

afternoon's trial in apparent deep sleep. His mouth kept falling open and his head lolled back on his shoulders, and then he awakened just long enough to catch himself and sit upright. Then it happened again. And again. And again.

Every time he opened his eyes, a different prosecution witness was on the stand describing another aspect of the Nov. 19, 1991, arrest of George McFarland in the robbery-killing of grocer Kenneth Kwan.

When state District Judge Doug Shaver finally called a recess, Benn was asked if he truly had fallen asleep during a capital murder trial. "It's boring," the 72-year-old longtime Houston lawyer explained. . . . Court observers said Benn seems to have slept his way through virtually the entire trial.

Unfortunately for McFarland, Texas' highest criminal court, several of whose members were coming up for reelection, concluded that this constituted effective criminal representation.

I guess they felt because the lawyer was in the courtroom, even though sound asleep, that would be effective representation. If you read the decision they probably would have ruled the same way if he had been at home sound asleep, so long as he had been appointed at some time.

McFarland is still on death row for a murder he insists he did not commit, on the basis of evidence widely reported by independent observers to be weak.

Then we have Reginald Powell, a borderline mentally retarded man who was 18 at the time of the crime. Mr. Powell was eventually executed. Why? Because he accepted his lawyer's advice to reject a plea bargain that would have saved his life.

There were a number of attorney errors at the trial. The advice he received seems to be very bad advice. Some may feel this advice, the advice given to this 18-year-old mentally retarded man, was affected by the flagrantly unprofessional conduct of the attorney, a woman twice Powell's age, who conducted a secret jailhouse sexual relationship with him during the trial. Despite this obvious attorney conflict of interest, Powell's execution went ahead in Missouri a year ago.

I ask each Member of the Senate when you go home tonight, or when you talk to your constituents, and when you consider the bill I will be introducing, to remember these cases and consult your conscience to ask whether these examples represent the best of 21st century American justice.

The judge who presided over McFarland's trial summed up the Texas court's view of the law quite accurately when he reasoned that, while the Constitution requires a defendant to be represented by a lawyer, it "doesn't say the lawyer has to be awake." If your conscience says otherwise, maybe we ought to do something.

My proposal rests on a simple premise: States that choose to impose capital punishment must be prepared to foot the bill. They should not be permitted to tip the scales of justice by denying capital defendants competent

legal services. We have to do everything we can to ensure the States are meeting their constitutional obligations with respect to capital representation.

Can miscarriages of justice happen when defendants receive adequate representation? Yes, they can still happen. So I think it is critical to ensure that death row inmates have a meaningful opportunity—not a fanciful opportunity—but a meaningful opportunity—to raise claims of innocence based on newly discovered evidence, especially if it is evidence that is derived from scientific tests not available at the time of the trial.

Perhaps more than any other development, improvements in DNA testing have exposed the fallibility of the legal system. In the last decades, scores of wrongfully convicted people have been released from prison—including many from death row—after DNA testing proved they could not have committed the crimes for which they were convicted. In some cases the same DNA testing that vindicated the innocent helped catch the guilty.

Most recently, DNA testing exonerated Ronald Jones. He spent close to 8 years on death row for a 1985 rape and murder that he did not commit. Illinois prosecutors dropped the charges against Jones on May 18, 1999, after DNA evidence from the crime scene excluded him as a possible suspect.

It was also DNA testing that eventually saved Ronald Keith Williamson's life, as I discussed earlier. He spent 12 years as an innocent man on Oklahoma's death row.

Can you imagine how any one of us would feel, day after day for 12 years, never knowing if we were just a few hours or a few days from execution, locked up on death row for a crime we did not commit?

Some of the major hurdles to postconviction DNA testing are laws prohibiting introduction of new evidence—laws that have tightened as death penalty supporters have tried to speed executions by limiting appeals. Only two States, New York and Illinois, require the opportunity for inmates to require DNA testing where it could result in new evidence of innocence. Elsewhere, inmates may try to get DNA evidence for years, only to be shut out by courts and prosecutors.

What possible reason could there be to deny inmates the opportunity to prove their innocence—and perhaps even help identify the real culprits—through new technologies? DNA testing is relatively inexpensive. But no matter what it costs, it is a tiny price to pay to make sure you have the right person.

The National Commission on the Future of DNA Evidence, a Federal panel established by the Justice Department and comprised of law enforcement, judicial, and scientific experts, issued a report last year urging prosecutors to consent to postconviction DNA testing, or retesting, in appropriate cases, espe-

cially if the results could exonerate the defendant.

In 1994, we set up a funding program to improve the quality and availability of DNA analysis for law enforcement identification purposes. The Justice Department has handed out tens of millions of dollars to States under this program. Last year alone, we appropriated another \$30 million for DNA-related grants to States. That is an appropriate use of Federal funds. But we should not pass up the promise of truth and justice for both sides of our adversarial system that DNA evidence holds out. We at least ought to require that both sides have it available.

By reexamining capital punishment in light of recent exonerations, we can reduce the risk that people will be executed for crimes they did not commit and increase the probability that the guilty will be brought to justice. We can also help to make sure the death penalty is not imposed out of ignorance or prejudice.

I learned, first as a defense attorney and then as a prosecutor, that the pursuit of justice obliges us not only to convict the guilty, but also to exonerate the wrongly accused and convicted. That obligation is all the more urgent when the death penalty is involved.

Let's not have the situation where, today in America, it is better to be rich and guilty than poor and innocent. That is not equal justice. That is not what our country stands for.

I was proud to be a defense attorney. I was very proud to be a prosecutor. I have often said it was probably the best job I ever had. But there was one thought I always had every day that I was a prosecutor. I would look at the evidence over and over again and I would ask myself, not can I get a conviction on this charge, but will I be convicting the right person. I had cases where I knew I could get a conviction, but I believed we had the wrong person, and I would not bring the charge. I think most prosecutors feel that way. But sometimes in the passion of a highly publicized, horrendous murder, we can move too fast.

I urge Senators on both sides of the aisle, both those who support the death penalty and those who oppose it, to join in seeking ways to reduce the risk of mistaken executions.

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. SMITH of New Hampshire. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

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BANKRUPTCY REFORM ACT OF  
1999—Continued

Mr. SMITH of New Hampshire. Mr. President, I would like to speak briefly

about two amendments that are before the Senate—the Schumer amendment on abortion and the Levin amendment dealing with the so-called gun carve-out.

When I took my oath of office on the floor of the Senate, I swore to support and defend the Constitution of the United States. I am amazed sometimes at the type of things we face in the Senate with amendments and bills that I find to be unconstitutional, at least the way I read it.

These two amendments I am referring to essentially harass Americans who are defending three of our most important constitutional rights—the right to life, which is guaranteed by the 5th and the 14th amendments, the right to free political speech, as guaranteed by the 1st amendment, and the right to keep and bear arms, as guaranteed by the 2nd amendment.

It is interesting, as one listens to the debate on these respective amendments, some take the position that it is OK to support the 2nd but not the 1st; it is OK to support the 1st but not the 2nd; some say it is OK to support the 1st and the 2nd but not the 5th and the 14th. But they are all part of the Constitution. Unless you are going to remove an amendment, as we did once with the 21st amendment repealing the 18th, then I do not think we have the right to stand here and say one thing is constitutional and something else is not.

The Schumer amendment tries to exempt abortion protesters from claiming bankruptcy. This is an amendment that unfairly targets a legitimate form of civil disobedience. I believe there are some acts for which people should not be allowed to file for bankruptcy—such willful acts that might lead to a personal injury or the destruction of property. That is not what we are talking about here. I believe most student loans, taxes, child support, and alimony payments also should not be dischargeable.

This amendment adding abortion protesters to the nondischargeable list under bankruptcy laws—let's call it what it is. It is nothing more than another attempt to financially bankrupt and silence free speech of those who peacefully—peacefully—want to speak out against something they believe in so strongly or oppose so strongly, and that is abortion, those who want to defend the constitutionally guaranteed right to life.

On a talk show yesterday, this issue came up, this supposedly *Roe v. Wade* rule that abortion is legal under the Constitution. If someone can find the word "abortion" in the Constitution, where it says abortion is legal, I will be happy to change my position. If somebody will come down to the floor and point out to me where the word "abortion" and the right to an abortion appears in the Constitution—of course, it does not, and if it is not in there, then any power not specifically outlined in the Constitution belong to the States and the people.

There is no right to an abortion under the Constitution. *Roe v. Wade* was a bad decision; it is an unconstitutional decision. Judges are fallible, they make mistakes, and they made a mistake when they passed that awful decision which has taken the lives of 40 million children—40 million children since *Roe v. Wade* passed in 1973, 40 million children who will never have the opportunity to live their dreams, never have the opportunity to be a Senator, to be a President, to be a doctor, to be a mom, a dad. Gone. We took them away, almost one-sixth of the entire U.S. population, under that decision, and it is an unconstitutional decision because a young child inside the womb or outside has a constitutional right to life.

Let's talk about what this amendment does.

Antiabortion protests, no matter how you feel about abortion, is political speech, I say to my colleagues. This is political speech. They have a right to speak. I am not talking about protesters who commit violent acts or commit bodily harm to others. I am not in favor of that, nor should we tolerate that. I am talking about people standing outside a clinic holding a sign, praying, protesting peacefully. That is what this amendment is going after. People who do that are now going to be subjected to this provision on bankruptcy, an unfair provision.

It is political speech for somebody to peacefully protest abortion just as much as it is political speech for union organizers or urging other workers not to cross a picket line. What is the difference? Why don't we single them out? But we are not.

My colleague Senator SCHUMER singles out one type of protest, a protest on an issue with which he disagrees. It is not constitutional, and it is not fair. It is political speech just as much as when the NAACP enforced its boycott of southern businesses. The Supreme Court in *NAACP v. Claiborne Hardware* said so. We already have enough laws on the books harassing abortion protesters, including the Freedom to Access Clinic Entrances, so-called FACE, and the Racketeer-Influenced and Corrupt Organizations Act, known as RICO. The financial penalties under these laws are harsh, unusually harsh for one specific type of protest or protester—a peaceful protester.

This amendment proposes to give these protesters absolutely no way to deal with the treble damages against them under RICO. A recent RICO case against protesters who carried posters of aborted children resulted in \$109 million against the pro-lifers; \$109 million for peacefully protesting without harming anyone's person or property. It is outrageous. That ought to be enough to chill anyone's free speech. What is next? Free speech under the Constitution is protected.

Another one of the RICO cases currently pending involves a Catholic bishop and religious brother praying

the rosary in their car in the driveway of an abortion clinic peacefully.

A pro-life gentleman in another case was standing on a walkway near an unused locked door of a clinic and was not blocking access to that clinic.

How much are they going to have to pay for standing up for what they believe in, such as the marchers did during the civil rights movement when they sat at the lunch counters and marched in the streets? \$200 million? \$1 billion? Where is it going to stop?

Can you imagine RICO, which was originally drafted to fight mobsters and organized crime, now being used against civil rights demonstrators or antiwar protesters, or abolitionists protesting slavery? What will we say then? We know what we would say. We would say it is wrong, and it is wrong to protest those who respectfully, quietly, peacefully protest what they believe in, which is the right to life.

It is a violation of the first amendment. This is a patently unfair discriminatory amendment, and it does not deserve even the dignity of being offered because it is so flagrantly unconstitutional.

I urge my colleagues, when the vote comes tomorrow, to vote no on the Schumer amendment. Get it off the floor of the Senate because it does not belong here. We should not be talking about unconstitutional bills on the floor of the Senate.

Another amendment which will be offered tomorrow is called the gun carve-out amendment, again, a discriminatory amendment against one group. The Levin amendment proposes to exempt gun manufacturers from bankruptcy laws. In other words, if you are a gun manufacturer, you cannot claim bankruptcy, you cannot be treated like everybody else.

Why? Because the author of the amendment doesn't like gun manufacturers. I guess he believes they shouldn't be allowed to manufacture guns. Under current law, businesses and corporations can discharge their debts through bankruptcy unless the debt is incurred through negligence or intentional misconduct. I agree businesses should be held accountable if they are so irresponsible or malicious to knowingly sell harmful products, but are we really at the point in America when we are going to say if we produce a gun, manufacture a gun, legitimately, as a manufacturer, and then if somebody gets ahold of that gun and commits a crime, that now the manufacturer is responsible? Is this where we have come in our society now, no personal accountability, no personal responsibility?

Why don't we do it with automobiles? Why not? You drive your 1999 Chevy down the road, you hit somebody and kill them, it must be the automobile manufacturer's fault, not you. You are behind the wheel. You can't have any accountability or responsibility. Name another product—a hamburger. There are people who say meat is bad for you.

Maybe we should hold all of the cattle growers responsible for producing hamburger. Maybe we should hold the people who work in the meat packing plants accountable. Where is the individual personal responsibility and accountability?

This is a discriminatory piece of legislation. Again, I regret it is here. The gun industry is selling a legitimate and lawful product. If it is banned, at least that is an honest amendment. I wouldn't agree with it, but at least it would be more honest than it is to say what we are saying, that we are going to exempt you from bankruptcy laws. It is, in fact, a product that is constitutionally protected and specifically mentioned in the second amendment. Everybody knows what it says. There is no secret. It is No. 2 on the amendment list, the Bill of Rights. The right of the people to keep and bear arms shall not be infringed, period. No qualifiers in there. It doesn't say what kind of gun; doesn't say how many guns; doesn't say manufacturer, no exceptions. It just simply says the right of the people—we are people—to keep and bear arms shall not be infringed. That is all it says. And if you have that right under the Constitution to have that weapon to protect yourself, as many do, then you ought to have the right to manufacture it.

This amendment encourages litigation against gun manufacturers and should be called the legislation through litigation amendment. This amendment will have the effect, as follows: If someone sues a gun manufacturer, the manufacturer's bankruptcy will not stop the lawsuit. Outrageous. Gunmakers are already being forced out of business by frivolous, illegitimate, and unconstitutional government-sponsored lawsuits against them. How much more do they have to take? This is a constitutional amendment that specifically says you have the right to keep and bear arms and that right would not be infringed. There is no gray area. It is not as if there is something we have to interpret. There is nothing to interpret. It is right there. When the founders put the ten amendments, the Bill of Rights, onto the Constitution, they made it No. 2.

This amendment singles out a legal industry for unfavorable treatment in bankruptcy proceedings. If successful, it is only going to hasten the demise of the gun industry. That is the purpose of it. That is what is behind this. It is the Bill Clinton agenda. It is being carried out in the Senate. Shut down gun shows. Shut down gun manufacturers. Stop the production of guns in America. Blame the gun manufacturers. Blame everybody except the person behind the gun who commits the crime. For goodness' sake, we wouldn't want to punish that person. Somebody else has to bear the blame. Maybe he had a bad childhood. It must be his father's fault, his mother's fault, the gun manufacturer's fault, the gun seller's fault—everybody but the fault of the person who uses the weapon.

This is what we have come to in America. It is not going to stop here. If legislation such as this slips through, it will be a whole lot of things—hamburger, cars, cigarettes. How about a desk, a chair? You could hurt somebody with that chair if you hit them with it. Well, maybe we ought to sue the manufacturer of the chair. That is what it is coming to. That is how ridiculous it is. Right here in the Senate, we allow it to happen. We debate it day after day trying to stop this stuff as it comes at us in waves, unconstitutional laws. Somebody has to stand up—and some of us do—to stop it because it is outrageous.

Gun controllers cannot win legislatively so they litigate. That is the way to do it. They can't get the American people on their side so they get a few unelected judges on their side. There are many industries that can be considered dangerous, as I said: Carmakers, alcohol, tobacco, fast food, whatever—legal businesses. Are they being singled out in this bankruptcy bill? No, not this one, but maybe next year or next week. Who knows? Just wait. It is going to happen sooner or later. These government-sponsored lawsuits against gun manufacturers and tobacco companies are just the beginning because we have now opened the Pandora's box. We have said defendants should be held liable for damage caused by others even if the damage was totally beyond the defendant's control.

It goes against common sense, and that is what has served our Nation so well, common sense and individual responsibility. That is what America is about. It is not about this kind of nonsensical legislation that puts the blame and the burden on people who shouldn't have the blame and the burden.

I had a shotgun next to my bed as a young man, probably 7 or 8 years old. I used it. I shot it frequently. I didn't shoot at anybody. I didn't take it to school and kill anybody, nor did any of my friends who also had shotguns. Why is that? Why is it that suddenly now all this is a big issue? Because we are trying to pass the burden of responsibility on to somebody else other than ourselves.

We have a cultural problem in this country of the highest magnitude. It isn't about exempting the gun industry from bankruptcy laws. That is not going to get it right. Believe me, what is going to get it right is when we start exercising responsibility in this country again.

The Founding Fathers would turn over in their graves if they could hear this stuff. I can't imagine what Daniel Webster, who wasn't a founder, but he was sitting at the desk that I sit at right over there about 150 years ago. I can't imagine what he would think to be on this floor and debating, blaming the gun manufacturer for somebody else's crime, exempting them from bankruptcy laws. I can't imagine what he would think or Washington or Jefferson or Adams or Madison or Ham-

ilton or any of the great founders who wrote that Constitution, what they would think. In many ways, I am glad they are not here to see it.

In October of 1999, an Ohio court dismissed a suit against the gun industry stating that the suit "is an improper attempt to have this court substitute its judgment for that of the legislature, something which this court is neither inclined nor empowered to do." That was the City of Cincinnati versus Beretta USA Corporation.

In addition, court decisions in Connecticut and Florida this past December ruled that State lawsuits against gun manufacturers have no legal basis whatsoever. Yet here we are on the floor of the Senate trying to do it. The judges in those cases saw that the actions of criminals cannot be controlled by any industry. They were right. So why are we here? Because people are trying to make something happen that they know the American people don't support. So we try to do it this way.

I am heartened by recent polls which show that an overwhelming majority of Americans believe that gun manufacturers should not be blamed for crimes committed with guns. Even if you think there are too many guns, even if you believe that, you better think very carefully before you vote on this as to what might be next. Should we be responsible for the actions of our adult children if they commit a crime? Where is it going to stop?

If there is even one single successful judgment against the gun industry, those who seek to destroy it, and along with it the second amendment, will have a ready means to do so. That is what will happen. So we have two amendments that propose to violate the constitutional rights of the American people, two politically motivated proposals that target politically incorrect targets for unfair treatment; dump on them while they are down. Let me again remind my colleagues of the oath we all took right there at the desk to defend and support the Constitution and abide by American standards of fairness and democracy that have served our Nation so well. Vote no on these two amendments. No matter how you feel about the two issues in question, vote no on these two amendments.

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ELIAN GONZALEZ

Mr. SMITH of New Hampshire. Mr. President, on the case of Elian Gonzalez, the young Cuban boy who is now in Miami, I support Senator MACK's private relief bill to give Elian Gonzalez U.S. citizenship. This is something I believe should be done. It is not necessarily going to stop him from being sent back to Cuba, but it is the right thing to do.

I met Elian Gonzalez personally and the great uncle in Little Havana in Miami on January 8. I took the time to go meet Elian. I wanted to talk with him myself. I wanted to look him in