in our current process, to the benefit of both our wildlife and our citizenry. While additional corrections could be made, those who drafted this bill believe that a more comprehensive overhaul of ESA is not going to pass this Congress. I tend to agree with that assessment and I am also willing to pursue the strategy of trying to pass these reforms now as a foundation for further reforms later. That is the message I would like to send with my cosponsorship of S. 1180 today.

Having said all that, Mr. President, I cannot endorse each and every provision within this legislation. I will be supporting amendments that will change or add to the bill in a number of areas.

For instance, while I support S. 1180's stated goal of providing incentives to promote voluntary habitat conservation by private landowners, I am very concerned about what the bill as a whole will fail to do in the area of protecting private property rights.

This is no small matter. The right to own and use property goes to the very heart of our American democracy. It was so important to our founding fathers that they enshrined the protection of private property in the Constitution's Bill of Rights.

It is equally important today. Yet our federal government has increasingly ignored these rights. President Clinton rejected the Constitution's guarantee outright when he pledged to veto any ''compensation entitlement legislation'' intended to strengthen Americans' private property rights. Representatives of this administration have even suggested that the idea of *private property is an outmoded notion*.

Let me say to them, how dare they. Nowhere in the administration's hostility toward private property rights is there more evidence of that than in their threat to veto an endangered species reform that has that in it.

Let's take a look at Secretary Babbitt's ''no surprises'' policy, for example. The basic idea is that if landowners surrender control over the use of part of their property for ESA purposes, then the Federal Government will let them use the rest of it without interference. To put it another way, Secretary Babbitt proposes that you pay the Government for the right to use your own land. By comparison, the Constitution of the United States promises that if the Federal Government wants your land used a certain way, the Federal Government has to pay you for it.

Even more outrageous than Secretary Babbitt's program is the fact that many landowners think it is actually a pretty good deal. How oppressive and tyrannical have ESA regulations become, when citizens are willing, even eager, to give up their property and their constitutionally protected right to compensation just to get the Government off their back, just to get the Government to leave them alone.

I applaud the goal of S. 1180 in reducing regulatory burdens and improving the certainty and finality of Government action in protecting endangered species. It is bad policy to require the American people to sacrifice their constitutionally protected rights for any Federal program, even this one.

I would like to see S. 1180 strengthen and protect fifth amendment rights to compensation. I will vote for amendments and/or legislation that strengthens our citizens' private property rights.

The paramount natural resource issue for Americans in the West is sovereignty of our States over water that flows and exists within the boundaries of those Western States. It is easy to say that all we need to do is remain silent on this issue and it will be OK. In fact, however, preserving State water sovereignty is not so easy. The reality of how Federal water rights are created, or not created, requires that we speak to the question, I believe, in this legislation.

The appropriation doctrine is the water law of Western States and has as its central premise that the first person to claim a water right has priority on its use over those water claimants who assert claims at a later date. In the arid West, this principle lies at the very heart of our economy. It is the ability to allocate this precious resource—the resource of water—that allows us to exist in the West.

It is for this reason we westerners become particularly agitated when the Federal Government tries to disrupt this principle or to ''take'' our water. Does this legislation create a Federal reserved water right? The answer is no, it doesn't. But it should say that very clearly. And I will support an amendment that I hope can pass, which will say very clearly that, within the Endangered Species Act reauthorization, it doesn't.

With all of those considerations, though, I believe it is important that we move S. 1180. I think it is a positive step forward. As I have said, I believe it lays the right foundation for further changes in Congresses to come. It says to the American people that we are concerned about preserving species of animals, insects, of all things on this earth, if we can possibly do it. At the same time, there is a reasonable right and a reasonable responsibility enshrined within the Constitution that we preserve the right of the citizenry to exist also.

It is for this reason that this legislation should clearly state the Congress' intent. For the record, this Senator does not intend for the endangered species reauthorization legislation to create a federal reserved water right. This is why I believe S. 1180 must state clearly that no implied or express federal water right is created in this legislation. I will support and vote for such an amendment.

With these areas of concern in mind, I am also inclined to support a shorter term of reauthorization than S. 1180 provides. As I mentioned previously, it is my goal to build additional improvements on the foundation laid by this legislation. Accelerating the opportunity for Congress to re-open the issue would only advance that goal.

In closing, Mr. President, let me repeat my endorsement for the goals that Senator KEMPTHORNE and the other supporters of this bill set out to achieve in reauthorizing the Endangered Species Act. I think the bill will make improvements that are critical to ongoing EAS efforts in my state and elsewhere in the nation, and amendments in the areas I have discussed today will enhance those improvements.

I yield the floor.

Mr. HATCH addressed the Chair.

The PRESIDING OFFICER (Mr. THOMAS). The Senator from Utah is recognized.

COMPREHENSIVE ANTI-TOBACCO LEGISLATION

Mr. HATCH. Mr. President, to date, our efforts to develop comprehensive, bipartisan anti-tobacco legislation have been stymied by the lack of consensus on a number of major issues.

Over the next few weeks, I intend to devote full attention toward refocusing our efforts on a bill which can be enacted this year.

To accomplish that goal, it is important that Congress and the Administration reflect on what our objective actually has been—and should continue to be.

Last June, the 40 State Attorneys General, public health representatives, tobacco company officials, and representatives of the Castano group, announced a bold new initiative focused on eradicating the scourge of youth tobacco use.

This proposed global tobacco settlement presents Washington with a once-in-a-generation-opportunity to help families and communities raise a whole generation of youth tobacco-free.

Certainly, no one in Congress was bound to the particulars of the June agreement.

But, we would not have seen such virtually unprecedented legislative consideration of the tobacco issue in the past 11 months were it not for this settlement.

In short, our objective in 1997 was to improve the public health, and specifically the health of our youth, through a constitutional package of reforms which relies on a guaranteed stream of revenue from tobacco companies.

Our objective should be the same in 1998.

But it appears that it is not.

Unfortunately, partisan politics, fear, greed and Washington's pile-on mentality have caused us to lose sight of this objective.

Instead, we are simply trying to ''out-tobacco'' one another. If that continues, the public interest will not be served, and Big Tobacco will win.

As an optimist, I remain hopeful the Congress will succeed this year in passing strong, anti-tobacco legislation

that is comprehensive, workable, and Constitutionally-permissible.

But as a realist, I also know that the events of the last few weeks, in which this issue has become increasingly fractionalized and politicized, make our task that much more difficult.

Comprehensive tobacco legislation is now in jeopardy. Not for want of trying, to be sure, but for a lack of consensus on several crucial issues.

For us to consider comprehensive tobacco legislation, and then to fail, would be a terrible loss, a loss for our country, a loss for our political system, and a loss for the generation of our youth America's parents hope to bring up tobacco-free.

Let me be blunt. Our failure to enact comprehensive anti-tobacco legislation would also be a significant victory for the tobacco industry, an industry which has knowingly marketed harmful products for decades, deliberately targeting our youth in their quest for profits.

Let me be equally frank. Passage of just any bill will be a significant loss for the American people, who should be able to rely on their legislators to write sound, responsible legislation.

In writing a bill, we should not give in to the tobacco industry's demands. We should not give in to their less-than-veiled attempts to force both the Administration and the Congress into abandoning our objectives—addressing the problem of youth tobacco, reforming the legal system to allow for appropriate compensation to claimants, enhancing biomedical research with respect to tobacco, improving the public health, as well as helping our farmers transition away from growing tobacco.

At the outset of my remarks, I want to distinguish carefully and clearly any substantive concerns I have about the legislation that has emerged from the Commerce Committee with my respect and admiration for those who have brought the legislation to this point.

First and foremost, I commend the Chairman of the Commerce Committee, Senator MCCAIN. Anybody who knows anything about JOHN MCCAIN knows that he is a patriot and true American hero.

As I will lay out, while I do have significant concerns with many of the major details of the legislation that the Commerce Committee has put forward—and would have preferred that we could have worked more closely together—I do commend the efforts of all the members of the Commerce Committee in moving a bill forward for floor consideration.

But before I discuss the policies of tobacco control, I want to sound a cautionary note about its politics.

Pundits report that Democrats are in a ''win-win'' position on this issue.

As conventional wisdom goes, the minority can keep on moving the goal posts of this legislation, proposing more and more harsh amendments, defying Republicans to vote against their ever-changing version of the bill.

In this way, the Democrats can either foster the perception that they are tougher on Big Tobacco by making the bill more and more onerous, or they can tar and feather any recalcitrant Republicans with the charge that Republicans are in cahoots with Big Tobacco. That is pure bunk.

Listening to the President's press conference last week, I was impressed by his earnest statement that this not be an election year issue. But, as we all well know, any issue raised consistently fewer than six months before an election is an election issue. It cannot be avoided.

All rhetoric aside, the way to accomplish our goal—the reduction of youth tobacco use—is for the Congress and the White House to work together on a bill which can be enacted and implemented. We are not there yet, despite public protestations to the contrary.

A number of key differences in approach are major stumbling blocks to enactment of a bill. These barriers include:

ALLOCATING ANY REVENUES THAT ARE DERIVED FROM A BILL

The Senate budget resolution calls for all revenues to be devoted to Medicare.

While the House has not completed work on its version, there are some in the House who believe that tobacco revenues should be used for more general tax decreases.

Others suggest the tobacco revenues be used to help pay for health insurance for low-income people.

A fourth approach is embodied in the President's budget, which advances a number of new or expanded domestic spending programs that will be financed with tobacco revenues.

DETERMINING THE FINAL COST OF THE PROPOSAL

The bill approved by the Senate Commerce Committee has an initial price tag of $516 billion over the next 25 years, without any calculation of the lookback provision, which naturally could push that price tag much higher.

In contrast, the original settlement offered on June 20, 1997 was $368.5 billion.

Legitimate questions have been raised about the ability of various industry players to pay a sum as high as $500 billion to $700 billion, which is what, extrapolated out, the Commerce bill could cost in the end.

Let's face it, as much as many would like to penalize this industry, we are penalizing ourselves if we enact a new program predicated upon revenues that won't be there.

ASSESSING THE PER PACK OR PER CAN INCREASE

A related question is the price per product increase that will result from the new industry payments.

A widely-reported figure is the Treasury Department's estimate that the Commerce bill, for example, will result in a per cigarette pack increase of $1.10 five years from now.

As the Judiciary Committee's hearing last week revealed, we do not know the precise methodology the Administration used to make this price projection. Deputy Secretary Summers told the Judiciary Committee last week that he would provide us with the information that I requested, but we are still waiting.

We do know that Wall Street experts, like David Adelman of Morgan Stanley Dean Witter, Martin Feldman of Salomon Smith Barney, and Gary Black of Sanford C. Bernstein, have concluded that the Administration's projections are far too low and that the true retail price of a pack of cigarettes—measured in constant 1997 dollars—will be in the neighborhood of $5 per pack in year 5, more than a $3 increase.

Under this scenario, the price per carton will shoot up $30. This increase is almost twice as high, twice as fast, as the ''up to $1.50 per pack'' increase over 10 years called for by the President last September.

ASCERTAINING THE EFFECT ON LAW ENFORCEMENT

The Treasury Department testified before the Judiciary Committee last week that ''by closing the distribution chain for tobacco products, we will be able to ensure that these products flow through legitimate channels and effectively police any leakages that do take place.'' In fact, Deputy Secretary Summers said that with these regulatory controls, ''we do not expect a large-scale smuggling problem. . .''

Law enforcement officials at all levels with whom I have spoken are not so sanguine. These are the officers who will be on the front lines, policing against the violence, hijackings, smuggling, and other related crimes that are inherent in any opportunity for a black market.

One officer with whom I spoke termed the Treasury statement ''laughable.''

DEVELOPING A CONSENSUS ON THE AGRICULTURE PROVISIONS

One of the most unifying themes in the tobacco debate is the need to make certain that we provide an adequate program to transition American farmers out of tobacco production into other alternatives.

There are major divisions, however, on how to structure that program. There are two major approaches in the Senate, one developed by our colleague from Kentucky, Senator FORD (the ''LEAF'' Act), the other by our colleague from Indiana, Senator LUGAR.

The major difference between these two bills is that the Lugar bill terminates the tobacco price support program, while the LEAF bill does not.

The final key difference is in determining the extent of the role of the tobacco companies in any final legislation.

As many are aware, the Department of Justice has undertaken one or more investigations related to tobacco companies.

If there have been violations of the law, they should be prosecuted to their

fullest, and it behooves the Department to move forward on its investigations swiftly and conclusively.

But this specter of wrong-doing should not be allowed to cast such a shadow over the tobacco legislation that it becomes an excuse for inaction.

Some have castigated the companies for their departure from directionless congressional deliberations.

I do not believe that Congress needs the approval of the industry to pass tobacco legislation.

As everyone knows, I am no friend of the tobacco industry or their products.

But, having made these points, as a legislator with a deep appreciation of the process of building consensus in our democratic society, I do believe that Congress would be wise to consider the perspectives of the tobacco industry in fashioning legislation.

This is true for one very fundamental reason: we want a program which works, a program with which this tremendously-resourced, tremendously-creative industry will comply.

Perhaps I am just not as smart as those who believe the companies cannot contribute anything constructive to the process.

When Congress is dramatically affecting a sector of the economy, as long as that industry's products are legal, as long as they have a right to perform in our society, then that industry's views should be heard, no matter how much we don't like that industry.

That should not amount to a veto.

No outside group—not the tobacco companies, not the private attorneys, not the state attorney generals, not the public health groups, not anyone—should expect or be granted a veto over this legislation.

What all affected parties should get is a forum for their views, an opportunity to be heard. This is the very essence of democracy.

So I must ask those who pride themselves on not sitting down at the table with this industry to reexamine this position.

I echo the suggestion that Mississippi Attorney General Mike Moore made a few weeks ago, that the President reconvene all of the original participants in these negotiations. Congress should be part of such talks.

It just seems to me that beyond the purely public health issues, tobacco legislation has major social, political, and economic dimensions that argues for an inclusive process as possible.

Some 50 million Americans use these products. Public health experts almost unanimously agree that we should not make them go cold turkey overnight.

There is also the question of political philosophy of whether it is a proper role for the government to take away the freedom of adult Americans to consume tobacco products.

Moreover, as a conservative, I am generally loath to endorse any type of new taxes. I am particularly sensitive about advocating a regressive scheme whereby the lower income segments of our society which have disproportionately higher smoking rates are called upon, in essence, to fund social programs dictated by the political elites.

Tobacco revenue ought not be used to finance an explosion of new entitlements, a veritable ''honey pot'' of money to fund a mini Great Society.

I am afraid that the President's approach in the budget strays down this path by paying for child care and education initiatives with the as yet agreed upon and uncollected tobacco revenues.

To put it bluntly, the President has spent the money even before Congress has passed a bill.

Also from an economic standpoint, I am mindful that several million decent, tax-paying, Americans are dependent, directly or indirectly, on the tobacco industry for their livelihoods.

We have wisely, I think, sought to make an accommodation to the thousands of tobacco farmer families.

Do we not also have some similar responsibility to carefully consider the economic interests of those who work on the loading docks at Philip Morris or sell cigarettes at the local gas station or 7–11 Store?

Still other of our citizens are shareholders in these firms or may be dependent on pension funds with substantial holdings of tobacco securities.

I note that Yale University, home of one of the most absolutist anti-tobacconists, Dr. David Kessler, recently voted not to divest its tobacco holdings from its endowment investment portfolio. To me, this says a lot.

We in Congress and the Administration must take care not to engage in a game of political one-upsmanship in which we all trip over ourselves in the race to show the public who is the toughest on tobacco.

We may find that in the quest to punish the black-hatted tobacco industry we will have trampled over the interests and security of a lot of ordinary, hard-working Americans.

These are very hard questions to answer, but they are questions which must be resolved before Congress can write a tobacco bill.

Ten days ago, I received a bipartisan letter from four of the State Attorneys General who participated in last year's settlement negotiations.

This letter—which I believe is a serious effort to help Congress make the corrections necessary before we consider the Commerce Committee legislation—highlighted three areas of concern, three particular areas in which Congress runs the risk of undermining the settlement's objectives if it continues down the current road.

I ask unanimous consent that that letter be printed in the RECORD.

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

COLORADO DEPARTMENT OF LAW,
OFFICE OF THE ATTORNEY GENERAL,
Denver, CO, April 24, 1998

Hon. ORRIN G. HATCH,
U.S. Senate,
Russell Building, Washington, DC.

DEAR SENATOR HATCH: We are pleased to respond to your request for our legal views on pending tobacco legislation. You have specifically asked us about any constitutional concerns and the consequences. There are three key issues of concern to us: 1. the difficulty of accomplishing several provisions of the legislation without the industry's waiver of constitutional challenges; 2. the potential for creating a contraband market; and 3. potential bankruptcy of the industry.

We are glad that Congress is now seriously focusing on passing comprehensive tobacco legislation and that full Senate consideration is likely in the near future. We have appreciated the opportunity to work with you, Senator McCain, and others throughout the hearing process and committee consideration of tobacco issues. Your leadership in holding the first Congressional hearings last year addressing the legal complexities of the tobacco settlement was especially helpful. We look forward to continuing to share whatever insight and expertise we have gained from several years of engaging in legal battles with the tobacco industry.

The landmark agreement reached on June 20, 1997, was not perfect, but it includes critical themes which should provide the framework for any Congressional action. Tobacco legislation must be comprehensive. It must pass constitutional muster so the war against teen smoking moves to the streets and not the courthouse. And any financial settlement must not bankrupt the industry and produce even greater problems for the nation.

As lawyers, we believe that the industry's waiver of constitutional challenges is necessary to accomplish many of the public health goals within the bounds of the Constitution. Losing the voluntary nature of the settlement agreement may have severe legal repercussions. Therefore, the following consequences should be considered:

NO CONSENT DECREES

Consent decrees are essential to ensure long-term compliance by the industry with key elements of the comprehensive package. Consent decrees, by definition, require the consent of all parties to the litigation. If a party does not agree to the terms of a proposed decree, then the court cannot thrust a settlement upon the parties. *Theatre Time Clock Co., Inc.* v. *Motion Picture Advertising Corp.*, 323 F. Supp. 172, 173 (E.D. La. 1971). Therefore, If any party objects to a term contained within a proposed consent decree, a court cannot order its acceptance. *Flight Transportation Corp. Securities Litigation* v. *Fox and Co.*, 794 F.2d 318, 321 (8th Cir. 1986). Consequently, if the tobacco industry will not enter into the consent decrees, particularly the advertising restrictions, corporate culture, payments, and other enforcement mechanisms of the decree, the lawsuits cannot be settled with assurance. The states will lose those enforcement mechanisms that were contemplated to be included in such consent decrees.

LOOK-BACK PENALTIES

Penalties must have a direct relationship to the harm being prevented. Penalties imposed by the government must be ''rational in light of [their] purpose to punish what has occurred and to deter its repetition.'' *Pulla* v. *Amoco Oil Company*, 72 F.3d 648, 658 (8th Cir. 1995). Therefore, there must be a reasonable relationship between the penalties imposed and the harm likely to result from the defendant's conduct as well as the harm that

has actually occurred. *Id.* at 659 (quoting *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993)).

Although the courts have not articulated any precise formula for ascertaining the ''reasonableness'' of penalties, Justice Scalia observed that the touchstone is the value of the fine in relation to the particular offense. *Austin* v. *United States*, 509 U.S. 602, 627 (1993) (Scalia, J., concurring in part and concurring in the judgment). If there is no reasonable relationship, the penalties would be considered an excessive fine and would not withstand judicial scrutiny. See generally *TXO*, 509 U.S. 443; *Pulla*, 72 F.3d 648.

The June 20 agreement with the tobacco industry had a formula for the penalties imposed, which linked the actual cost of a youth who begins smoking and the profit received from that youth over the course of his life, to the amount of the penalty. This demonstrates precisely the type of rational relationship required by courts.

However, the proposed look-back penalty may not pass judicial scrutiny. At $3.5 billion, the fines are the largest imposed on any industry for any conduct. As originally proposed, the penalties could be suspended if the manufacturers made serious, good faith efforts to curb youth smoking but, unfortunately, failed to successfully change the behavior of teenagers. This approach provided a due process review, rather than imposing penalties through strict liability. Under the current Senate Commerce bill, the companies will be penalized even if they make every reasonable attempt to halt youth smoking.

A look-back penalty closely tied to tobacco company behavior, or a penalty voluntarily agreed to by the companies, is constitutionally sound and a valuable mechanism for fighting youth smoking.

ADVERTISING AND MARKETING RESTRICTIONS

The District court in *Beahm* v. *U.S. Food and Drug Administration*, 966 F.Supp. 1374 (M.D.N.C. 1997), held that the FDA's regulations relating to restrictions on tobacco advertising were beyond the authority of the FDA and, therefore, were invalid. This case is currently on appeal to the Fourth Circuit. Although that court has not yet ruled on the validity of existing FDA advertising regulations, even if it should find that those regulations are within the purview of FDA control, the advertising and marketing restrictions set forth in the June 20th agreement may not survive First Amendment review. This is in part because the restrictions envisioned by the June 20 agreement are much more expansive than the FDA restrictions currently being litigated. The total ban on outdoor advertising, black and white only ads, prohibition on Internet advertising, and prohibition on event sponsorship are but a few examples of the marketing and advertising restrictions contained in the June 20 agreement, implemented by the voluntary Master Settlement Agreement, Protocol and consent decree.

It has been recognized that the First Amendment ''directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.'' *Liquormart, Inc.* v. *Rhode Island*, 116 S.Ct. 1495, 1508 (1996). Furthermore, even communications that do no more than propose a commercial transaction are entitled to the coverage of the First Amendment. *Id.* In recognition of the seriousness of this issue, the Supreme Court has stated that ''when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process,'' strict scrutiny is applicable. *Id.* at 1506. Consequently, in order to survive judicial review, the government must demonstrate that its restriction on speech was no more extensive than necessary. *Id.* at 1509. Because of this heavy burden, ''speech prohibitions of this type rarely survive constitutional review.'' *Id.* at 1508.

Although the June 20 agreement with the tobacco companies does not propose a total ban on advertising, its expansiveness may nonetheless cause a reviewing court to apply the strict scrutiny review utilized in *Liquormart*. As that court recognized, not all commercial speech regulations are subject to a similar form of constitutional review. *Id.* at 1507. Therefore, when a state regulates commercial messages to protect consumers from deceptive, misleading, or otherwise harmful advertisements, ''less than strict review'' is appropriate. *Id.* However, because the advertisements forbidden by the June 20 restrictions would have presumably been truthful in nature and the restrictions are being implemented for purposes other than protecting the bargaining process, it seems likely that this less stringent standard of review would be inapplicable. Consequently, the government would have to demonstrate that there were no less intrusive means available to accomplish their goals. As the court in *Liquormart* recognized, application of this standard usually acts as the death knell for government restrictions. *Id.* at 1508.

In this same vein, the restrictions included in the June 20 agreement could probably not be characterized as time, place or manner of expression restrictions, which carry with them a less stringent standard of review. Specifically, such bans are content neutral. See generally *Kovacs* v. *Cooper*, 336 U.S. 77 (1949). Conversely, the bans envisioned in the agreement are obviously content driven.

In sum, the expansiveness of the proposed advertising restrictions as well as the high burden that must be met in order to justify such restrictions, raise serious concerns that without the industry's voluntary consent and participation, the advertising prohibitions envisioned in the June 20 agreement may not survive First Amendment scrutiny.

Additionally, the June 20 agreement incorporated the FDA regulations, which, if overturned by the Fourth Circuit, would also be unavailable as a regulatory mechanism. While it is true that the industry would have some incentive to limit its advertising and marketing to achieve the look back requirements, if the look back penalties are also found to be legally deficient, their value as an incentive would be eliminated.

ADVERTISING RESTRICTIONS AGAINST RETAILERS, DISTRIBUTORS, WHOLESALERS, AND ADVERTISING BUSINESSES

The June 20 agreement contemplated that the participating companies would police their retailers, wholesalers, distributors, and advertising agencies by contract and by refraining from placing ads with them. These voluntary implementation mechanisms were to be built into the Master Settlement Agreement, Protocol and consent decrees. However, any legislation that could be unconstitutional as to the industry could also be unconstitutional as to the related agents. Therefore, the same First Amendment issues that could preclude the government from instituting blanket prohibitions on advertising by tobacco manufacturers may also preclude prohibitions affecting industry agents.

DOCUMENT DISCLOSURE

The public depository of documents set forth in the June 20 agreement presumed some level of voluntary participation on the part of the tobacco industry. While documents filed in court, or otherwise made available to the public, can certainly be put in a central public depository, it is questionable that the industry can be required to release documents not otherwise available, including documents it considers privileged or confidential, as well as any future documents or research.

Obviously, almost any American business would object to the government seizing its internal corporate documents and opening them for inspection. The depository raises both private property and search and seizure concerns.

The Fifth Amendment provides in part: ''nor shall private property be taken for public use, without just compensation.'' U.S.C.A. Const. Amend. 5. It has been widely recognized that the property to which this amendment applies is that which ''is made up of mutually reinforcing understandings that are sufficiently well grounded to support a claim of entitlement.'' *Nixon* v. *U.S.*, 978 F.2d 1269, 1275 (1992) (recognizing that former President had a property interest in presidential papers). Those property interests may be created in a myriad of ways, including uniform custom and practice. *Id.* at 1276.

Accordingly, the documents that were to be deposited by the tobacco companies in a public depository constitute ''property'' for Fifth Amendment purposes. This conclusion is consistent with the district court's decision in *Nika Corp.* v. *City of Kansas City*, 582 F. Supp. 343 (W.D. Mo. 1983), wherein it was held that a corporation's documents constituted ''property'' invoking Fifth Amendment protections. See also *U.S.* v. *Dauphin Deposit Trust Co.*, 385 F.2d 129 (3rd Cir. 1967) (trust company had a property interest in various business records). In *Nika* the court held that the government could not confiscate particular business documents without providing for a method of compensation for such taking. *Id.* Although the court found that there were adequate means provided in that case, this clearly demonstrates that corporate documents constitute ''property'' for Fifth Amendment purposes, thereby invoking the necessity for compensation when the government takes such for public purposes. Consequently, there is a strong possibility the tobacco companies could not be compelled to deposit the documents specified in the June 20 agreement without just compensation.

Furthermore, if the Fifth Amendment protects the industry from being required to hand over to the government all of its documents, it seems that it would also protect them from being required to pay the costs of the depository, unless the costs are somehow built into other licensing fees.

The tobacco companies would almost certainly raise objections based on case or controversy and standing against individuals wishing to challenge a decision by the companies to withhold documents. Under Article III, §2 of the Constitution, the federal courts have jurisdiction over disputes only where there is a ''case'' or ''controversy.'' *Raines* v. *Byrd*, 117 S.Ct. 2312, 2317 (1997). One element of that test requires the complainant to establish that they have standing to sue. *Id.* This requires the complainant to demonstrate that he has suffered a personal injury fairly traceable to the defendant's allegedly unlawful conduct * * *.' *Id.* Therefore, any individual wishing to protest tobacco companies' refusal to disclose documents would have to establish that they were injured by such refusal Presumably, the only means of doing so would be to assert that the refusal negatively impacted their own personal pending litigation with a particular tobacco company. However, this would be difficult to demonstrate because a tobacco company's refusal to deposit documents in a public depository is not the equivalent of refusing to produce those documents in a particular action. Consequently, any individual

wishing to protest the tobacco companies' refusal to disclose documents might have to wait until their own suit was filed, motions for discovery were made, and a particular tobacco company refused to comply, before they would have standing on this issue. Even then, they might not be able to demonstrate that they were somehow injured by the tobacco company's refusal to place such documents in a public depository.

One of the primary benefits to individual claimants of having the industry documents placed in a public depository, aside from having ready access to the documents, is the voluntary agreement of the companies not to challenge the authenticity of the documents when they are offered as evidence in individual trials. The companies are now well-known for fighting vigorous evidentiary battles. If the industry does not enter into the voluntary agreements, one can also assume that they will challenge the introduction of these documents in individual trials, resulting in considerably more expense for the plaintiffs than was envisioned under the June 20 agreement.

CONTRABAND

As law enforcement officials of the states, we are also concerned about the danger of creating a contraband market for tobacco products. Our children will not be helped by creating a new product line for organized crime, nor by providing a new entry market for drug dealers. Additionally, the adverse health consequences of smoking cigarettes produced in unregulated foreign or clandestine domestic markets are likely to be even more significant than cigarettes produced by the existing U.S. companies.

The experience of the states with relatively high tax rates on tobacco products has been studied in some detail. Revenues lost to smuggling cigarettes into these states has been a major concern. This is estimated to be a $1 billion per year problem nationwide. In 1988 California increased its tobacco tax from 18 cents to 35 cents per pack and today the contraband market is estimated to be between 17.2 and 23% of cigarettes sold. Michigan increased its cigarette tax in 1994 from 25 cents to 35 cents a pack. Michigan lost an estimated $144.5 million per year in tax revenue. Washington State increased its tax in 1997 to 82.5 cents per pack, and lost an estimated $110 million a year to smuggling. New York State, with a 56 cent state tax estimates it is losing about $300 million of tax revenue per year due to smuggling. The typical scenario after a state makes a significant increase in its cigarette tax is a decrease in sales in that state, but a marked increase in sales in neighboring states. Smoking rates in the higher-tax state typically remain the same, so the increase in sales reflects purchases to take into the higher-tax state.

There is a definite correlation between tax rates and the level of smuggling. For many years, the differential in tax rates on tobacco products was mainly an interstate problem with contraband products being smuggled into those states with the highest tax rates. The problem has now reached international proportions. At first, popular American brands were smuggled into other countries. We are now seeing that as tobacco taxes rise nationwide, foreign manufactured cigarettes and other products are being smuggled into the United States.

BANKRUPTCY

Finally, we believe it to be in the best interests of accomplishing the broad public health goals of legislation to avoid bankruptcy of the tobacco industry.

Critics of the June 20 settlement have suggested that bankruptcy is not a great risk. This industry has a history of annual domestic profits. For example in 1996 Philip Morris and RJR (76 percent of the market) had domestic profits of $6.3 billion. While it is not possible to determine precisely the market value of the domestic tobacco companies (not the parent companies), it is possible to estimate their market value—if they were sold today. The stock of the Nabisco Food Company, which is 80.5 percent owned by RJR, trades publicly. This allows an extrapolation of the value which the market places on RJR's tobacco operations. That value is $1.184 billion. Part of that is comprised of international operations and part is domestic. Foreign tobacco companies like Imperial and Gallaher trade at price earning rations of 10 to 11. If one uses a 10.5 P/E for Reynolds' international earnings, Reynolds' domestic operations have a negative market value of $1.1196 billion. Using similar valuation methods for the other companies, Brown & Williamson is worth a negative $240 million; Lorillard is worth a positive $641 million and Philip Morris USA is positive $3.855 billion. If one were to ignore the fact that foreign tobacco companies trade at P/E's higher than the imputed value of domestic companies and assume identical valuation of domestic and foreign companies, the entire domestic industry could be worth as much as $21.484 billion. On this basis, the total market of the industry (both foreign and domestic) is estimated to be less than $50 billion. Liability to the states alone exceed several hundred billion dollars. The conclusion is obvious—this is an industry that produces significant cash but has questionable inherent value as many industry assets cannot be converted to other uses and have little value outside the tobacco environment.

State Attorneys General do not seek financial ruin of any industry. It is our job to bring about compliance with the laws and that is what we seek from the tobacco companies. This is an industry that sells a legal product, employs thousands of people, and provides a living to many more, ranging from farmers to retailers. Our goal has been to hold the industry accountable for its actions, and to provide for significant public health gains. If the current companies are liquidated, new companies can be expected to step into the breach, within or outside this country. We would have virtually no claims against these replacement tobacco companies for past industry practices. Further, foreign tobacco companies (possibly with manufacturing operations abroad) might immediately step in to satisfy US demand for cigarettes. This, of course, could hurt our farming communities and those whose employment depends on this industry.

In conclusion, we appreciate your interest and efforts to move comprehensive legislation forward. We are concerned that the fundamental goal of reducing youth smoking may be lost in the current political rhetoric. It's time for action and for comprehensive legislation to achieve this goal now, not after years of additional litigation and debate.

Sincerely,

GALE A. NORTON,
Attorney General,
State of Colorado.
BETTY D. MONTGOMERY,
Attorney General,
State of Ohio.
JAN GRAHAM,
Attorney General,
State of Utah.
CHRISTINE O. GREGOIRE,
Attorney General,
State of Washington.

Mr. HATCH. In brief, the concerns highlighted in this letter from the Attorneys General of Colorado, Ohio, Utah and Washington are:

(1) The difficulties created by enacting legislation without the industry's voluntary waiver of several constitutional prerogatives.

The Generals raise specific legal concerns about attempting to legislate in the absence of consent decrees and other voluntary agreements with the industry.

These concerns go to several major features of any comprehensive bill: advertising and marketing restrictions (including restrictions affecting retailers, distributors, and advertisers); look back penalties; and document disclosure.

We should also take to heart General Mike Moore's observation that, in the nearly three years since it was first proposed, the FDA's rule on tobacco advertising has not gone into effect.

We all know the cause: litigation.

But by settling the lawsuit, in Mississippi, there is no billboard advertising today, a result that goes far beyond the FDA rule and what the Constitution would permit us to do legislatively.

(2) The second concern of the Attorneys General is the untoward effect that the potential bankruptcy of the tobacco industry would entail. Let me be clear about my position on this.

I would like nothing more than for the tobacco industry to pay a trillion dollars. But I also want an anti-tobacco program which works. All of the bills before Congress have in common a serious effort to curtail youth tobacco use. All of the bills rely on industry payments to fund those efforts.

If we bankrupt the companies, or if we drive them offshore, ultimately no one wins, because we need the industry payments to fund the massive anti-tobacco program the American public wants. Without that funding source, the whole program goes down the drain.

If the companies become bankrupt or move offshore, it is a whole new ball game, and one which we cannot control.

It would be more intellectually honest just to ban tobacco.

On this subject, the AGs' letter said: State Attorneys General do not seek financial ruin of any industry. It is our job to bring about compliance with the laws and that is what we seek from the tobacco companies. This is an industry that sells a legal product, employs thousands of people, and provides a living to many more, ranging from farmers to retailers. Our goal has been to hold the industry accountable for its actions, and to provide for significant public health gains. If the current companies are liquidated, new companies can be expected to step into the breach, within or outside this country. We would have virtually no claims against these replacement companies for past industry practices. Further, foreign tobacco companies (possibly with manufacturing operations abroad) might immediately step in to satisfy U.S. demand for cigarettes. This, of course, could hurt our farming communities and those whose employment depends on this industry.

(3) The third major point of concern for the Attorneys General is the potential for increasing the black market for illegal contraband cigarettes.

A recent case study from Alaska is illustrative. Five months ago, Alaska increased its cigarette tax from 29 cents to one dollar. From all we know about nicotine addiction, the resulting decrease in sales cannot be explained by sudden cessation. Rather, it appears that legal sales were replaced in part by black market cigarettes. The Alaskan legislature is considering rolling back some of the tobacco taxes.

With respect to the issue of contraband the AGs' letter says:

As law enforcement officials of the states, we are also concerned about the danger of creating a contraband market for tobacco products. Our children will not be helped by creating a new product line for organized crime, nor by providing a new entry market for drug dealers. Additionally, the adverse health consequences of smoking cigarettes produced in unregulated foreign or clandestine markets are likely to be even more significant than cigarettes produced by the existing U.S. companies . . .

The letter from the AGs notes that the cigarette contraband problem is already a $1 billion nationally. For example, the AGs provide an estimate that in the state of California—which raised its state tobacco tax in 1988 from 18 cents to 35 cents a pack—that today between 17% and 23% are smuggled. That's about 1 in every 5 cigarettes.

The AG's letter goes on to say:

There is a definite correlation between tax rates and the level of smuggling. For many years, the differential in tax rates on tobacco taxes was mainly an interstate problem with contraband products being smuggled into those states with the highest tax rates. The problem has now reached international proportions. At first, popular American brands were smuggled into other countries. We are now seeing that as tobacco taxes rise nationwide, foreign manufactured cigarettes and other products are being smuggled into the United States.

I have also received letters from a number of law enforcement organizations, whose thousands of members will be expected to provide the first line of defense against these smugglers. These law enforcement officers are extremely apprehensive that passage of this legislation will precipitate the emergence of a thriving black market in cigarettes, posing huge problems for law enforcement at every level. They say the Commerce bill, in particular, will inevitably lead to the creation of a massive black market, giving organized crime a new line of business and undermining not only respect for the rule of law, but also the real goal of the legislation, preventing underage tobacco use.

I might also add that one of the most frightening outcomes of a new black market would be the likelihood that children will find it easier than ever to purchase tobacco products.

One of government's principal responsibilities is to help families and communities keep children from smoking. A large, lucrative black market could have the unintended consequences of making parents' job harder.

It is not too hard to envision unregulated cigarettes being sold on literally every street corner.

In response to this concern we have been told by the Administration not to worry because the system contemplated by the Commerce Committee bill is a closed system.

When our colleague from California, Senator FEINSTEIN, asked a series of questions about this black market she was repeatedly told about this purported closed system.

I believe that Senator FEINSTEIN shares my concern about the government's ability to design a ''closed system,'' given our experience with guarding the nation's borders and safeguarding our children in the costly and never-ending battle against illicit drugs.

I share Senator's FEINSTEIN's pointed remarks on this issue because I, too, simply do not believe that this closed system will prove so easy to implement.

It seems to me that the real question for policymakers is this. Given these facts, how can we shape a comprehensive national tobacco control strategy that can help prevent the next generation of young Americans from choosing to use tobacco and help those already addicted to stop?

In my view, most of the essential elements for answering this question can be found in the proposed global tobacco settlement announced last June 20th.

In return for funding a comprehensive anti-tobacco education and cessation program with an unprecedented payment of $368.5 billion spread over 25 years, under the agreement the industry would be granted a measure of financial certainty and predictability by settling a series of pending lawsuits.

Now, almost 11 months after that settlement was proposed, it still holds forth the best model for comprehensive legislation which can be enacted this year.

It contains the limited liability provisions which are necessary to evoke tobacco industry compliance with the program.

The President's most senior representatives have said, both publicly and privately, that they would not oppose some version of those provisions in a bill which was otherwise acceptable. It is not the breaking point some assert it to be.

The AGs' proposal also avoids some of the pitfalls inherent in legislation currently being discussed. For example, it will pass Constitutional scrutiny.

At some point, you have to stand up for some principles like the First Amendment's protection of commercial speech—a principle that, according to virtually every constitutional law expert that has testified before the Judiciary Committee, will be subject to court intervention if advertising and promotion restrictions of tobacco products are written into a federal statute.

For example, noted First Amendment practitioner Floyd Abrams has stated that attempting to codify the existing FDA rule—currently in held in abeyance pending further judicial proceedings in the Fourth Circuit Court of Appeals, would run afoul of First Amendment protection.

By virtually insisting that the Commerce Committee codify the FDA rule, the Administration is risking a protracted Constitutional battle over advertising provisions that industry will voluntary go far beyond.

Still others point out that, absent industry agreement by contract and consent decree, it will be unconstitutional to require so-called industry lookback penalties if certain tobacco reduction targets are not met.

Mr. President, these are issues that concern me very much.

They are issues which merit serious study, and then concerted action, but they should not be stumbling blocks to enactment of a final bill.

I am alarmed.

I see the sands racing through the hourglass as we move toward adjournment, but I do not see consensus emerging on the shape of tobacco legislation.

Indeed, I see the Congress increasingly polarized, as members race into either one of two camps: the ''keep-upping-the-ante'' faction, those who will ''pile on'' any punitive bill, or the ''minimalist approach'' contingent.

The result of this polarity is a paralysis which cannot be breached until we realize we are jeopardizing our effectiveness through politicization.

Surely there is a middle ground, a basis for legislation which focuses on our real target—weaning a generation of kids off of nicotine—not on the politics of punishment.

These political games not only disappoint those we represent, but also, as I have outlined, punish them as well.

We owe our kids, and we owe their parents, hard-working Americans in every state, so much, much more.

RELEASE OF WINDOWS 98

Mr. HATCH. Mr. President, I am told that this afternoon in New York City Bill Gates and a number of other executives from throughout the computer and software industries will be holding a press conference urging law enforcement officials not to interfere with the release of Windows 98.

I certainly do not begrudge Mr. Gates or others in the industry to make their views known. That is what makes our democracy work. Indeed, I would like nothing more than to see more enlightened debate on this terribly important policy issue. But I cannot help but wonder how many of these executives are on that stage because they truly want to be. It strikes me as curious that it was only after calls from Microsoft that many of these individuals saw fit to sign letters and make public appearances. Indeed, I have been told that some executives in fact hope to see the Justice Department pursue further its case against Microsoft, but