T]itle IX of the Education Amendments of 1972 and regulations issued pursuant to such title should not be amended or altered in any manner which will lessen the comprehensive coverage of such statute in eliminating gender discrimination throughout the American educational system.

Id.

The amici curiae strongly urge this Court to reject Petitioner's effort to limit the protections afforded by Title IX just as Congress has rejected it: only a broad and comprehensive application of Title IX comports with the intention of Congress.

CONCLUSION

Where an institution such as Petitioner receives the general benefit of federally-subsidized tuition payments, it cannot avoid the imposition of Title IX's prohibition against gender discrimination by contending that the prohibition applies only to those expenditures that are directly traced to a federal dollar that was given to the institution for a specific purpose. If Title IX applied only to the traceable federal dollar received by indirect aid recipients such as Petitioner, the funding termination sanction would be effectively nullified: the Department would be unable to show that the gender discrimination occurred in the one percent of teacher salaries or the three percent of library construction paid for by federal dollars. To impute such an intention to Congress is contrary to the overwhelming evidence that Congress intended that the broad remedial purposes of Title IX be served by interpretations of the statute favoring comprehensive application.

The amici curiae urge this Court to give full weight to the intent of the Congress that Title IX be applied comprehensively and in a manner

designed to eliminate gender discrimination from the American educational system. Institutions such as Petitioner cannot be allowed to avoid the strictures of Title IX and, by so doing, preclude American women from obtaining the education that is the backbone of American democracy and crucial to their efforts to obtain equality in this society.

Respectfully submitted.

KAREN SYMA SHINBERG CZAPANSKIY,

Counsel for Amici Curiae

August 1983

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UPDATE ON TITLE IX AND SPORTS #3

INTRODUCTION

On December 4, 1979,¹ the Department of Health, Education and Welfare announced the final version of the long overdue policy interpretation on sex discrimination in varsity collegiate athletics. Originally slated for publication in July 1978 when the equal athletic opportunity requirements of Title IX² became fully effective for colleges and universities,³ the policy has been the subject of study and often heated national debate since a draft interpretation was published for comment in December 1978.⁴

The avalanche of responses to the proposed policy—over 700 letters, many of which contained extensive legal analyses—combined with comments from college presidents, athletic directors, and women groups, convinced HEW officials to reexamine much of their thinking on what the policy should be. During the year that followed publication of the proposed policy, HEW staff met extensively with the various interest groups and traveled to college campuses in order to better assess the impact of Title IX on intercollegiate athletics before finalizing the policy.

Calling the final policy “sensible” and “flexible,” HEW Secretary Patricia R. Harris said it had been developed in response to requests from colleges and universities for guidance about the athletic sections of the 1975 Title IX regulation. She said the policy

interpretation, which parallels the requirements of the regulation also “reminds institutions that they remain obligated by the regulation to meet the athletic interests and abilities of male and female students.”

In addition, Secretary Harris noted it was HEW's expectation that “as schools amend their programs, they would do so with sensitivity and with recognition that such changes should result in enhancing—not minimizing—the role of women coaches and athletic directors, as well as women athletes, in sports programs.”

The policy interpretation is intended to clarify what the Title IX regulation requires: it is a supplement, *not* a replacement for, or a change in that regulation. Consistent with the statute and regulation, HEW will use the policy interpretation to determine whether a college's intercollegiate athletic program is in compliance with Title IX. (See tables comparing the key provisions of regulation and policy interpretation.)

¹ Published in the December 11, 1979 *Federal Register* (Vol. 44, No. 239, 71413-71423).

² Title IX of the Education Amendments of 1972 prohibits sex discrimination in federally assisted education programs.

³ 45 C.F.R. 86.41.

⁴ Published in the December 6, 1978 *Federal Register*. (Vol. 43, No. 238, pp. 56070-58076). See PSEW “Update on Title IX and Sports #2,” January 1979.

The Project on the Status and Education of Women of the Association of American Colleges provides information concerning women in education, and works with institutions, government agencies and other associations and programs related to women in higher education. Funded by Carnegie Corporation of New York and The Ford Foundation, the Project develops and distributes free materials which identify and highlight issues and federal policies affecting women's status as students and employees. This publication may be reproduced in whole or in part without permission, provided credit is given to the Project on the Status and Education of Women, Association of American Colleges, 1818 R Street, N.W., Washington, D.C. 20009.

SUMMARY OF THE FINAL POLICY INTERPRETATION

The final policy interpretation clarifies the meaning of "equal opportunity" in intercollegiate athletics. It explains the factors and standards set out in the law and regulation which the Department will consider in determining whether an institution's intercollegiate athletics program complies with the law and regulations. It also provides guidance to assist institutions in determining whether any disparities which may exist between men's and women's programs are justifiable and nondiscriminatory. The policy interpretation is divided into three sections explaining what is required in three major areas:

- **Compliance in Financial Assistance (Scholarships) Based on Athletic Ability:** In accordance with the Title IX regulation, the governing principle in this area is that all such assistance should be available on a basis substantially proportional to the number of male and female participants in the institution's athletic program.
- **Compliance in Other Program Areas (equipment and supplies; games and practice times; travel and per diem; coaching and academic tutoring; assignment and compensation of coaches and tutors; locker rooms, and practice and competitive facilities; medical and training facilities; housing and dining facilities; publicity; recruitment; and support services):** In accordance with the Title IX regulation, the governing principle is that male and female athletes should receive equivalent treatment, benefits and opportunities.
- **Compliance in Meeting the Interests and Abilities of Male and Female Students:** In accordance with the Title IX regulation, the governing principle in this area is that the athletic interests and abilities of male and female students must be equally accommodated.

The key standards for measuring compliance in each of the above program areas are:

- overall proportionality in availability of athletic scholarships;
- overall (program-wide) equivalence in availability, quality and kind of athletic benefits, opportunities, and treatment afforded student athletes; and
- effectiveness in equally accommodating the interests and abilities of presently enrolled male and female student athletes.

There is considerable flexibility in the policy opportunity. The policy does not require that program components be identical but provides that men's and women's sports programs will be compared to determine whether the college's policies and practices result in overall program equivalence. (Equivalence is defined as "equal or equal in effect.")

The policy interpretation also provides a limited number of acceptable justifications for "non-discriminatory differences" in each of the three major program areas. Disparities in proportional scholarship awards, for example, might be justified if the difference arose as the result of the non-discriminatory uneven distribution of higher out-of-state tuition grants between men and women. Similarly, schools are allowed to award fewer grants in order to phase in scholarships as part of team development efforts.

Furthermore, in program areas other than financial assistance, disparities in one program component might be counter-balanced by a disparity in some other aspect of the program, provided the overall opportunities are equivalent.* For example, a small difference in the quality of equipment which favors the men's teams might be weighed against a small disparity in opportunities for travel which favors the women's program. However, no overtly discriminatory policy or disparity so severe that it, by itself, produces inequality of overall athletic opportunity will be treated with such flexibility in applying the policy interpretation.

The Enforcement Process

The policy interpretation also describes the procedures used by HEW to enforce Title IX and introduces a special approach to be applied to inter-collegiate athletic programs: a state of conditional compliance. Under this approach a school which is currently in violation of Title IX's requirements in intercollegiate athletics may still avoid being found in noncompliance if it can demonstrate both:

- a *history and continuing practice* of upgrading the program revealed to be deficient and,
- an *acceptable* plan indicating that the problem revealed during an investigation by the Office for Civil Rights will be corrected within a "reasonable" period of time.

* Failure to comply with the financial assistance requirement cannot be counter-balanced by other program factors, and by itself constitutes a violation of Title IX.

TITLE IX AND INTERCOLLEGIATE ATHLETICS

Consistent with the requirements of the regulation, HEW will determine whether a school's athletic program is in compliance with Title IX by assessing three basic aspects of the athletic program:

Financial Assistance—Scholarships and grants-in-aid provided on the basis of athletic ability.

The Title IX **regulation** requires that:

Colleges and universities provide reasonable opportunities for male and female students to receive scholarships and grants-in-aid in proportion to the number of male and female participating athletes.

The **policy** explains that:

Schools must distribute all athletic assistance on a substantially proportional basis to the number of participating male and female athletes. Unequal spending for either the men's or the women's program may be justified by sex-neutral factors, such as a higher number of male athletes recruited from out-of-state.

Athletic Benefits and Opportunities—This includes equipment, travel, compensation of coaches, facilities, housing, publicity and other aspects of a program .

The Title IX **regulation** specifies the factors that HEW should assess in determining whether a school is providing equal athletic opportunity:

- Equipment and supplies
- Scheduling of games and practice
- Compensation of coaches
- Housing and dining services
- Publicity
- Travel and per diem costs

- Opportunities for coaching
- Locker rooms and other facilities
- Medical and training services
- Other relevant factors

The **policy** explains that schools must provide "equivalent" treatment, services and benefits in those areas. HEW will assess each of those factors by comparing:

- Availability
- Kind of benefits
- Kind of treatment
- Quality
- Kind of opportunities

Accommodation of Student Interests and Abilities—The third section of the policy sets out how schools can meet the requirement of the regulation to "effectively accommodate the interests and abilities of both sexes."

The Title IX **regulation** requires that schools effectively:

Accommodate the interests and abilities of students of both sexes in the selection of sports and levels of competition.

The policy explains how to accommodate interests and abilities through:

- Selection of sports
- Levels of competition
- Measuring of interests and abilities

TITLE IX AND INTERCOLLEGIATE ATHLETICS

THE REGULATION

I. Athletic Financial Assistance (Scholarships) § 86.37(c)

A recipient that provides athletic scholarships or grants-in-aid must provide reasonable opportunities for those awards in *proportion* to the number of students of each sex participating in intercollegiate athletics.

II. Compliance in Other Athletic Benefits and Opportunities § 86.41(c)

Factors considered in determining whether equal opportunity exists:

- equipment and supplies
- games and practice
- travel and per diem
- coaching and academic tutoring
- assignment & compensation of coaches and tutors
- locker rooms, practice and competitive facilities
- medical and training services and facilities
- housing and dining services and facilities
- publicity
- other factors, as determined by OCR

POLICY INTERPRETATION

I. Athletic Financial Assistance (Scholarships)

Scholarship dollars must be divided equally, in proportion to the numbers of male and female athletes.

Example: Total scholarship fund = \$100,000 in a school with 70 male and 30 female athletes. Male athletes are entitled to \$70,000. Female athletes are entitled to \$30,000.

Unequal results can be explained by factors such as:

- higher scholarship costs for out-of-state students which do not result from policies that limit the availability of scholarships for the underrepresented sex
- reasonable professional decisions about the number of awards in any year which are most appropriate for program development

II. Compliance in Other Athletic Benefits and Opportunities

HEW will compare for each sex and for each factor:

- availability
- quality
- kind of benefits
- kind of opportunities
- kind of treatment

Each program component should be *equal or equal in effect*.

HEW *does not require identical benefits, opportunities, or treatment*, but the effect of any differences must be negligible.

Factors which may justify any differences found:

- the unique aspects of particular sports (e.g., type of equipment required)
- legitimate sex-neutral factors related to special circumstances of a temporary nature
- unique demands associated with the operation of a competitive event in a single-sex sport
- voluntary affirmative action taken to overcome the effect of past discrimination

TITLE IX AND INTERCOLLEGIATE ATHLETICS

THE REGULATION

III. Effective Accommodation of Student Interests & Abilities § 86.41(c)

HEW will consider the following factor, among others, in determining whether equal opportunity exists:

- Whether *the selection of sports & levels of competition effectively accommodate* the interests and abilities of members of both sexes.

POLICY INTERPRETATION

III. Effective Accommodation of Student Interests & Abilities

Measuring Athletic Interests and Abilities

The recipient must:

- Take into account the increasing levels of women's interests and abilities;
- Use methods of determining interest and ability that do not disadvantage the underrepresented sex;
- Use methods of determining ability that take into account team performance records; and
- Use methods that are responsive to the expressed interests of students capable of intercollegiate competition who belong to the underrepresented sex.

Selection of Sports

- When there is a team for only one sex, and the excluded sex is interested in the sport, the university may be required to:
 - Permit the excluded sex to try out for the team if it is not a contact sport; or
 - Sponsor a separate team for the previously excluded sex if there is a reasonable expectation of intercollegiate competition for that team.
- Teams do **not** have to be integrated.
- The same sports do **not** have to be offered to men and to women.

Levels of Competition

Equal competitive opportunity means:

- The numbers of men and women participating in intercollegiate athletics is in proportion to their overall enrollment; or
- The school has taken steps to insure that the sex underrepresented in athletic programs is offered new opportunities consistent with the interests and abilities of that sex; or
- The present program accommodates the interests and abilities of the underrepresented sex.

and

- Men and women athletes, in proportion to their participation in athletic programs, compete at the same levels; or
- The school has a history and practice of upgrading the levels at which teams of the underrepresented sex compete.

Schools are not required to develop or upgrade an intercollegiate team if there is no reasonable expectation that competition will be available for that team.

Note: After May 7, 1980 both the new Department of Education and the Department of Health and Human Services (formerly HEW) will have Title IX responsibility.

TITLE IX AND INTERCOLLEGIATE ATHLETICS

WHAT ABOUT THE FOOTBALL TEAM?

SCHOLARSHIPS

The Standard

- Total \$ available for all sports must be divided between men and women in proportion to # of men and # of women athletes

Flexibility

- Each school decides how to spend \$ available for men's programs and women's programs

Disparities in proportionality of total scholarship aid may be justified by:

- Decision to phase-in women's scholarships if appropriate for development of women's teams

or

- Other nondiscriminatory factors

Effect on Competition

- Current average statistics indicate only 8% disparity
athletes: 70% men; 30% women
\$ scholarships: 78% men; 22% women
- If reduction of scholarships for men necessary, all competing schools can make same reduction (e.g., NCAA Division 1 lowers current scholarship limit)

OTHER PROGRAM COMPONENTS

The Standard

- For all sports, program components (e.g., equipment, facilities, medical services) must be substantially equivalent for men and women athletes

Flexibility

Disparities in any program component may be justified by:

- Nature of the sport (e.g., frequency with which equipment wears out; size and upkeep requirements of stadium; rate of injury from participation)

or

- Size of competitive events

or

- Other nondiscriminatory factors

Effect on Competition

- Support for football need not be cut even though women do not have comparable team
- National level competition need not be cut even though women do not compete nationally

MEMORANDUMG.C.
To: James W. CicconiFROM: Victor E. Schwartz *VES*

DATE: June 30, 1983

SUBJECT: Correspondence Concerning S. 44,
The Product Liability Bill

Enclosed is a copy of correspondence that has been sent by Senators Hollings, Packwood and Kasten to the Secretary of Commerce, Secretary of Labor, Attorney General, Director of OMB, and the Chairman of the Council of Economic Advisers concerning the current Administration's position on S. 44, the product liability bill. As you know, last year the President endorsed Federal product liability legislation (Attachment A). The principal piece of such legislation, S. 2631, was evaluated by a Cabinet Council on Commerce and Trade Working Group. After the Working Group had completed its effort, a letter was forwarded to the Commerce Committee seeking a prompt markup of the bill (Attachment B). A number of suggestions were made by the Working Group, but the principal one focused on by the Cabinet Council was concerning worker compensation.

Prior to markup last year a number of the Working Group's suggestions were considered and alterations were made in the bill, principally in removing a provision that would have prevented claimants from recovering where they could not identify who made the product, shielded retailers and wholesalers in all situations where they were handling a sealed package or container, and modifying a provision that indicated when a manufacturer had the right to warn a person other than the product user. Other suggestions made by the Working Group were not adopted.

This year additional consideration was given to the Working Group's suggestions and particular focus was directed at the Department of Labor's concerns. Potential changes in those areas have now

Memo to James W. Cicconi
June 30, 1983
Page 2

CROWELL & MORING

been put in potential amendment form dealing with joint and several liability and the provision on worker compensation (Attachment C). As counsel for The Product Liability Alliance, the principal group that seeks support of S. 44, we are committed to working with the Department of Labor to alleviate its concerns about the proposal. These proposed amendments reflect that concern.

S. 44 was ready to move toward markup, however, certain documents that were prepared at the Department of Commerce were brought to the attention of Senators Hollings and Packwood. One document (marked "DRAFT" and enclosed as Attachment D) suggested that the Administration was "divided" about the issue of product liability. The document was revised in the Department of Commerce and never sent to the Secretary.* Unfortunately, this document which was not based on any factual matters as far as we know (they reflected old debates) reached Ralph Nader's Congress Watch and that organization provided them to the Senators. This resulted in delay of markup of the bill. This delay is of acute concern to The Product Liability Alliance because we are soon facing the annual meeting of the American Trial Lawyers Association here in Washington on July 15. That organization plans to flood the Hill with material attacking S. 44.

A number of chief executive officers will probably be contacting Mr. Baker on this matter, but I wanted you to have the factual information that has come to our attention. Naturally, we hope that the Administration can give its firm support for a prompt markup of S. 44 and not allow this letter to constitute an effective delaying tactic.

As always, I will be pleased to answer any questions you may have about this matter.

Enclosures A, B, C, D and E

* The actual document forwarded is enclosed as Attachment E; the Secretary has not acted on that document.

THE WHITE HOUSE
WASHINGTON

July 15, 1982

MEMORANDUM FOR THE RECORD

FROM: CRAIG L. FULLER *CF*
SUBJECT: Product Liability/CM212

During the Cabinet meeting held today, the following points with respect to product liability were agreed upon by those present and approved by the President:

1. The Administration approves in principle the enactment of Federal legislation providing uniform standards for product liability.
2. Product liability litigation should remain in the normal forums of the judicial process (e.g., no changes in jurisdiction).
3. No new Federal enforcement powers on machinery shall be created.
4. The legislation shall not change other, unrelated areas of the law (e.g., workmen's compensation, etc.)

The Cabinet Council on Commerce and Trade will continue to work on the details of the pending legislation in a manner consistent with the principles listed above.

September 9, 1982

Honorable Robert W. Kasten, Jr.
Chairman, Subcommittee on Consumer
Committee on Commerce, Science and
Transportation
United States Senate
Washington, D.C. 20510

Dear Bob,

As Chairman Pro Tempore of the Cabinet Council on Commerce and Trade, which has been charged by the President with responsibility for reviewing all matters within the Executive Branch pertaining to Federal legislation on product liability, I am pleased to provide you with the Administration's position on the August 2, 1982 Staff Working Draft of S. 2631, the Product Liability Act.

On the whole, the draft fairly and equitably balances the rights and obligations of all interested parties and should contribute significantly to ending the product liability crisis currently facing so many companies. By establishing clear and uniform standards of responsibility and by placing liability on the party best able to protect against the harm, it should increase predictability, ensure that injured persons receive fair compensation, promote safety and reduce transaction costs.

In addition, the draft is generally consistent with the basic principles which the President established to guide the Cabinet Council in implementing his decision of July 15 to support the concept of Federal legislation establishing uniform product liability standards. Those were that there be no changes in jurisdiction, no new Federal enforcement powers or machinery, and no changes to unrelated areas of law, such as Worker Compensation.

The Cabinet Council's review, however, did identify a number of areas in the August 2, 1982 Staff Working Draft of S. 2631 which the Administration believes should be clarified, modified, or deleted. Section 11 of the bill (EFFECT OF WORKER COMPENSATION BENEFITS) raises extremely difficult issues of fairness because of differences between the rules and procedures in product liability law and those in worker compensation schemes. The Administration seriously questions whether or not Section 11 represents an equitable solution for employees, employers and manufacturers. We look forward to a legislative solution on this issue.

We appreciate your willingness to compromise on many of these issues and will be pleased to assist you in drafting the language necessary to implement these recommendations. All of us in the Administration are grateful to you for your leadership on this important initiative. I want to assure you of our continued assistance and urge prompt consideration of S. 2631 by the full Committee.

Sincerely,



Secretary of Commerce

1 section 10 shall be considered. For purposes of this
2 paragraph, the court may determine that two or more persons
3 are to be treated as a single person party.

4 (c) The court shall--

5 (1) unless section 11(a) requires a different
6 result, determine the award of damages to each claimant
7 in accordance with the findings under subsection (b)(2);

8 (2) enter judgment against each party liable on the
9 basis of rules of joint and several liability; and

10 (3) state in the judgment each party's percentage
11 of responsibility for the claimant's harm.

12 Joint and several liability and contribution among joint and
13 several tortfeasors shall be determined in accordance with
14 applicable State law, except that the basis for contribution
15 shall be each party's percentage of responsibility for the
16 claimant's harm.

17 (d) Upon motion made not later than one year after
18 judgment is entered, the court shall determine whether all
19 or part of a judgment against a joint tortfeasor is
20 uncollectible from that party, and shall reallocate any
21 uncollectible amount among the other joint tortfeasors,
22 including a claimant at fault, according to their respective
23 percentages of fault. The party whose liability is
24 reallocated is nonetheless subject to contribution and to
25 any continuing liability to the claimant on the judgment.

1 (c) The court shall enter judgment against each party
2 determined to be liable in proportion to its percentage of
3 responsibility for the claimant's harm, as determined under
4 subsection (b)(2), unless section 11(a) requires a different
5 result.

6 (d) If a claimant has not been able to collect on a
7 judgment in a product liability action, and if the claimant
8 makes a motion within 1 year after the judgment is entered,
9 the court shall determine whether any part of the obligation
10 allocated to a person who is a party to the action is not
11 collectable from such a person. Any amount of obligation
12 which the court determines is uncollectable from that person
13 shall be reallocated to the other persons who are parties to
14 the action and to whom responsibility was allocated and to
15 the claimant according to the respective percentages of
16 their responsibility, as determined under subsection (b)(2).

17 MISUSE, ALTERATION, CONTRIBUTORY NEGLIGENCE

18 OR ASSUMPTION OF THE RISK

19 Sec. 10. (a)(1) If a manufacturer or product seller
20 proves by a preponderance of the evidence that misuse of a
21 product by any person other than the defendant manufacturer
22 or product seller and other than the claimant's employer has
23 caused all or a portion of the claimant's harm, the
24 determination in section 9(b)(2) shall reflect the shall be
25 considered in determining the percentage of total
26 responsibility for the claimant's harm allocable to misuse.

1 Under this subsection, the trier of fact may determine that
2 the harm caused by the product occurred solely because of
3 misuse of the product, under section 9(b)(2).

4 (2) For purposes of this Act, misuse shall be
5 considered to occur when a product is used for a purpose or
6 in a manner which is not consistent with the warnings or
7 instructions available to the user, or which is not
8 consistent with reasonable practice of users of the product,
9 or when a product user fails adequately to train another
10 person in the safe use of the product, or otherwise provide
11 for the safe use of the product, and that lack of training
12 or the failure otherwise to provide for the safe use of the
13 product was a cause of the claimant's harm.

14 (b)(1) If a manufacturer or product seller proves by a
15 preponderance of the evidence that an alteration or
16 modification of the product by any person other than the
17 defendant manufacturer or product seller and other than the
18 claimant's employer has caused all or a portion of the
19 claimant's harm, the determination in section 9(b)(2) shall
20 reflect shall be considered in determining the percentage of
21 total responsibility for the claimants' harm allocable to
22 alteration or modification. Under this subsection, the
23 trier of fact may determine that the harm arose solely
24 because of the product alteration or modification. The
25 determination in section 9(b)(2) shall not be made if--
26 under section 9(b)(2).

1 (A) the alteration or modification was in
2 accordance with instructions or specifications of the
3 manufacturer or product seller;

4 (B) the alteration or modification was made with
5 the express consent of the manufacturer or product
6 seller; or

7 (C) the alteration or modification was reasonably
8 anticipated conduct, and the manufacturer or product
9 seller failed to provide adequate warnings or
10 instructions with respect to that alteration or
11 modification.

12 (2) For purposes of this Act, aAlteration or
13 modification shall be considered to occur--

14 (A) when a person other than the manufacturer or
15 product seller changes the design, construction, or
16 formula of the product, or changes or removes warnings,
17 instructions, or safety devices that accompanied or were
18 displayed on the product; or

19 (B) when a product user fails to observe the
20 routine care and maintenance necessary for a product and
21 that failure was the cause of the claimant's harm.

22 (3) (2) Ordinary wear and tear of a product shall not be
23 considered to be alteration or modification of a product
24 under this subsection. Alteration or modification shall not
25 be considered to occur if--

1 apparent, without inspection, to an ordinary reasonably
2 prudent person; or

3 (B) when the claimant knew about the product's
4 defective condition, and voluntarily used the product or
5 voluntarily assumed the risk of harm from the ~~product,~~
6 or product.

7 ~~(C) when the claimant misused, altered, or modified~~
8 ~~the product, as these terms are defined in subsections~~
9 ~~(a)(2) and (b)(2).~~

10 (d) Evidence of product misuse, alteration, or
11 modification, as defined in subsections (a) and (b), by the
12 claimant's employer or other acts or omissions of the
13 claimant's employer shall be considered on the issue of
14 whether the employer's misuse, alteration, modification or
15 other act or omission was a superseding cause of the
16 claimant's harm.

17 EFFECT OF WORKERS' COMPENSATION BENEFITS

18 Sec. 11. (a) In any product liability action in which
19 damages are sought for harm for which the person injured is
20 entitled to compensation under any State or Federal workers'
21 compensation law, ~~and in which~~ (1) the judgment entered
22 against each defendant and third-party defendant found
23 liable shall be determined by applying the defendant's
24 percentage of responsibility, as determined under section
25 9(b)(2), to the amount remaining after the claimant's total
26 damages, as determined under section 9(b)(1), are reduced by

1 the sum of the amount paid as workers' compensation benefits
2 for that harm and the present value of all workers'
3 compensation benefits to which the employee is or would be
4 entitled for the harm is greater than (2) the sum of the
5 amount proportionate to conduct defined in section 10, the
6 court shall enter judgment against the defendant or
7 defendants determined to be liable in an amount equal to the
8 amount of total damages to the claimant, as determined under
9 section 9(b)(1), less the amount of workers' compensation
10 benefits, as determined under this subsection. If a person
11 eligible to file a claim for receive workers' compensation
12 benefits has not filed such a claim, or either he or his
13 employer has failed to exhaust their remedies under an
14 applicable workers' compensation law, any product liability
15 action brought by the claimant shall be dismissed without
16 prejudice stayed until those remedies are exhausted. The
17 determination of workers' compensation benefits by the trier
18 of fact in a product liability action shall have no binding
19 effect on and shall not be used as evidence in any other
20 proceeding.

21 (b) Unless the manufacturer or product seller has
22 expressly agreed to indemnify or hold an employer harmless
23 for harm to an employee caused by a ~~product~~-- product

24 (1) neither the employer nor the workers'
25 compensation insurance carrier of the employer shall
26 have ~~no~~ a right of subrogation, contribution, or implied

1 indemnity ~~or lien~~ against the manufacturer or product
2 seller or a lien against the claimant's recovery from
3 the manufacturer or product seller if the harm is one
4 for which a product liability action may be brought
5 under this Act, and .

6 (2) the workers' compensation insurance carrier of
7 the employer shall have no right of subrogation against
8 the manufacturer or product seller.

9 (c) In any product liability action in which damages are
10 sought for harm for which the person injured is entitled to
11 compensation under any State or Federal workers'
12 compensation law, no third party tortfeasor may maintain any
13 action for implied indemnity or contribution against the
14 employer or any coemployee of the person who was injured.

15 (d) No person entitled to file a claim for benefits
16 pursuant to applicable State or Federal workers'
17 compensation laws or who would have been entitled to file
18 such a claim, or any other person whose claim would be
19 derivative from such a claim, shall be allowed to recover in
20 any action other than a workers' compensation claim against
21 a present or former employer or workers' compensation
22 insurer of the employer or any coemployee for harm caused by
23 a product.

24 (e) Without regard to when the harm giving rise to the
25 claim occurred, the provisions of this section do not apply
26 to any person subject to or covered by the Longshoremen's

1 and Harbor Workers' Compensation Act (33 U.S.C. 901 et
2 seq.), as amended.

FORM CD-183
(REV 2-80)
FORMERLY SEC-25

U.S. DEPARTMENT OF COMMERCE

ABSTRACT OF SECRETARIAL CORRESPONDENCE

TO:	The Secretary	The Deputy Secretary
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Date:

INFORMATION MEMORANDUM

From: General Counsel

Prepared by H. Stephen Halloway/Assoc GC/377-1328

Subject: Status Report on Product Liability Legislation

Background:

On September 9, 1982, you signed a letter to Senator Robert Kasten expressing the views of the Administration on certain provisions of his product liability bill, S. 2631. A copy of this letter is attached at Tab A.

On October 1, S. 2631 was ordered reported by the Senate Commerce Committee. Senator Kasten has now reintroduced the bill in substantially identical form as S. 44 (the Kasten bill).

Neither S. 2631 nor the Kasten bill completely reflect the changes the Administration requested in your September 9, 1982, letter to Senator Kasten. In summary form, the major differences are as follows:

1. Worker Compensation. The Administration did not support provisions in S. 2631 which would change the law of most states governing lawsuits arising out of workplace injuries. These provisions would: (1) reduce employees' product liability damages by the amount attributable to employer negligence, (2) prohibit actions by manufacturers against employers, (3) prohibit subrogated actions against manufacturers by employers

Control No. _____

SURNAME AND ORGANIZATION (Typed)	PREPARED BY	CLEARED BY	CLEARED BY	CLEARED BY	CLEARED BY	CLEARED BY
	INITIALS AND DATE					

and their insurance carriers, and (4) prohibit actions by employees covered by worker compensation plans against their employers.

The intent of the first three of these provisions is to reallocate the litigation costs associated with workplace injuries to coincide more closely with the responsibilities of the parties involved. Thus, if the employer's negligence (e.g., the removal of a safety feature on an industrial machine) was the principal cause of an injury, damages against the manufacturer of that machine should be reduced accordingly. Likewise, a negligent employer and his insurance carrier should not be permitted to sue the manufacturer to recover the worker compensation award paid to the employee. Such awards are a cost of doing business which can be budgeted for and mitigated by sound safety practices; they should not be subsidized by manufacturers. Finally, employers should be free from lawsuits by either manufacturers or employees, on the ground that their liability should be limited to that provided for in the applicable worker compensation plan.

Each of these provisions would to some extent overrule existing state laws, to the benefit of manufacturers and employers and at the expense of injured employees. In addition, they arguably go beyond the limits of the Administration policy on product liability in that they would have indirect effects on the operation of state -- and federal -- worker compensation laws.

In your letter of September 9 to Senator Kasten, you indicated that these provisions raised "extremely difficult issues of fairness".

These provisions are retained in the Kasten bill.

2. Preemption of state law. The Administration urged clarification of provisions in S. 2631 providing for the preemption of state law with respect to "matters governed by this Act". The Administration's concern was that these provisions were unduly ambiguous and, broadly interpreted, could have an undue impact on the vitality of state tort law. This result would be inconsistent with the Administration's principles of federalism. The Kasten bill retains these provisions without change.

3. Collateral Estoppel: The Administration recommended the deletion of provisions barring the use of the doctrine

of collateral estoppel in product liability actions. Under this doctrine, it is possible to establish a fact by showing that a previous court had accepted it, without relitigating the issue. Thus, for example, a plaintiff could establish that exposure to asbestos in the workplace causes cancer by referring to an earlier decision on this point, thus saving the expense of litigating the issue again.

Collateral estoppel is an equitable rule which is permitted only with the permission of the court. Clearly, use of the doctrine operates in favor of plaintiffs in those instances where the causes of injuries are complex and proof is expensive and difficult. The Department of Justice opposed a prohibition of the use this rule because they found insufficient evidence that a problem existed in this area for which a federal solution was appropriate.

The Kasten bill retains these provisions.

4. Jury Determination of Damages. The Administration opposed provisions removing from the jury the responsibility of setting punitive damages in product liability actions. S. 2631 provided that while the jury would determine whether or not such damages were called for, the actual amount of such damages would be determined by the trial judge. This provision responded to the concerns of product liability defendants that punitive damage awards were excessive, and that juries were unduly swayed by prejudicial evidence. The Administration position reflected the strongly held view of the Department of Justice that there was no evidence of the existence of a national problem in this area, and furthermore that, in light of the quasi-criminal nature of punitive damages, a jury trial on the issue may be required by the constitution.

Analysis:

The Administration position on S. 2631 was reached through a process characterized by sharp disagreement on the issues discussed above, as well as others. You presided over two Cabinet Council meetings on this subject, and the Product Liability Task Force reached a consensus only with great difficulty. Even at the Cabinet meeting on July 15, 1982, the President made the decision only after spirited discussions of the issues.

Many of the difficulties experienced last year resulted from institutional concerns that are not easily amenable to change. The Department of Labor continues to be concerned about the effect that any such legislation would have on worker compensation generally and the operation of federal compensation programs in particular. (Although business groups have been working with the Labor Department and may be close to a compromise on these issues) Justice is concerned over the effect of the bill on its subrogation docket and on the preemption question, and shares with Labor concern over the potential impact of the legislation on pending and future asbestos cases. The White House policy staff (Harper, Uhlman, Horowitz, Niskanen) are skeptical of the need for federal legislation in an area traditionally left to state law. They believe that, to the extent a federal bill is at all appropriate, other alternatives should be carefully examined.

Another aspect of this problem deserves your consideration. That is the extent to which the Administration can control the outcome of the process, once it has reached a position on the bill.

There is broad-based support within the business community for S. 44. However, this support is based upon agreements made with and among various segments of the business community, and the coalition supporting the bill has been put together, in large part, by tying the support of each of its members to specific provisions in the bill. Thus, the original concept behind the legislation has been expanded to accommodate individual concerns. The collateral estoppel provision, for example, was supported very strongly by the pharmaceutical and chemical industries. Certain of the provisions affecting worker compensation were heavily endorsed by the insurance and manufacturing groups, while employers bargained for others as a counter-balance. The wholesaler-distributors insisted upon inclusion of a provision protecting them from liability for prepackaged products. The machine-tool builders wanted provisions regarding the contributory negligence of employees.

The deletion of any one of these provisions necessarily jeopardizes the coalition. The deletion of any provision at the insistence of the Administration will necessarily be seen as an attempt to defeat the legislation.

Senator Kasten also was compelled to make accommodations to members in order to assure support in committee. At least one provision -- that regarding the Sindell override -- was dropped from the bill at the insistence of Senator Gorton. At markup, moreover, after the Administration had signalled its acceptance of the bill, a new and potentially controversial provision was inserted at the insistence of Senator Kassebaum. This provision, which dealt with aircraft certification, was inserted at the request of the aircraft industry and would be of particular concern to the Departments of Health and Human Services, the Federal Aviation Administration and the Department of Defense.

The difficulties inherent in any attempt to alter the content of S. 44 may be exemplified by the events of last year, when the Administration offered a series of recommendations to Kasten which were an implicit condition of Administration support for the bill. Although Senator Kasten agreed to many of our recommendations, he was forced to reject many of them, in large part because of the need to hold together his coalition in committee. A number of groups threatened to withdraw their support of the bill if their particular provision was negotiated away. Such withdrawal would in turn have resulted in erosion of support by other Committee members.

Senator Kasten understands that his bill will not pass the Senate or House without compromises along the lines the Administration has recommended. However, the Senator and the business community believe that any compromises must advance the bill through the legislative process. Their concern is that the Administration's recommendations if accepted early in this process would leave little with which to bargain in the legislative forum.

Conclusion:

1. The Administration is divided at this time regarding the specific provisions of a federal product liability bill. OMB and the Domestic Policy Staff retain serious reservations about the general concept and merits of the Kasten bill.
2. The Administration cannot control the outcome of the process. Senator Kasten cannot negotiate with the Administration alone; he must also accommodate the industry groups and fellow members.

3. Your continuing to manage this issue in the CCCT will require a major commitment of time and resources. Your personal presentation of these issues to members of the Cabinet and White House staff will again be essential if we are to achieve at least the same result as last year.
4. The business community places enactment of product liability legislation high on its agenda.
5. The CCCT process has gone as far as it can go. Further discussion of this issue in that forum will not provide any different result than last year.
6. There is a role for the Commerce Department. We can complement the business community effort by working within the Administration to advance passage of product liability legislation. This can best be accomplished through the standard OMB legislative clearance process. Product liability legislation is not new. This process is tailor-made to hashing out inter agency differences of opinion on issues that have been around a long time. Many of the differences can be resolved in this process at the Staff level conserving Secretarial involvement for critical decisions.

Recommendation:

The product liability issue should be staffed through the OMB A-19 legislative comment process. The Department will have ample opportunity to influence this process in ways which are timely and effective, without the exposure inherent in treatment of the issue by the Cabinet Council. Your personal involvement need not necessarily be reduced, and the the Department will be better situated to respond to problems as they arise.

FORM CD-183
(REV. 2-80)
FORMERLY SEC. 350

U.S. DEPARTMENT OF COMMERCE

ABSTRACT OF SECRETARIAL CORRESPONDENCE

TO:	<input checked="" type="checkbox"/> The Secretary	<input type="checkbox"/> The Deputy Secretary
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Date: APR 20 1983

INFORMATION MEMORANDUMFrom: *AM*
8/7 General Counsel

Prepared by: H. Stephen Halloway/Assoc. General Counsel/377-1328

Subject: Status Report on Product Liability Legislation

Background:

On September 9, 1982, you signed a letter to Senator Robert Kasten expressing the views of the Administration on certain provisions of his product liability bill, S. 2631. A copy of this letter is attached at Tab A.

On October 1, 1982, S. 2631 was ordered reported by the Senate Commerce Committee. Senator Kasten has now reintroduced the bill in substantially identical form as S. 44 (the Kasten bill).

Neither S. 2631 nor the Kasten bill completely reflect the changes the Administration requested in your letter to Senator Kasten. In particular, the Kasten bill adopts positions different from ours in the areas of worker compensation, preemption of state law, collateral estoppel, and jury determination of punitive damages. I have attached to this memorandum at Tab B a brief analysis of how the Administration position differs from the Kasten bill on each of these issues.

Control No. _____

SURNAME AND ORGANIZATION (Typed)	PREPARED BY	CLEARED BY	CLEARED BY	CLEARED BY	CLEARED BY	CLEARED BY
	Margulies Dep GC					Exec Sec
INITIALS AND DATE						

Discussion:

Our experience last year unmasked two major problems with which we will be confronted again this Congress. First, the Administration is deeply divided regarding the specific provisions of a Federal product liability bill. Second, even after the Administration forges a position, we cannot sufficiently influence the Congressional outcome because of Senator Kasten's needs to accommodate his fragile coalition of support among industry groups and fellow members.

Administration position. -- The Administration position on S. 2631 was reached through a process characterized by sharp disagreement on the issues discussed at Tab B, as well as others. You presided over two Cabinet Council meetings on this subject, and the Product Liability Task Force reached a consensus only with great difficulty. Even at the Cabinet meeting on July 15, 1982, the President made the decision only after spirited discussions of the issues.

Many of the difficulties experienced last year resulted from institutional interests that are not easily changed. The Departments of Labor and Justice and the White House policy staff all harbor parochial views that make it difficult to achieve an agreement.

Controlling the final product. -- Support within the business community for the Kasten bill is based upon agreements made with and among various segments of that community, and the coalition supporting the bill has been put together, in large part, by tying the support of each of its members to specific provisions in the bill. Thus, the original concept behind the legislation has been expanded to accommodate individual concerns.

The deletion of any one of these provisions necessarily jeopardizes the coalition. Moreover, the deletion of any provision at the insistence of the Administration will necessarily be seen as an attempt to defeat the legislation.

The difficulties we will face in attempting to alter the Kasten bill are disclosed by the events of last year, when the Administration offered a series of recommendations to Senator Kasten which were an implicit condition of Administration support for the bill. Although Senator Kasten agreed to many of our recommendations, he was ultimately forced to reject many of them, in large part because of the need to hold together his coalition in Committee. A number of groups threatened to withdraw their support of the bill if their

particular provision was negotiated away. Such withdrawal would in turn have resulted in erosion of support by other Committee members.

Conclusion:

For the reasons discussed above, we will encounter difficulty in obtaining product liability legislation that reflects our views. In terms of determining an Administration position, we have done all we can with the CCCT. Your continuing to manage this issue in that forum will require a major commitment of time and resources, and will provide no better result than last year.

However, the business community places enactment of product liability legislation high on its agenda, and the Commerce Department should continue to play a key role. At this juncture, we can best play this role by advancing passage of product liability legislation through the standard OMB legislative clearance process. This process is tailor-made to hashing out inter-agency differences of opinion on issues that have been around a long time. Many of the differences can be resolved in this process at the Staff level and so conserving Secretarial involvement for critical decisions. Your personal involvement need not necessarily be reduced, and the Department will be better situated to respond to problems as they arise.



September 9, 1982

Honorable Robert W. Kasten, Jr.
Chairman, Subcommittee on Consumer
Committee on Commerce, Science and
Transportation
United States Senate
Washington, D.C. 20510

Dear Bob,

As Chairman Pro Tempore of the Cabinet Council on Commerce and Trade, which has been charged by the President with responsibility for reviewing all matters within the Executive Branch pertaining to Federal legislation on product liability, I am pleased to provide you with the Administration's position on the August 2, 1982 Staff Working Draft of S. 2631, the Product Liability Act.

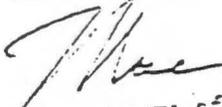
On the whole, the draft fairly and equitably balances the rights and obligations of all interested parties and should contribute significantly to ending the product liability crisis currently facing so many companies. By establishing clear and uniform standards of responsibility and by placing liability on the party best able to protect against the harm, it should increase predictability, ensure that injured persons receive fair compensation, promote safety and reduce transaction costs.

In addition, the draft is generally consistent with the basic principles which the President established to guide the Cabinet Council in implementing his decision of July 15 to support the concept of Federal legislation establishing uniform product liability standards. Those were that there be no changes in jurisdiction, no new Federal enforcement powers or machinery, and no changes to unrelated areas of law, such as Worker Compensation.

The Cabinet Council's review, however, did identify a number of areas in the August 2, 1982 Staff Working Draft of S. 2631 which the Administration believes should be clarified, modified, or deleted. Section 11 of the bill (EFFECT OF WORKER COMPENSATION BENEFITS) raises extremely difficult issues of fairness because of differences between the rules and procedures in product liability law and those in worker compensation schemes. The Administration seriously questions whether or not Section 11 represents an equitable solution for employees, employers and manufacturers. We look forward to a legislative solution on this issue.

We appreciate your willingness to compromise on many of these issues and will be pleased to assist you in drafting the language necessary to implement these recommendations. All of us in the Administration are grateful to you for your leadership on this important initiative. I want to assure you of our continued assistance and urge prompt consideration of S. 2631 by the full Committee.

Sincerely,



Secretary of Commerce

Areas of Disagreement Between
the Administration and S. 2631

I. Worker Compensation

S. 2631 contained provisions, not supported by the Administration, that would:

- ° reduce employees' product liability damages by the amount attributable to employer negligence,
- ° prohibit actions by manufacturers against employers,
- ° prohibit subrogated actions against manufacturers by employers and their insurance carriers, and
- ° prohibit actions by employees covered by worker compensation plans against their employers.

Each of these provisions would to some extent overrule existing state laws, to the benefit of manufacturers and employers and at the expense of injured employees. In addition, they arguably go beyond the limits of the Administration policy on product liability in that they would have indirect effects on the operation of state -- and federal -- worker compensation laws.

In your letter of September 9, 1982, to Senator Kasten, you indicated that these provisions raised "extremely difficult issues of fairness".

II. Preemption of State Law

The Administration urged clarification of provisions in S. 2631 providing for the preemption of state law with respect to "matters governed by this Act". The Administration's concern was that these could have an undue impact on the vitality of state tort law. This result would be inconsistent with the Administration's principles of federalism. The Kasten bill retains these provisions without change.

III. Collateral Estoppel

The Administration recommended the deletion of provisions barring the use of the doctrine of collateral estoppel in product liability actions. Under this doctrine, it is

possible to establish a fact by showing that a previous court had accepted it, without relitigating the issue. Clearly, use of the doctrine operates in favor of plaintiffs in those instances where the causes of injuries are complex and proof is expensive and difficult. The Department of Justice opposed a prohibition of the use of this rule because it found insufficient evidence that a problem existed in this area for which a federal solution was appropriate.

IV. Jury Determination of Punitive Damages

The Administration opposed provisions removing from the jury the responsibility of setting punitive damages in product liability action. S. 2631 provided that while the jury would determine whether or not such damages were called for, the actual amount of such damages would be determined by the trial judge. This provision responded to the concerns of product liability defendants that punitive damage awards were excessive, and that juries were unduly swayed by prejudicial evidence. The Administration position reflected the strongly held view of the Department of Justice that there was no evidence of the existence of a national problem in this area, and furthermore that, in light of the quasi-criminal nature of punitive damages, a jury trial on the issue may be required by the Constitution.

ec
ec

Scott, Stanley

STANLEY S. SCOTT
120 PARK AVENUE
NEW YORK, N.Y. 10017

August 3, 1983

Dear Jim:

In the event you missed the latest Tortorello survey, I thought you might want to review the attached material.

Nick Tortorello, as you may know, is a former top member of Lou Harris' operation and decidedly liberal -- another reason why I find the positive results interesting.

Sincerely,



Stanley S. Scott

SSS:dh
Attachment

cc: Mr. Jim Cicconi ✓

Honorable James A. Baker, III
Chief of Staff and Assistant
to the President
The White House
Washington, DC 20500

THE TORTORELLO TRENDLINE

Nicholas J. Tortorello
Editor

" " " " " "

Volume 1, Number 3

AUG 1 1983

July 1983

STANLEY S. SCOTT

PRESIDENTIAL POLITICS 1984 -- A PREVIEW

by
Robert G. Skolnick
and
Nicholas J. Tortorello

The Tortorello Corporation recently interviewed by telephone 1,005 adult Americans nationwide on the subject of President Reagan and the upcoming 1984 Presidential race. The purpose of the interviews was to get a preview of how that political environment is shaping up for next year.

Currently, President Reagan's job performance is not too bad with 43% rating him "excellent" or "good," 36% rating him "fair," and 19% rating him "poor." This compares favorably to Carter's 25% favorable rating at a similar point in his Presidential term.

President Reagan's job performance rating overall is as follows:

PRESIDENT REAGAN'S JOB PERFORMANCE

	<u>Total</u> %
Excellent	10.7
Good	32.1
Fair	35.9
Poor	19.2
Not sure/Refused	2.1

Among White respondents, his positive rating (excellent and good) was 48.0% as compared to 14.1% among minorities. Blacks and Hispanics also gave the President his largest poor rating at 36.6%. Regionally, his positive rating was lowest in the Northeast (39.7%), and highest in the West (54.3%). The better educated and upper income population gave the President much higher marks than the opposite end of the economic spectrum.

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THE TORTORELLO TRENDLINE

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PRESIDENT REAGAN'S JOB PERFORMANCE BY EDUCATION AND INCOME

	Education		Income	
	8th Grade Or Some High School	Some College Or More	\$14,999 Or Less	\$35,000 And Over
	%	%	%	%
Excellent	9.3	12.6	9.6	16.5
Good	26.4	32.8	28.5	33.3
Fair	33.6	36.5	32.6	35.4
Poor	28.0	16.6	25.4	13.0
Not sure/Refused	2.7	1.5	3.9	1.8

Age-wise, while those 55 years and older gave Mr. Reagan the highest excellent rating (12.0%), they also gave him the highest poor rating (24.0%). This demonstrates the split nature of the elderly toward one of their own in Mr. Reagan. Many elderly like Reagan's conservative policies, but not when they extend to Social Security, Medicaid, and withholding 10% of savings interest and dividends.

- HOW WOULD YOU CHARACTERIZE PRESIDENT REAGAN'S JOB PERFORMANCE SINCE HE TOOK OFFICE --
WOULD YOU SAY IT'S BEEN EXCELLENT, GOOD, FAIR OR POOR?

	RACE		REGION				EDUCATION			INCOME			AGE			POLITICAL PARTY REGISTRATION			
	BLACK /HIS- PANIC	WHITE	NORTH- EAST	MID- WEST	SOUTH	WEST	8TH GRADE OR SOME H.S.	HIGH SCH- DOL OR GRAD	SOME COL- LEGE OR MORE	\$14, 999 OR LESS	\$15, 000- \$34, 999	\$35, 000 AND OVER	34 OR LESS	35- 54	55 AND OVER	DEMO- CRAT	REPUB- LICAN	INDE- PENDENT	
	TOTAL	TOTAL	TOTAL	TOTAL	TOTAL	TOTAL	TOTAL	TOTAL	TOTAL	TOTAL	TOTAL	TOTAL	TOTAL	TOTAL	TOTAL	TOTAL	TOTAL	TOTAL	TOTAL
TOTAL	1005	142	835	264	285	270	186	182	368	451	228	431	285	400	315	283	443	295	168
	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
EXCELLENT	108	4	101	22	38	24	24	17	33	57	22	36	47	37	37	34	27	61	8
	10.7	2.8	12.1	8.3	13.3	8.9	12.9	9.3	9.0	12.6	9.6	8.4	16.5	9.3	11.7	12.0	6.1	20.7	4.8
GOOD	323	16	300	83	78	85	77	48	126	148	65	144	95	126	101	94	89	130	69
	32.1	11.3	35.9	31.4	27.4	31.5	41.4	26.4	34.2	32.8	28.5	33.4	33.3	31.5	32.1	33.2	20.1	44.1	41.0
FAIR	360	68	278	99	107	99	55	61	134	164	74	158	101	172	108	76	185	83	65
	35.9	47.9	33.3	37.5	37.5	36.6	29.6	33.6	36.4	36.5	32.6	36.7	35.4	42.9	34.3	26.9	41.8	28.1	38.7
POOR	193	52	140	54	54	57	28	51	67	75	58	88	37	61	64	68	133	18	24
	19.2	36.6	16.8	20.5	18.9	21.1	15.1	28.0	18.2	16.6	25.4	20.4	13.0	15.3	20.3	24.0	30.0	6.1	14.3
NOT SURE	14	2	11	4	5	4	1	4	5	5	6	4	4	4	3	7	5	2	2
	1.4	1.4	1.3	1.5	1.8	1.5	.5	2.2	1.4	1.1	2.6	.9	1.4	1.0	1.0	2.5	1.1	.7	1.2
REFUSED	7	-	5	2	3	1	1	1	3	2	3	1	1	-	2	4	4	1	-
	.7	-	.6	.8	1.1	.4	.5	.5	.8	.4	1.3	.2	.4	-	.6	1.4	.9	.3	-

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OBSERVATION

While the President's job performance ratings are not overwhelmingly positive, they nevertheless provide a reasonable base leading into 1984. More positive economic news will probably enlarge that base of support and make him quite a formidable opponent for the Democrats.

The data from our survey also shows the nation to be in a continuing conservative swing. When the respondents were asked if they would vote for a President in 1984 who is liberal, conservative, moderate, etc., the responses were as follows:

	<u>Total</u> %
Liberal/Ultra-Liberal	18.7
Moderate	23.2
Conservative/Ultra- Conservative	32.8
Not sure	25.3

Even among minorities, 25.3% expressed intent to vote for a conservative candidate. The region showing the most liberal character was the Northeast (Liberal/Ultra-Liberal 22.7%), with the West evidencing the most conservative (Conservative/Ultra-Conservative 35.5%). Younger respondents (35 or less) appeared more liberal (Liberal/Ultra-Liberal 24.3%), while the middle age range (35-54) most conservative (Conservative/Ultra-Conservative 37.4%). The clearly non-liberal character of those fifty years and older (Liberal/Ultra-Liberal 11.0%) further indicates that their significant "poor" rating of the President is based more on personal economic worries than political ideology.

The upscale, higher educated and income, population responded in somewhat greater numbers, as compared to the overall sample, at both ends of the spectrum:

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	<u>College Educated</u> %	<u>\$35,000+ Income</u> %
Liberal/Ultra-Liberal	22.6	19.3
Moderate	27.1	26.0
Conservative/Ultra-Conservative	34.8	35.8
Not sure	15.5	18.9

Even among registered Democrats, the conservative bent was evident:

	<u>Total</u> %
Liberal/Ultra-Liberal	23.5
Moderate	23.7
Conservative/Ultra-Conservative	28.0
Not sure	24.8

- IN 1984, DO YOU THINK YOU WILL VOTE FOR A PRESIDENT OF THE UNITED STATES WHO IS A LIBERAL, A CONSERVATIVE, A MODERATE, AN ULTRA-CONSERVATIVE OR AN ULTRA-LIBERAL?

	RACE		REGION						EDUCATION			INCOME			AGE			POLITICAL PARTY REGISTRATION		
	BLACK /HIS-PANIC	WHITE	NORTH-EAST	MID-WEST	SOUTH	WEST	BTH GRADE OR SOME H.S.	HIGH SCH- OOL	SOME LEGE	\$14, 999	\$15, 000- \$35, 000	\$35, 000 AND OVER	34- 44	45- 54	55 AND OVER	DEMOCRAT	REPUBLICAN	INDEPENDENT		
																			TOTAL	1005
TOTAL	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0		
ULTRA-LIBERAL	2.1	7.0	1.3	1.5	2.5	2.2	2.2	2.7	2.7	1.3	3.5	1.9	1.1	3.5	1.3	1.1	2.5	1.7	1.8	
LIBERAL	16.6	25.5	15.1	21.2	14.7	15.9	14.0	13.7	12.5	21.3	13.2	17.9	18.2	20.8	17.8	9.9	21.0	11.2	16.7	
MODERATE	23.2	17.6	24.4	23.5	19.3	27.8	22.0	17.6	21.5	27.1	18.0	24.8	26.0	24.8	21.9	22.6	23.7	21.7	31.4	
CONSERVATIVE	31.4	35	27.4	30.7	33.6	27.0	34.4	24.3	33.7	32.4	24.5	35.7	32.6	28.4	35.5	30.4	27.3	42.0	30.4	
ULTRA-CONSERVATIVE	1.6	.7	1.6	1.1	1.1	3.0	1.1	.5	.8	2.4	.9	.9	3.2	1.0	1.9	2.1	.7	3.4	1.2	
NOT SURE	25.3	24.6	24.8	22.0	28.8	24.1	26.3	41.2	28.8	15.5	39.9	18.8	18.9	21.5	21.6	33.9	24.8	20.0	18.5	

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When asked to name the preferred Democratic Presidential candidate for 1984, Mondale and Glenn showed up significantly stronger than any one else.

PREFERRED DEMOCRATIC CANDIDATE FOR 1984

	<u>Total</u> %	<u>Registered Democrats</u> %	<u>Registered Republicans</u> %	<u>Independents</u> %
Walter Mondale	29.5	34.3	26.1	25.0
John Glenn	29.3	27.8	32.8	32.1
Alan Cranston	3.9	5.0	3.4	2.4
Gary Hart	3.6	4.5	1.7	5.4
Other	2.7	3.6	1.7	3.0
None	8.9	5.2	13.6	9.5
Refused/Not sure	22.1	19.6	20.7	22.6

Q.4 - WHO WOULD YOU LIKE TO SEE AS THE DEMOCRATIC PRESIDENTIAL CANDIDATE IN 1984:
WALTER MONDALE, ALAN CRANSTON, GARY HART OR JOHN GLENN?

	RACE			REGION				EDUCATION			INCOME			AGE			POLITICAL PARTY REGISTRATION		
	BLACK /HIS- PANIC	WHITE		NORTH- EAST	MID- WEST	SOUTH	WEST	8TH OR SOME M.S.	HIGH SCH- DOL GRAD	SOME COL- LEGE OR MORE	\$14, 999 OR LESS	\$15, 000- \$34, 999	\$35, 000 OR OVER	34 OR LESS	35- 54	55 OR OVER	DEMO- CRAT	REPU- LICAN	INDE- PEN- DENT
TOTAL	1005	142	835	264	285	270	186	182	368	451	228	431	285	400	315	283	443	295	168
	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
WALTER MONDALE	298	59	230	82	99	70	47	56	107	135	62	134	79	139	82	76	152	77	42
	29.5	41.7	27.5	30.9	34.7	25.9	25.2	30.8	29.0	29.9	27.2	31.1	27.7	34.6	26.0	26.9	34.3	26.1	25.0
ALAN CRANSTON	39	5	32	5	6	7	21	8	10	21	9	14	13	17	10	12	22	10	4
	3.9	3.5	3.8	1.9	2.1	2.6	11.3	4.4	2.7	4.7	3.9	3.2	4.6	4.3	3.2	4.2	5.0	3.4	2.4
GARY HART	36	9	26	6	11	7	12	3	13	20	11	12	12	14	16	6	20	5	9
	3.6	6.3	3.1	2.3	3.9	2.6	6.5	1.6	3.5	4.4	4.8	2.8	4.2	3.5	5.1	2.1	4.5	1.7	5.4
JOHN GLENN	294	34	259	77	82	95	40	54	104	136	65	139	81	113	95	85	123	97	54
	29.3	23.9	31.1	29.2	28.8	35.2	21.5	29.7	28.3	30.2	28.6	32.3	28.5	28.3	30.1	30.0	27.8	32.8	32.1
NONE	89	7	76	21	24	23	21	8	33	47	14	33	38	25	38	26	23	40	16
	8.9	4.9	9.1	8.0	8.4	8.5	11.3	4.4	9.0	10.4	6.1	7.7	13.3	6.3	12.1	9.2	5.2	13.6	9.5
OTHER	27	5	22	11	6	7	3	6	12	9	11	10	6	7	9	11	16	5	5
	2.7	3.5	2.6	4.2	2.1	2.6	1.6	3.3	3.3	2.0	4.8	2.3	2.1	1.6	2.9	3.9	3.6	1.7	3.0
REFUSED/NOT SURE	222	23	190	62	57	61	42	47	89	83	56	89	56	85	65	67	87	61	38
	22.1	16.2	22.8	23.5	20.0	22.6	22.6	25.8	24.2	18.4	24.6	20.6	19.6	21.2	20.6	23.7	19.6	20.7	22.6

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OBSERVATION

Although Mondale currently leads Glenn among Democrats, Glenn's strength among Republicans and Independents would probably make him a more formidable candidate in the General Election. If Glenn is able to show some early primary strength, his broader ideological appeal would make him the stronger Democrat. The preponderance of candidates on the left will probably also aid in his building greater early support. Mondale and Cranston, for example, could split the liberal vote in the early primaries to Glenn's benefit. It is also interesting to note, that Glenn is the "Most Republican-like" of the Democrats, and may ironically be able to beat Reagan by appealing to the same groups as Reagan -- Republicans and Independents.

Although President Reagan does not receive overall majority support against potential Republican rivals, his strength within the party itself is widespread:

FAVORITE CANDIDATE FOR REPUBLICAN NOMINATION

	<u>Total</u> %	<u>Registered</u> <u>Republicans</u> %	<u>Registered</u> <u>Democrats</u> %	<u>Inde-</u> <u>pendents</u> %
Ronald Reagan	42.7	66.1	27.9	42.4
George Bush	17.8	11.9	21.4	19.6
Howard Baker	14.5	8.5	17.6	19.0
Jim Thompson	3.7	2.0	4.7	4.8
Other	0.8	0.7	1.1	-
None	6.6	2.7	9.9	6.5
Not sure	13.9	8.1	17.4	7.7

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Q.5 - WHO WOULD YOU LIKE TO SEE AS THE REPUBLICAN PRESIDENTIAL CANDIDATE IN 1984: RONALD REAGAN, GEORGE BUSH, HOWARD BAKER, OR JIM THOMPSON?

	RACE			REGION				EDUCATION			INCOME				AGE			POLITICAL PARTY REGISTRATION		
	BLACK /HIS- PANIC	WHITE		NORTH- EAST	MID- WEST	SOUTH	WEST	BTH GRADE OR SDME H.S.	HIGH SCH- COL- OR DOL GRAD	SOME LEGE OR MORE	\$14, 999 LESS	\$15, 000- \$34, 999	\$35, 000 OR OVER	34 OR LESS	35- AND 54	55 AND OVER	DEMO- CRAT	REPUB- LICAN	INDE- PEN- DENT	
																				TOTAL
TOTAL	1005	142	835	264	285	270	186	182	368	451	228	431	285	400	315	283	443	295	168	
	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	
RONALD REAGAN	429	28	388	100	134	105	90	67	151	210	84	178	145	165	141	121	123	195	71	
	42.7	19.7	46.4	37.8	46.9	38.9	48.4	36.9	41.0	46.5	37.0	41.3	50.8	41.1	44.7	42.8	27.9	66.1	42.4	
GEORGE BUSH	179	40	132	54	50	45	30	32	74	73	41	78	51	87	53	39	95	35	33	
	17.8	28.2	15.8	20.5	17.5	16.7	16.1	17.6	20.1	16.2	18.0	18.1	17.9	21.8	16.8	13.8	21.4	11.9	19.6	
HOWARD BAKER	146	25	119	48	41	35	22	28	46	72	32	68	34	63	38	44	78	25	32	
	14.5	17.6	14.3	18.2	14.4	13.0	11.8	15.4	12.5	16.0	14.0	5.8	11.9	15.8	12.1	15.5	17.6	8.5	19.0	
JIM THOMPSON	37	10	27	9	7	16	5	13	12	12	14	16	3	18	12	7	21	6	8	
	3.7	7.0	3.2	3.4	2.5	5.9	2.7	7.1	3.3	2.7	6.1	3.7	1.1	4.5	3.8	2.5	4.7	2.0	4.8	
NONE	66	15	49	15	19	22	10	7	22	37	14	29	19	20	23	21	44	8	11	
	6.6	10.6	5.9	5.7	6.7	8.1	5.4	3.8	6.0	8.2	6.1	6.7	6.7	5.0	7.3	7.4	9.9	2.7	6.5	
OTHER	8	1	6	2	3	3	-	-	6	2	3	3	2	3	3	2	5	2	-	
	.8	.7	.7	.8	1.1	1.1	-	-	1.6	.4	1.3	.7	.7	.8	1.0	.7	1.1	.7	-	
NOT SURE	140	23	114	36	31	44	29	35	57	45	40	59	31	44	45	49	77	24	13	
	13.9	16.2	13.7	13.6	10.9	16.3	15.6	19.2	15.5	10.0	17.5	13.7	10.9	11.0	14.3	17.3	17.4	8.1	7.7	

OBSERVATION

Should President Reagan definitely decide to run for re-election, as now appears certain, he will have a unified Republican party behind him. This will also allow him to amass and retain a substantial financial "war chest" early for the General Election.

His re-election is, however, not guaranteed. When asked about the likelihood of voting for the Democratic or Republican candidate, the response was very close.

	Total %
Democrat	41.7
Republican	37.6
Neither	1.9
Not sure	18.8

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Only in the West is there more Republican support. Unemployment in the Midwest has given the Democratic candidate its biggest margin (45.6% to 37.9%). The overwhelming Democratic support among minorities (68.3% to 18.3%) counterbalances the slight Republican edge among White respondents (41.1% to 37.6%). The Republican does better among college-educated and higher income respondents.

Q.6 - IN 1984, DO YOU THINK YOU WILL MOST LIKELY VOTE FOR THE DEMOCRATIC OR REPUBLICAN CANDIDATE FOR PRESIDENT?

	RACE			REGION				EDUCATION			INCOME			AGE			POLITICAL PARTY REGISTRATION		
	BLACK /HIS- PANIC	WHITE		NORTH- EAST	MID- WEST	SOUTH WEST		BTH	HIGH	SOME	\$14.	\$15.	\$35.	34	55	DEMO- CRAT	REPU- LICAN	INDE- PEN- DENT	
								GRADE	SCH- OOL	COL- LEGE	999	000-	000	OR	OR				OR
TOTAL	1005	142	835	264	285	270	186	182	368	451	228	431	285	400	315	283	443	295	168
	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
DEMOCRAT	419	97	314	110	120	111	68	79	156	184	98	197	102	187	130	99	312	28	51
	41.7	68.3	37.6	41.6	45.6	41.0	36.6	43.4	42.4	40.8	43.1	45.6	35.8	46.7	41.3	35.0	70.5	9.5	30.4
REPUBLICAN	378	26	343	98	108	92	80	54	130	193	71	155	133	153	119	104	64	220	67
	37.6	18.3	41.1	37.1	37.9	34.1	43.0	29.7	35.3	42.8	31.1	36.0	46.7	38.3	37.8	36.7	14.4	74.5	39.8
NEITHER	19	2	16	7	4	5	3	2	6	11	6	8	4	9	7	3	3	4	6
	1.9	1.4	1.9	2.7	1.4	1.9	1.6	1.1	1.6	2.4	2.6	1.9	1.4	2.3	2.2	1.1	.7	1.4	3.6
NOT SURE	189	17	162	49	43	62	35	47	76	63	53	71	46	51	59	77	64	43	44
	18.8	12.0	19.4	18.6	15.1	23.0	18.8	25.8	20.7	14.0	23.2	16.5	16.1	12.7	18.7	27.2	14.4	14.6	26.2

OBSERVATION

Although there is presently a slight Republican preference among Independents (39.8% Republican to 30.4% Democratic), it is this group that the Democratic candidate must appeal to in order to have a chance of success in November of 1984. Once again, it is Senator Glenn who has shown this appeal so far, making him currently the strongest potential Democratic rival. Even Senator Glenn, however, would find it tough-going against the President. Although there are now more who say they will vote for the Democrat than the Republican presidential candidate, with Reagan assumed to be the Republican nominee, the only real variable is the Democrat. As potential Democratic candidates fall by the wayside, some of their supporters will either turn to the President or stay away from the polls altogether. In either case, President Reagan's chances for re-election become enhanced.

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It is possible that the strongest ticket the Democrats could present would be a Glenn-Mario Cuomo combination. Such a ticket would be geographically and ideologically balanced, have the widespread support of the Democratic rank and file and have great appeal to some Republicans and Independents. But before this can occur, Glenn will have to demonstrate that he can speak out on the stump, and has real issue priorities. Cuomo's campaign prowess is less suspect although he may have to demonstrate that he can stand for something other than merely being "anti-Reagan."

The strength of a possible Glenn-Cuomo ticket will be tested in the polls in the next few months.

* * * * *

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