

THE WHITE HOUSE
WASHINGTON

file

January 17, 1995

MEMORANDUM FOR LEGAL REFORM WORKING GROUP

FROM: JOEL KLEIN *JK*
SUBJECT: Options Memorandum

I have asked Peter Yu and Jeff Connaughton to prepare an options memorandum for the President based on the memos that have been circulated. You previously received a copy of Peter's draft statement of principles. You might also benefit from Jeff's thinking on this subject, which is attached. We will circulate a draft of the options memorandum later this week.

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MEMORANDUM FOR LEGAL REFORM WORKING GROUP

FROM: JEFF CONNAUGHTON

SUBJECT: Confronting Political Choices

1. *The Republicans have defined legal reform as anti-lawyer, pro-competitiveness, and pro-innovation.*

The business community has capitalized on the public's animosity toward lawyers to develop political momentum behind reform proposals that would shield defendants from liability. Putting aside the usual Republican devotion to federalism principles, proponents have focused on Washington-led reforms to nationalize the fight against trial lawyers and to trump the results of similar reform battles in the fifty state capitals.

Last year's Senate vote count (cloture failed by two votes), the changes in Congress after the election, and legal reform's inclusion in the Contract with America all strongly indicate that a products liability and a securities litigation reform bill will pass the Congress this year. Because reform efforts have a long history (at least in the products liability area), the general outlines of the bills likely to pass are discernible at this stage. It's fair to say that, unless the President strongly opposes the Contract's approach to legal reform during the coming months, the bills he should expect to reach his desk will be pro-defendant and designed to restrict plaintiffs' rights.

2. *Peter Yu has drafted a statement of principles which raises federalism concerns and supports balanced reform.*

Peter's statement: (1) proposes reforms of the federal rules and procedures to curb frivolous suits and to promote alternative dispute resolution and expedited settlement (not currently before Congress), (2) supports preemptive federal standards for punitive damages (an element of Contract legislation), and (3) opposes the English Rule, the evisceration of private securities suits, caps on punitive damages, and discriminatory treatment of noneconomic damages (other elements of Contract legislation).

By design, Peter's statement indicates the President would support reasonable and "balanced" reform: the statement proposes provisions consumers like and opposes others too harmful of plaintiffs' interests; it acknowledges problems with frivolous suits and punitive damage awards; yet, Peter attempts to preserve the President's flexibility to either sign or veto the legislation Congress ultimately passes.

3. *Failure to confront the difficult political choices presented by legal reform only delays the political pain and squanders the opportunity to control the political debate.*

Before reaching consensus on a statement of principles, I believe we should decide upon a political strategy responsive to the considerable momentum behind Republican-led reforms. As long as legal reform remains driven by peoples' animosity toward lawyers, the President cannot win. If he signs legislation, consumer groups will accuse him of selling out to the business community. If he vetoes it, the Republicans and business community will say he has been captured by the trial lawyers. A statement of principles (even one as thoughtful and balanced as Peter's) without a stronger political strategy will have little impact on the national debate or the legislative process.

How does the President ultimately benefit, then, if we issue a statement of position some may initially perceive as reasonable and balanced? Unless we reframe the debate and create a winning scenario for the President, some version of the Republican-backed bills will pass the Congress, and we will not have prepared an effective rationale for the President's ultimate action (whether he signs or vetoes the bills).

4. *The White House should reframe Republican legal reform as favoring corporate defendants over consumers and small investors.*

Aggressively opposing the Contract's legal reforms creates a winning scenario that fits the President's "Middle Class" strategy. Poll figures indicate that although a majority of Americans support legal reform, the level of support makes it the weakest element of the Contract. By opposing the Contract-generated bills, the President can stand with small investors, consumers, and victims of corporate negligence (the vaunted "middle class") against insurance companies, large corporations, and accounting firms. If the President intends to pick fights on principle, he should rally to this one: The Contract's proposed legal reforms target relief to corporate defendants, not to the middle class. People may dislike lawyers, but they will resent to a greater degree legislation they believe will unfairly favor corporate defendants.

The Justice Department, the Securities and Exchange Commission, and the Rand Corporation's Institute for Civil Justice each have concluded the empirical data do not support proponents' claims of a litigation "explosion." The legal system does cost too much and take too long. But solutions that simply truncate plaintiffs' rights in meritorious suits do not address systemic problems: frivolous suits, excessive use of discovery as a strategic tool or tactic, motions practice that causes delay, the need for alternative dispute resolution methods and equitable settlement-inducement mechanisms, the need for active judicial case management, and access to justice for the middle class (which has been virtually priced out of our legal system, but for contingency fee arrangements in big-dollar cases).

Accordingly, I propose the attached version of a statement of principles (or perhaps it could serve as the political addendum to Peter's more scholarly rendition). Its purpose would be to defeat the bills before Congress or to develop a convincing veto rationale (should the President need it) based on principles the President comfortably can defend. At the same time, it proposes reforms consistent with those principles. I propose we use this statement of principles to develop an effective and sustained communications strategy that vigorously opposes the Contract's approach to legal reform.

5. *A Statement of Principles based on federalism concerns and the need for balanced reform would be insufficient to affect compromise.*

Even if we hope to support a compromise, a statement based on federalism concerns (except for preemptive federal standards for punitive damages) and the need for balanced reform, probably would not accomplish one. In the products liability area, the opposing sides have been engaged in mortal combat for a decade over an approach consumers deem fundamentally unsound. Fattened by the current political mood, the PLCC expects the President would dare not veto a bill that passes both houses of Congress. The PLCC is devising their recommended changes to last year's bill on the basis of Senate vote counts, not White House input.

As drafted, Peter's statement reflects a modulated pro-consumer position. By opposing some of the key components of legislation expected to pass, it would raise expectations of a veto among hopeful consumer groups and trial lawyers. The flexibility it seeks to preserve for the President is illusory: the draft statement alone would not change the current political dynamic (driven by attitudes about lawyers). We must reframe the bills as inimical to the interests of the middle class before a veto would be politically defensible and the threat of a veto effective.

In short, the WH cannot be an agent for compromise unless we employ effective and sustained political rhetoric against the substance of the Contract/PLCC approach and in favor of alternatives.

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In closing, I believe reform proponents' tactics require that we enter this debate on a political plane that speaks to a presidential election audience. The country's dislike of lawyers and litigiousness calls for a proactive and coherent explanation of the President's views on legal reform.

A DRAFT PROPOSAL
STATEMENT OF PRINCIPLES

- * **The Contract with America's Common Sense Legal Reforms target relief to corporate defendants, not to the middle class.**

How would the middle class benefit from:

- Making a losing plaintiff pay General Motors' legal fees?
- Capping the award of punitive damages against corporations that knowingly fail to correct design flaws leading to consumer death or injury?
- Enacting rules that discriminate against victims suffering loss of reproductive ability and other noneconomic damages?

- * **The Contract with America's Common Sense Legal Reforms would shield fraudulent market manipulators like Charles Keating and Ivan Boesky from suits by small investors.**

How would the middle class benefit from:

- Preventing certain types of securities fraud suits unless the plaintiff holds a minimum \$10,000 investment in one stock?
- Making losing plaintiffs pay defendants' attorney fees, effectively ending class-action lawsuits by small investors?
- Forcing investors to prove that a defendant had actual knowledge of a fraud as opposed to proving the defendant acted with reckless disregard for the truth -- thus licensing reckless behavior by officers, directors, brokers and other fiduciaries?

- * **The Administration supports legal reforms that reduce costs and delays in the federal civil justice system for plaintiffs and defendants.**

The middle class would benefit from:

- Limits on the fees attorneys can charge plaintiffs when suits settle early in the litigation process.
- Alternatives to trial such as court-annexed arbitration and mediation which allow the middle class to seek resolution of disputes at lower cost.
- Procedural reforms that encourage defendants to make reasonable settlement offers in meritorious cases and plaintiffs to accept them.

DRAFT PROPOSAL

- Enhanced judicial case management techniques to reduce costs and delay.
- Discovery and motions practice reforms that prevent defense lawyers from causing undue delay and plaintiffs' lawyers from conducting unwarranted fishing expeditions.
- A legal presumption against secrecy provisions that prevent the release of information relevant to public health or safety (and cause subsequent plaintiffs to rediscover the identical information, at the price of considerable expense and delay).

Business defendants would benefit from reforms directed at frivolous suits, not meritorious ones:

- Mandated sanctions for frivolous filings.
- Higher pleading standards on product liability actions.
- Changes to the way class actions are brought, pleaded, and managed in order to reduce the "race to the courthouse" by plaintiffs' lawyers who, intent on controlling the lawsuit and reaping large fees, have no inkling of the suit's merits.

- * **The Contract with America's Common Sense Legal Reforms would preempt state laws in a one-sided fashion: only where helpful to defendants, but not to consumers.**

How would the middle class benefit from:

- A preemptive federal law more restrictive of plaintiffs' rights than current law in many states?
- A preemptive federal law that caps punitive damages available under the laws of many states, without granting consumers uniform rights in all states?
- A preemptive federal law that disrupts state law balances of consumer and business interests developed by state legislatures and state judges?
- A federal products liability statute that Washington lobbyists in future years would attempt to amend with additional provisions favoring corporate defendants?

DRAFT PROPOSAL

- * **The Contract with America's Common Sense Legal Reforms Expose Republican Hypocrisy About Federalism and Free-Market Approaches.**
 - When the direction of most governmental reforms emphasizes the role of the states and moves away from Washington control, why should the federal government regulate product liability suits brought under state law?
 - Litigation reflects a free-market approach to enforcing public safety and health concerns; why don't the Contract reforms respect the individual's freedom to sue if her legal rights have been violated?
- * **The Model of Consensus Legal Reform Should be the Civil Justice Reform Act of 1990.**
 - The CJRA focuses on systemic reform to reduce litigation costs and delay in the federal civil justice system.
 - A broad coalition of Democrats and Republicans developed the CJRA and corporations and consumers, defense and plaintiffs' attorneys supported its enactment.
 - The CJRA mandated the courts to study the effectiveness of designated procedural reforms in ten pilot districts, so Congress could enact empirically verified, uniform solutions.
 - The Administration supports building on the CJRA by implementing reforms in the areas of judicial case management, discovery, and enhanced use of alternative dispute resolution on the basis of the pilot programs Congress and the federal courts established in the CJRA.