

VITAL SPEECHES

— OF THE DAY —

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We Will Succeed

PRESIDENT REMEMBERS 9/11 HEROES AT MEDAL OF VALOR CEREMONY

George W. Bush

President of the United States — Page 706

Hurricane Relief

PRESIDENT DISCUSSES HURICANE RELIEF

George W. Bush

President of the United States — Page 614

Human Rights

HAS ENOUGH BEEN DONE

Louise Arbour

High Commissioner for Human Rights, United Nations — Page 711

Tort Reform

COMMON SENSE AND COMMON LAW

Steven B. Hantler

Chairman, American Justice Partnership — Page 714

Economic Out

PURSuing A MONETARY POLICY THAT PERSERVE PRICE STABILITY FOR THE LONG TERM

Anthony M. Santomero

President, Federal Reserve Bank of Philadelphia — Page 718

Partnerships in Counterterrorism

WE MUST WORK TO LIVE UP TO OUR ALLIES AS WELL AS OUR ENEMIES

Christopher C. Harmon

Kim T. Adamson, Chair of Insurgency & Terrorism
Marine Corp University — Page 721

New Orleans

THE FIRST NEW AMERICAN CITY OF THE 21ST CENTURY

Laurence Geller

Founder, President and CEO, Strategic Hotel Capital, Inc. — Page 725

Leadership

GEORGE WASHINGTON AS AN EXAMPLE OF LEADERSHIP

James Hodges

PhD, National Speakers Association — Page 727

Law Enforcement and the Fight Against Methamphetamine

IMPROVING FEDERAL, STATE AND LOCAL EFFORTS

Gary Oetjen

DEA, Assistant Special Agent in Charge — Page 732

IMPARTIAL



CONSTRUCTIVE



AUTHENTIC

THE BEST THOUGHT OF THE BEST MINDS ON CURRENT NATIONAL QUESTIONS

and more productive. Discussions at the sub-regional level, bringing together governments, national institutions and civil society, might allow more opportunity for experiences to be shared, problems analysed and solutions identified. It is this information that needs to be gathered and reflected on if an effective regional framework, designed for the region as a whole is to come into being.

Furthermore, it is important that governments take ownership of this process. It is governments, of course, who bear the primary responsibility to ensure that individual rights are protected. My Office can assist, but only modestly. I believe that this ownership can more easily be achieved in the short-term at the sub-regional level.

The Office of the High Commissioner for Human Rights is of course fully committed to working with you to facilitate discussions on sub-regional human rights arrangements in the Asia-Pacific region and towards the establishment of a pan-regional framework.

Our presence in the region as a whole is growing. We have experience through our many technical cooperation projects in Asia and the Pacific, together with 10 field presences, including sub-regional presences in Bangkok, Fiji and Beirut.

We are also embarking on an ambitious, and much needed, reform initiative, called for by the Secretary-General in his recent report "In larger freedom". This initiative is outlined in a document called "The OHCHR Plan of Action" which you have before you and to which I draw your attention.

In essence, this Plan articulates a means by which the Office of the High Commissioner can do more, better, to help states realise the rights of their people. It explicitly urges all countries to move from an era of declaration, concerning their human rights commitments, to one of implementation.

In this regard, the Plan of Action outlines a course for the Office of the High Commissioner that is premised on the self-evident observation that it is states and local partners, whether national institutions, courts, civil society and the like, which are best placed to effect real change to the capacity of people to realise their rights.

It is premised on a course for the Office of the High Commissioner which includes more effective engagement with its Member States – built on a keen understanding of the local challenges being faced in the implementation of rights, and which is sustained.

And it is premised on building closer, richer partnerships with all of you, with civil society, with human rights defenders, with the United Nations system, particularly through the United Nations country teams, on the ground.

In this context, the Plan of Action also builds on the growing recognition of the centrality of human rights within the United Nations system. Strengthening the capacity of United Nations country teams to support the efforts of Member States, at their request, to enhance their national human rights promotion and protection systems is central to our common endeavours. In many ways this is a concrete articulation of our belief that human rights are not only priorities for my Office, or your governments, but for the United Nations system as a whole. I wish to urge my colleagues in the United Nations country teams to strengthen their support for the implementation of activities under the Tehran Framework, at the request of Member States.

Our country teams have a crucial role to play in creating strong national human rights protection systems and my Office stands ready to assist with relevant human rights advice, training and the sharing of methodological tools.

Excellencies, Ladies and Gentlemen,

I hope that you will agree that while further reflection is needed, change is necessary. During the next four days, I trust that you will use this opportunity to discuss thoroughly the proposals put forward by both Professor Muntarbhorn and myself. I urge you to consider these proposals carefully and candidly.

I hope that this thirteenth workshop will take the next step and adopt conclusions that will reflect a willingness and boldness to adapt and move forward effectively, intelligently and collegially as we all strive to make tangible improvements for people throughout Asia and the Pacific.

I wish you very fruitful discussions and I look forward to the result of your deliberations. Thank you.

Tort Reform

COMMON SENSE AND COMMON LAW

Address by STEVEN B. HANTLER, *Chairman, American Justice Partnership*

Delivered to the West Virginia Chamber Of Commerce, Charleston, West Virginia, September 2, 2005

Thank you for inviting me to West Virginia. Here, as in so many other states, economic development authorities are looking for ways to entice companies to

bring jobs to communities in sore need of more employment opportunities.

And, from the corporate end, there is a reciprocal pro-

cess of ranking states by their business climates. Business people ask: Does the regulatory regime in a particular state give companies a fair shake? Are its tax policies reasonable? Are its employment policies well structured?

As a result of these rankings, states now compete to enact regulatory and tax policies that provide a good business climate.

Until now, however, a key ranking has been left out—the quality of a state’s civil justice system. When companies look to build a plant, or locate a headquarters or major sales office in a state, they now want to know if that state’s judges and laws are fair to defendants. They especially want to be alerted if states have counties that could be characterized by the American Tort Reform Association’s memorable description as “Judicial Hellholes.”

This new comparative focus smokes out the states that massively discriminate against defendants, and shines a spotlight on those willing to embrace reform. As a result of this pressure, we have recently seen common sense legal reforms take root in Texas, Georgia, Mississippi, South Carolina and elsewhere.

As Chairman of the American Justice Partnership, a coalition of state and national organizations, I am now working with local leaders like the West Virginia Chamber of Commerce to bring common sense legal reforms to this state. Our organization enjoys the leadership of former Michigan Gov. John Engler, now head of the National Association of Manufacturers, and Dan Pero, President of the Partnership.

We’re a young organization, but we already have a formidable track record across the country, based on a unique approach. Our mission is to support local leaders who advocate reform in their states, and to coordinate national and state groups and funding sources. We also provide the tools for states to compete for business on the basis of the quality of their civil justice systems.

When you compare states on this basis, West Virginia is still way down the list. Now, I know what some of you are thinking—this is just what we need, some guy from out of state telling us what is wrong with our tort system and railing against plaintiff’s lawyers. I’m not here to do either. You already know how bad your tort system is and why. And it does as much good complaining about plaintiff’s lawyers as it does complaining about the weather, or the Hokies and the Panthers. I’ve been studying these guys for years to see what makes them so successful. To see why they have been eating our lunch in courtrooms all across the country and especially in the Mountain State.

Plaintiff’s lawyers are some of the most politically astute and public relations savvy entrepreneurs in the coun-

try. To paraphrase James Carville—“It’s the Politics, Stupid.” Don’t get me wrong, tort reform legislation is important and you need to build upon the solid progress under Governor Joe Manchin’s leadership. But you cannot forget the underlying politics. The plaintiff’s lawyers don’t.

We have to remember that the best piece of tort reform legislation is only as good as the next state Supreme Court that strikes it down. For the past 20 years, the plaintiff’s lawyers have been investing their money—which used to be “our money”—in electing activist trial and appellate court judges. Activist judges are those who do not feel constrained by the law and, as a result, legislate from the bench. And, their “judicial legislation” is what causes “Judicial Hellholes.”

A chief executive officer of one of America’s largest companies offered his perspective on Judicial Hellholes. In these jurisdictions, this CEO says: “the judiciary is elected with verdict money.” And, “so . . . it’s almost impossible to get a fair trial if you’re a defendant in some of these places.” And, this CEO goes on to say: “Any lawyer fresh out of law school can walk in there and win the case, so it doesn’t matter what the evidence or the law is.”

I know what you’re thinking—this is some bitter CEO whose company was socked with a billion-dollar judgment in one of these “Hellholes.” That is not the case. This quote is from Dickie Scruggs, one of the most successful plaintiff’s lawyers in the country. You know things must be really bad when even the trial bar says things like this.

Why do I refer to Mr. Scruggs as a CEO? The Manhattan Institute took to calling the plaintiff’s bar Trial Lawyers Incorporated, appropriate when you consider that this group raked in \$46 billion in contingency fees in 2003. This is more than the revenue of such companies as Pfizer, Microsoft and Intel and double the revenues of Coca-Cola and Cisco Systems. And if there is a Trial Lawyers Incorporated, then Dickie Scruggs—widely recognized as the king of torts—is its CEO.

What Dickie Scruggs says about Judicial Hellholes is true. In fact, many of you may know that the American Tort Reform Association has designated the entire state of West Virginia as a Judicial Hellhole—you’ve got the only statewide designation in the country!

By no means is the criticism only from out-of-staters. A Charleston Daily Mail editorial says that West Virginia “has been a running gravy train for tort lawyers.” Another Daily Mail editorial reminds us, “Justice is not measured in how much money a lawyer makes or what kind of car a lawyer drives. It is measured on scales that must be balanced.”

Some needed balancing has already taken place in West

Virginia. One was the voters' recent rejection of the reelection bid of a notoriously biased state Supreme Court justice. And another was the election of a new governor. Balance, it turns out, is a watchword of Governor Manchin. In his State of the State address, the governor set out a pro-jobs agenda while promising "balanced" civil justice reforms. And thanks to his leadership and that of the legislature, we saw solid progress in 2005.

However, no governor and no legislature can quickly undo all the damage that has been done to this state.

Plaintiff's lawyers often accuse reformers of obsessing over what they dismiss as judicial anecdotes. The fact of the matter is that some judgments can be so shocking that their impact on corporate site selection and investment in new jobs can last for years. I cannot begin to tell you the national impact of an April 2004 case before the West Virginia Supreme Court.

You know the case I am talking about. When a company fired its safety director for on-the-job cocaine use, the state Supreme Court ruled that the company had to continue to keep him on the payroll. The employer's contract said he could only be let go for "dishonesty." Even though he lied about his drug use, the state's top court ruled that there was no contractual violation.

Chief Justice Elliott Maynard wrote a stinging dissent. Let me read just part of it: "This court says that [the company] was wrong to fire a deceitful, coke-head safety director in a plant where tanks of acetylene, and other explosives are everywhere!

"The irony is that if there had been some explosion or other accident which killed or seriously injured another employee, the victim of that accident could have successfully sued under our workers' compensation deliberate intent statute and obtained a large verdict.

"The Court would doubtless have upheld the large verdict based on the fact that the company allowed a cocaine user to be its safety director." End quote.

Other cases have received wide notoriety. The state's top court abandoned the common sense and common law idea that plaintiffs should suffer an injury in order to, well, be plaintiffs. Despite recent reforms, a plaintiff in perfect health can still receive awards for "medical monitoring" because he or she may become ill in the future. With awards made in lump sums, it is said that many plaintiffs are buying trucks or boats instead of saving for some anticipated medical cost.

Car companies have also been stung by cases. A suit over a \$15,000 car can result in fees for trial lawyers in excess of \$370,000. Hearing loss cases against equipment manufacturers move forward despite the fact that some of the plaintiffs are elderly—when hearing loss natu-

rally occurs—and the legal responsibility for protecting their hearing rested with their employer under OSHA rules. And, if you're a small business owner, all of this hurts you even more since it's much harder for a small business to absorb litigation costs than a large company.

Yet trial lawyers are able to sell suits like these to juries and to the public because of their second area of expertise—public relations.

The plaintiff's lawyers and their surrogates, like Ralph Nader, have demonized business and profits. Our country, Ralph Nader tells us, is undergoing a "corporate crime wave" that "has looted and drained trillions of dollars from millions of workers, their pensions, and from small investors." He also says we need to "prosecute and convict the corporate executive crooks and to democratize corporate governance."

Nader makes American capitalism sound like Chicago before Elliott Ness. Most corporations—like most individuals in business—are not WorldComs or Enrons. They don't need a punitive sword of Damocles to make them do right.

The Naderite critique declares open season on successful companies because Naderites are by nature economic pessimists. If someone is rich, then they must have made someone else poor. Economic pessimists have trouble seeing that wealth creation can be a win-win, making almost everyone better off.

These views are not just inaccurate; they advance a very dangerous cynicism. This breeds unnecessary regulations and class-action lawsuits that destroy innovation. We have to ask, in a country in which 91 million Americans are shareholders, are such attacks hurting a special interest, or are they attacks on the general interest? I'll talk more about this later.

The plaintiff's lawyers have also demonized "legal reform" by claiming that it is a bailout for evil corporations. They have created a Robin Hood image for themselves that appeals to the compassionate side of Americans who generally root for the underdog. But Robin Hood didn't fly around Sherwood Forest in \$50 million jets, or own golf courses or 120-foot yachts as our trial lawyer friends do.

Let me be clear—legal reform is simply about restoring predictability and fairness to our civil justice system without restricting access to our courts for legitimate claims. Who could oppose this other than Trial Lawyers Incorporated?

Their \$46 billion in annual legal fees are just the tip of the iceberg in what our tort system costs us Americans every year. I'm sure you've heard that the tort system in the United States costs more than \$246 billion a year. Our

tort system is bigger than the economy of Denmark and more than twice the size of the economy of New Zealand. It is far bigger than most other countries in the world; that's how bad it really is.

There's another statistic that really gets under my skin—we spend more than twice as much on the tort system than we spend on new cars. If everyone goes out today and buys a new car, it will be an investment in jobs, manufacturing and the future. Spend that money on lawsuits, however, and all you will have is a national investment in richer lawyers.

And guess who pays this \$246 billion tab? Not the “evil corporations” who have drawn the public ire of the plaintiff's bar. No, this extraordinary cost is passed on to consumers in the price of everything they buy. Right now this lawsuit tax is \$3,200 a year for a family of four, and it will rise to \$4,000 very soon—the loss of a nice down payment on a new car.

West Virginians are also hurt when their doctors quit the practice of medicine or get out of high-risk practices. West Virginians are hurt as investors as stock values and 401Ks plummet under the assault of the trial bar, with some companies losing 25% of their value after the announcement of a class-action lawsuit.

Charities and non-profits are also hurt. The Little League spends more money on liability insurance than it does on bats and balls. And people are afraid to volunteer for charitable work or serve on the boards of charities for fear of being sued.

While the tort system is hurting everyone else, the trial lawyers are getting rich. They may well be the fastest growing group of billionaires in this country replacing high-tech CEOs. So, when we get past the trial bar's public relations campaign, ordinary people like you and I have the greatest stake in fixing West Virginia's badly broken civil justice system.

You should draw inspiration from those states I mentioned earlier, the ones embracing reform. Texas Governor Rick Perry successfully led a campaign to win sweeping tort reforms. He's now running television ads all over the country telling companies that Texas is now open for business.

The same thing happened in Mississippi, allowing Governor Haley Barbour to tell CEOs that Mississippi is now a safe investment. The lawsuits that inevitably will come out of Hurricane Katrina will be adjudicated in a more common sense legal environment. In February of this year, Governor Sonny Perdue and the Georgia legislature worked together on passing sweeping reforms. Not to be outdone, one month later, Governor Mark Sanford and the South Carolina legislature passed sweeping reforms.

All over the region, states are restoring fairness and predictability to their civil justice systems—generating confidence in the courts, stimulating economic growth and job expansion, and helping improve their competitive position in the global marketplace.

State by state, we must decide which road we will take.

Down one road, we restore fairness and predictability to the civil justice system. Our prosperity grows. More jobs are created. The pressure on taxes and the cost of living is reduced. More companies want to move to West Virginia.

Down the other road, the perverse incentives built into our legal system lead to more lawsuit abuse. The litigation tax each of us now pays goes up even higher. The vitality of our business community is drained away by frivolous lawsuits.

West Virginia has strong leaders who understand the need to fix the civil justice system and who have the courage to get the job done. Governor Manchin understands the stakes and has stated his support. Steve Roberts of the State Chamber, and his team, are galvanizing the business community to get involved and support legal reform.

So what needs to be done? Legal reform requires three efforts.

First, judges who follow the law instead of making new laws from the bench. If judges want to make law, they should run for the legislature. Governor Manchin can make a difference by appointing judges who are committed to the “rule of law” instead of the “rule of lawyers.” It's also important for the business community to support candidates for judicial and other offices.

Second, legal reform requires laws that fairly balance the needs of consumers and business, and do not create perverse incentives for lawsuit abuse. This, of course, requires a state senate and a state house that support fair and balanced legal reforms.

And, third, legal reform requires that those of us who are actively involved in the effort do a better job of communicating the need for legal reform to the public, to elected officials, and to the media.

It falls to those of us in leadership roles to win public support for changes to our legal system before the abuses of the trial bar irreparably undermine its integrity.

Will we stand on the sidelines and, by default, allow lawsuit abuse to erode our communities and our prosperity? Or, will we stand together, shoulder-to-shoulder, in support of a common sense reforms and stick with it until we achieve what the people in Texas, Georgia, Mississippi, South Carolina and many other states have already accomplished?

Thank you for your hospitality and thanks for listening.