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Kagan - Lexis-Nexis DC Circuit [3]

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Kagan - Lexis-Nexis DC Circuit [3]

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LEVEL 1 - 20 OF 166 STORIES

Copyright 1998 Star Tribune
Star Tribune (Minneapolis, MN)

November 12, 1998, Metro Edition

SECTION: Pg. 17A

LENGTH: 571 words

HEADLINE: Tobacco settlement package expected to be announced Friday

SOURCE: McClatchy Newspapers

DATELINE: Washington, D.C.

BODY:

A tobacco settlement package expected to be announced as early as Friday would require the four largest U.S. cigarette manufacturers to pay about \$ 200 billion over 25 years and follow stiff advertising restrictions, sources close to the talks indicated Wednesday.

The deal, aimed at settling dozens of states' lawsuits against the tobacco industry, could prompt price increases of 35 cents per pack of cigarettes. It would bypass the need for congressional action after the Senate failed to pass a more sweeping legislative package last spring.

"They're not done," said Scott Williams, an industry spokesman in Washington, D.C. "It is a very complex agreement they're working on. There is a desire to pick up the pieces from the collapse of the national settlement."

On Tuesday, the Fourth U.S. Circuit Court of Appeals, based in Richmond, Va., let stand an earlier ruling in which a three-judge panel said the Food and Drug Administration lacks the authority to regulate nicotine as a drug. The White House said it would appeal that decision to the Supreme Court.

The tobacco agreement is aimed at compensating states for their Medicaid costs of treating sick smokers. The accord gives 37 states with pending suits, plus nine that didn't file suit, until Nov. 20 to join the settlement. The total payments would decrease in proportion to the number of states that declined to participate. Four states - Texas, Florida, Minnesota and Mississippi - have settled their suits for a total of \$ 40 billion. The trial on the state of Washington's suit has started.

The amount each participating state would receive from the proposed settlement, which is being negotiated in New York, is linked to its number of Medicaid recipients.

In addition to the \$ 200 billion in direct payments to the states, the industry would pay \$ 1.45 billion for a five-year national ad campaign against smoking and use \$ 250 million to create a public health foundation to reduce youth smoking.

The accord probably would reduce tobacco consumption, because the industry payments to the states would increase the price of cigarettes, participants said.

Star Tribune (Minneapolis, MN), November 12, 1998

Elena Kagan, a domestic policy adviser to President Clinton, said the White House hadn't seen details of the settlement package but was cheered by what it knew.

"From what we hear, this is a real step in the right direction," she said. "We give the attorneys general all the credit in the world for having accomplished this. At the same time, it leaves a great deal to be done."

Kagan said the Clinton administration is considering a tobacco tax increase as part of the federal budget proposal it will submit to Congress early next year. She said the White House will take into account price increases that may result from the states' settlement deal.

Congress last year raised the federal excise tax on tobacco from 24 cents to 44 cents per pack of cigarettes. Attempts to raise the tax by as much as \$ 1.50 a pack failed this year.

Kagan said the White House is also weighing legislation to strengthen the FDA's control of cigarette makers, in the wake of the industry's legal challenges to tougher FDA regulations imposed in 1996.

"We're trying to figure out what best advances the president's goal of reducing youth smoking. We certainly are very interested in passing legislation to make clear that the FDA has jurisdiction over tobacco products," Kagan said.

LANGUAGE: ENGLISH

LOAD-DATE: November 13, 1998

LEVEL 1 - 21 OF 166 STORIES

Copyright 1998 Associated Newspapers Ltd.
The Evening Standard (London)

October 14, 1998

SECTION: Pg. 57

LENGTH: 667 words

HEADLINE: THE NEW MAN WHO SPEAKS FOR CLINTON;
Joe Lockhart is tough, quick-witted and a big hit at the White House. But will these qualities be enough to protect the President from a hungry press? BARBARA McMAHON reports

BYLINE: Barbara McMahon

BODY:

A sense of humour is the winning characteristic of Joe Lockhart which is just as well. Last week he took up one of the most challenging, if not unenviable jobs in contemporary spin-doctoring - Press Secretary to Bill Clinton in his last period of office. His career trajectory could follow the same path as that of his boss, if the President is brought down by the Monica Lewinsky

EVENING STANDARD, October 14, 1998

scandal.

But Lockhart has made good start. The other day when the President was making a flying visit to press some flesh, Lockhart overslept and missed Air Force One. After leaping on a scheduled flight and catching up with the party, he fielded some good-natured ribbing from journalists: "Itak responsibility for my own actions," he said, aping speech from Clinton. "I deeply regret it. I'm dealing with the people I have hurt the most. And I'll have nothing further to say." He later said he thought a lighthearted response lightened the mood. He scored a hit with the press corps.

"You'd be a fool not to be daunted and intimidated by this task," he said in recent interview. "It's complex mix of emotions. am daunted and intimidated. But I'm also incredibly excited. It's the biggest professional challenge I will face in my lifetime." So far he has had to field questions on Kosovo and the global financial crisis, but those are as nothing compared to the obsession the nation's press has with l'affaire Lewinsky, the impending impeachment proceedings and the ongoing investigations of special prosecutor Kenneth Starr.

To make the new job even more tricky, Lockhart follows the widely admired Mike McCurry, who was

highly popular with the White House correspondents, particularly the female ones, but who has now gone on to a lucrative job in the private sector.

Colleagues say the 39-year-old Lockhart, who only a few years ago was working for Sky television news in London, reporting on economics, will handle the pressure. "He's smart, and he has an understanding of the issues," said Elena Kagan, deputy chief secretary of domestic policy. "People feel he has earned it and the President absolutely made the right decision in appointing him."

As McCurry's deputy for the last year and a half, Lockhart has had plenty of practice in the daily rigours of the White House briefing room - "Speaking the truth slowly ..." as the urbane McCurry

described the job, or "not saying too much or too little" as Lockhart puts it.

The son of two journalists, Lockhart was born in the Bronx and grew up in a New York City suburb. He studied European history at Georgetown University and, after graduating, landed a job as a regional press coordinator for President Jimmy Carter's doomed 1980 campaign. He tasted political failure twice after that by

working as assistant press secretary in Walter Mon-dale's 1984 presidential campaign and Michael Dukakis's attempt in 1988.

That experience apparently soured politics for him, at least for a while.

He worked in public relations as a senior vice president for an agency company in New York and then tried his hand at journalism. He took the Murdoch shilling at Sky and then returned to the States to work for ABC and CNN. His mentor McCurry persuaded him to return to politics and take the job as chief spokesman for the 1996 Clinton-Gore campaign. His quick-witted responses

EVENING STANDARD, October 14, 1998

during daily briefings earned him many admirers and he was persuaded to stay on as deputy head of the White House press staff.

He relishes the rough-and-tumble of the job, but displays flashes of temper when he feels journalists step out of line or wilfully misunderstand.

Fiercely loyal to Clinton, Lockhart said he has spoken with his boss about the Sexgate scandal. "I got the sense that the President recognised the mistake he made.

I, for one, don't need more than that," he said. His main problem will be that the Republican-controlled Congress, the hungry press, and, ultimately, the American people may require a great deal more.

LOAD-DATE: October 15, 1998

LEVEL 1 - 22 OF 166 STORIES

The Associated Press

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October 1, 1998, Thursday, PM cycle

SECTION: Washington Dateline

LENGTH: 808 words

HEADLINE: With fear, fascination, Lockhart takes press secretary role

BYLINE: By ROBERT BURNS, Associated Press Writer

DATELINE: WASHINGTON

BODY:

Midway through a European tour, President Clinton and his entourage were winging their way to Belfast, Northern Ireland. Word got out that the president's press secretary-in-waiting, Joe Lockhart, had overslept in Moscow and missed Air Force One.

Not content to take the needling and let it drop, Lockhart - once he had caught up with the presidential party - raised a few eyebrows by jokingly borrowing words from Clinton, whose admission of having lied about Monica Lewinsky was hanging like a cloud over the trip.

"I take responsibility for my own actions," Lockhart deadpanned to reporters. "I deeply regret it. I'm dealing with the people I have hurt the most. And I'll have nothing further to say."

The Associated Press, October 1, 1998

Classic Lockhart. Humility with humor, not afraid to deliver a poke in the presidential ribs.

"It just struck me that everybody needed to lighten up a little bit," Lockhart recalled of that difficult day in the Clinton camp. "If I could make a joke at my expense - even a little bit at the president's expense - and it would lighten the mood and loosen people up," then it was worth trying.

Lockhart figures to have plenty more chances to put his wit to use in a White House under siege. After a year and a half as a deputy to the widely admired Mike McCurry, Lockhart takes over as top spokesman Monday with just over two years left in Clinton's term.

He approaches the new assignment with a mixture of fear and fascination.

"You'd be a fool not to be daunted and intimidated by this task," he said in a recent interview in the high-ceilinged West Wing office that is the Grand Central Station of presidential public relations. "It is a complex mix of emotions. I'm serious when I say daunted and intimidated. But I'm also incredibly excited."

Colleagues inside the White House seem pleased, too.

"He's smart and he has an understanding of the issues," said Elena Kagan, deputy chief for domestic policy. "People feel he has earned it and the president absolutely made the right decision."

Lockhart, 39, is a stocky man with salt-and-pepper hair and a ready smile. A gifted gabber, quick with a quip, he also is known for flashes of temper. He can be easy going, but also boldly political.

The press secretary's most visible role is conducting the daily briefing for White House reporters, an exercise in verbal gymnastics in which one slip of the tongue can carry a heavy penalty.

When Clinton stole into the White House briefing room July 23 to spring the announcement that McCurry was leaving and Lockhart was taking over, he said Lockhart knows what it will take to succeed.

"Joe knows that he can only serve my interests well if he takes care of yours also," Clinton told reporters.

Behind the scenes, the press secretary also must juggle internal White House pressures - don't say too much, don't say too little, keep this secret, leak that secret, humor the press, challenge the press. And because the press secretary speaks not just for the president but for his entire administration, Lockhart must be prepared to handle issues ranging from AIDS policy to foreign policy.

"It's the biggest professional challenge I will face in my lifetime," Lockhart says.

He knows his chances of succeeding will depend in part on keeping the trust of first lady Hillary Rodham Clinton, who called him at home the evening Clinton announced he would succeed McCurry.

The Associated Press, October 1, 1998

"She (offered) very warm congratulations and a very strong statement that she was directly accessible to me and she looked forward to working together," Lockhart recalled.

Marsha Berry, Mrs. Clinton's press secretary, said her boss had no hand in Lockhart's selection.

"But I know she's glad he's the one," she said.

Lockhart himself had some doubt after he and the rest of the country heard Clinton admit on national television Aug. 17 that he had been lying about an affair with Ms. Lewinsky. During a moment alone with the president during the Russia-Ireland trip in early September, Lockhart raised the matter.

"I got the sense that the president recognized the mistake he made," Lockhart said. "I, for one, don't need more than that."

Lockhart has had to deal with his share of political failure. During a decade in which Republicans had a lock on the White House, Lockhart in the 1980s was on the losing end of Democratic presidential campaigns three times - Jimmy Carter in 1980, Walter Mondale in 1984 and Michael Dukakis in 1988.

He grew up in the New York City suburb of Suffern, N.Y., the son of journalists. Not far out of his teens he felt the tug of politics and campaign work. He snagged a spot on the Carter re-election campaign in 1980, and then moved back and forth between politics, television journalism and corporate public relations before McCurry persuaded him to take the job of chief spokesman for the 1996 Clinton-Gore campaign.

LANGUAGE: ENGLISH

LOAD-DATE: October 1, 1998

LEVEL 1 - 23 OF 166 STORIES

Copyright 1998 The Austin American-Statesman
Austin American-Statesman

October 1, 1998

SECTION: News; Pg. A20

LENGTH: 767 words

HEADLINE: New press secretary keeps humor

BYLINE: Robert Burns

BODY:

WASHINGTON -- Midway through a European tour, President Clinton and his entourage were winging their way to Belfast, Northern Ireland. Word got out that the president's press secretary-in-waiting, Joe Lockhart, had overslept in Moscow and missed Air Force One.

Austin American-Statesman, October 1, 1998

Not content to take the needling and let it drop, Lockhart -- once he had caught up with the presidential party -- raised a few eyebrows by jokingly borrowing words from Clinton, whose admission of having lied about Monica Lewinsky was hanging like a cloud over the trip.

"I take responsibility for my own actions," Lockhart deadpanned to reporters. "I deeply regret it. I'm dealing with the people I have hurt the most. And I'll have nothing further to say."

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"It just struck me that everybody needed to lighten up a little bit," Lockhart recalled of that difficult day in the Clinton camp. "If I could make a joke at my expense -- even a little bit at the president's expense -- and it would lighten the mood and loosen people up," then it was worth trying.

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"She (offered) very warm congratulations and a very strong statement that she was directly accessible to me and she looked forward to working together," Lockhart recalled.

During a moment alone with the president during the Russia-Ireland trip in early September, Lockhart raised the Lewinsky matter with President Clinton.

"I got the sense that the president recognized the mistake he made," Lockhart said. "I, for one, don't need more than that."

Lockhart has had to deal with his share of political failure. During a decade in which Republicans had a lock on the White House, Lockhart in the 1980s was on the losing end of Democratic presidential campaigns three times -- Jimmy Carter in 1980, Walter Mondale in 1984 and Michael Dukakis in 1988.

He grew up in the New York City suburb of Suffern, N.Y., the son of journalists. Not far out of his teens, he felt the tug of politics and campaign work.

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LOAD-DATE: October 6, 1998

LEVEL 1 - 24 OF 166 STORIES

Copyright 1998 Times Printing Company
The Chattanooga Times

October 1, 1998, Thursday

SECTION: National; Pg. A13

LENGTH: 816 words

HEADLINE: Press job daunts, excites Lockhart

BYLINE: By Robert Burns, The Associated Press

BODY:

WASHINGTON -- Midway through a European tour, President Clinton and his entourage were winging their way to Belfast, Northern Ireland. Word got out that the president's press secretary-in-waiting, Joe Lockhart, had overslept in

The Chattanooga Times, October 1, 1998

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The Chattanooga Times, October 1, 1998

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Marsha Berry, Mrs. Clinton's press secretary, said her boss had no hand in Lockhart's selection.

"But I know she's glad he's the one," she said.

Lockhart himself had some doubt after he and the rest of the country heard Clinton admit on national television Aug. 17 that he had been lying about an affair with Ms. Lewinsky. During a moment alone with the president during the Russia-Ireland trip in early September, Lockhart raised the matter.

"I got the sense that the president recognized the mistake he made," Lockhart said. "I, for one, don't need more than that."

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LANGUAGE: ENGLISH

LOAD-DATE: October 1, 1998

LEVEL 1 - 25 OF 166 STORIES

Copyright 1998 Associated Press
AP Online

September 30, 1998; Wednesday 14:36 Eastern Time

SECTION: Washington - general news

AP Online, September 30, 1998

LENGTH: 815 words

HEADLINE: Lockhart Takes Press Secretary Role

BYLINE: ROBERT BURNS

DATELINE: WASHINGTON

BODY:

Midway through a European tour, President Clinton and his entourage were winging their way to Belfast, Northern Ireland. Word got out that the president's press secretary-in-waiting, Joe Lockhart, had overslept in Moscow and missed Air Force One.

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AP Online, September 30, 1998

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LANGUAGE: ENGLISH

AP Online, September 30, 1998

LOAD-DATE: September 30, 1998

LEVEL 1 - 26 OF 166 STORIES

The Associated Press

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September 30, 1998, Wednesday, AM cycle

SECTION: Washington Dateline

LENGTH: 808 words

HEADLINE: With fear, fascination, Lockhart takes press secretary role

BYLINE: ROBERT BURNS, Associated Press Writer

DATELINE: WASHINGTON

BODY:

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The Associated Press, September 30, 1998

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LANGUAGE: ENGLISH

LOAD-DATE: September 30, 1998

LEVEL 1 - 27 OF 166 STORIES

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Los Angeles Times

August 15, 1998, Saturday, Home Edition

SECTION: Part A; Page 1; National Desk

LENGTH: 1510 words

HEADLINE: COURT RULES FDA CANNOT REGULATE TOBACCO AS DRUG;
LAW: APPEALS PANEL 'S DECISION DEALS KEY BLOW TO CLINTON ADMINISTRATION'S FIGHT
TO CURB YOUTH SMOKING. JUDGES SAY CONGRESS NEVER GAVE THE AGENCY JURISDICTION.

BYLINE: ALISSA J. RUBIN, TIMES STAFF WRITER

DATELINE: WASHINGTON

BODY:

A federal appeals court dealt a crushing blow Friday to the Food and Drug Administration, ruling that it has no authority to regulate nicotine as a drug and cigarettes as drug-delivery devices.

The 2-1 ruling by a three-judge panel of the U.S. 4th Circuit Court of Appeals, which reversed a lower court decision, represents a major setback for the administration's efforts to restrict tobacco use by children.

"We do not dispute that Congress has charged the FDA with protecting the public health and that tobacco products present serious health risks for the public," wrote Judges H. Emory Widener and James Michael.

Los Angeles Times August 15, 1998, Saturday,

However, they added, "based on our review of the record, the FDA lacks jurisdiction to regulate tobacco products and all of the FDA's regulation of tobacco products are invalid."

The ruling dealt another setback to high-profile efforts by the Clinton administration to curb teen smoking. In June, Congress defeated sweeping legislation that would have regulated the tobacco industry, raised the price of cigarettes and undertaken a comprehensive public health campaign to stop children from smoking.

But the administration said that it would ask for a rehearing of the case before the full 4th Circuit Court in Richmond, Va.

"Our commitment for this issue is for the long term," said Elena Kagan, deputy domestic policy advisor to President Clinton.

"We will take however long it takes us in the courtroom, however long it takes us in Congress. We will continue to fight for the measures that reduce youth smoking," Kagan said.

The voluminous FDA regulation overturned by the court required people under age 27 to present photo identification when buying cigarettes and prohibited the sale of cigarettes to anyone under 18. The rule also called for a ban on cigarette vending machines, except in places such as bars, and broad restrictions on tobacco advertising and promotion.

Despite Friday's ruling, the limits on youth access to tobacco will remain in effect at least through the administration's appeal to the full circuit court. Other restrictions had not yet been implemented.

The tobacco industry applauded the ruling.

"We are pleased by the court's ruling that the FDA does not have authority to regulate tobacco products and that the agency's 1996 tobacco rule is invalid," said Scott Williams, a spokesman for the five major tobacco manufacturers.

But anti-smoking advocates in Congress and the public health community said that the decision would inspire them to new efforts.

"The appeals court decision today makes it even more imperative that Congress pass comprehensive legislation to address the problem of youth tobacco use and addiction," said Sen. John McCain (R-Ariz.), who led the Senate effort to pass comprehensive tobacco legislation.

The FDA rule, announced in August 1996, was the first major attempt by the federal government to regulate tobacco and was promoted primarily as a measure to reduce youth smoking. Three thousand children begin smoking every day and about one-third of them die prematurely of tobacco-related diseases.

The regulation was heralded by Clinton as "historic action" that would "put Joe Camel and the Marlboro Man out of our children's reach forever." Clinton had hoped that strict tobacco controls aimed at children would be a major part of his presidential legacy.

Los Angeles Times August 15, 1998, Saturday,

Last year, when a federal judge upheld the crucial part of the rule granting the FDA authority to regulate tobacco products as a drug, opponents of the industry viewed it as a landmark decision and a major victory for public health.

Now the issue is likely to be fought for years in the courts and, barring a reversal by the full Appeals Court or the Supreme Court, none of the restrictions will remain in effect.

*

That would force the FDA to go back to Congress for legislation authorizing it to regulate tobacco. Such provisions were included in the massive tobacco bill that was killed by the Senate in June. An aggressive lobbying campaign by the tobacco industry and reluctance by public health groups to compromise on key provisions, such as capping the industry's liability in future lawsuits, contributed to the bill's demise.

Friday's ruling continued a winning streak for the tobacco industry, which has seen a dramatic reversal of its fortunes since just a year ago, when it faced massive lawsuits by the states and an unfriendly Congress.

All that has changed in recent months. Three weeks ago, the industry scored its biggest success yet in the numerous lawsuits filed by states to recover their tobacco-related health care costs. A judge in Indiana threw out that state's case in its entirety.

Cigarette manufacturers also recently won dismissal of several class-action suits filed on behalf of tens of thousands of allegedly addicted smokers in several states as well as by labor union health care funds that have sought reimbursement for the costs of treating sick smokers.

But the industry's most stunning victory was the complete collapse of legislation in Congress to regulate tobacco and limit its use by children.

Anti-smoking advocates lamented Friday's ruling. "Today's decision is a victory for Big Tobacco's lawyers over America's families and their children," said William D. Novelli, president of the Campaign for Tobacco-Free Kids.

"We are deeply disappointed with today's decision. We believe that FDA's oversight is critical to protecting the American public, and especially children, from tobacco products," Novelli said. "We expect this ruling to be appealed and overturned."

*

Yet the cigarette manufacturers' victories effectively strengthen their hand in their dealings with the states, which are trying to negotiate a similar but more limited settlement than the one proposed a year ago. It would also likely mean a smaller payout by the cigarette industry.

Los Angeles Times August 15, 1998, Saturday,

With the FDA's marketing and advertising regulations in limbo as a result of Friday's ruling, any marketing curbs to which industry agrees would be purely a concession.

"The tide has turned and this strengthens the industry's hand," said Gary Black, a tobacco analyst with Sanford Bernstein & Co., a Wall Street investment firm.

The decision's effect on Congress is more difficult to assess. In the nearly 35 years since the surgeon general's report found that cigarette smoking is a health hazard, Congress has imposed almost no tough regulation on the tobacco industry. The single exception was the smoking ban on airline flights--which benefited members of Congress, who are frequent fliers.

"This has got to be a wake-up call for the public health community and the Clinton administration," said Black. "Congress said no to passing tough tobacco regulations, the courts said no. So they have one more shot at this and it's through the settlement with the attorneys general."

But the prospects for compromise are dim at best. The public health community remains adamantly opposed to accepting less than a comprehensive regulatory bill that forces the industry to pay hundreds of billions of dollars and submit to stringent marketing and advertising limits.

"I don't think the public health forces will be very moved by this to compromise. And given that it doesn't soften people, it's not likely to prompt legislation," said Richard Daynard, a law professor at Northeastern University and head of the Tobacco Products Liability Project.

Still, some analysts predict that court action might force a reevaluation of the need to take up comprehensive tobacco legislation next year. There is virtually no time left this year for Congress to revive a measure as complex as the tobacco bill.

"If this was the final decision, it would give the industry tremendous negotiating leverage," conceded Daynard. "But it's not and nobody thinks it is. This is simply a way station to the Supreme Court."

Indeed, many legal analysts said that the court's decision did not take into account the massive record that the FDA built on the deleterious health effects of tobacco.

"I am confident . . . that the Department of Justice will vigorously appeal this case," said Walter Dellinger, the former solicitor general and now a law professor at Duke University.

*

Indeed, the dissenting opinion by the court emphasized that the FDA had attempted to take into account a growing body of evidence about the dangers of smoking and as the only regulatory public health agency with authority to regulate drugs, to keep the public as safe as possible.

Los Angeles Times August 15, 1998, Saturday,

"After years of considering an array of evidence, much of it only recently brought to light, the FDA decided to regulate a product that is estimated to cause some 400,000 deaths a year," wrote Judge Hall in his dissent.

"Inasmuch as cigarettes and smokeless tobacco are responsible for illness and death on a vast scale, FDA regulations aimed at curbing tobacco use by children cannot possibly be contrary to the general intent of the Food Drug and Cosmetic Act to protect the public health," he said.

LANGUAGE: English

LOAD-DATE: August 15, 1998

LEVEL 1 - 28 OF 166 STORIES

Copyright 1998 Newsday, Inc.
Newsday (New York, NY)

August 15, 1998, Saturday, NASSAU AND SUFFOLK EDITION

SECTION: NEWS; Page A06

LENGTH: 607 words

HEADLINE: BIG TOBACCO'S VICTORY / APPEALS COURT BARS FDA REGULATION

BYLINE: By Harry Berkowitz. STAFF WRITER

BODY:

A federal appeals court panel on Friday rejected the White House's attempt to use the Food and Drug Administration to crack down on teen smoking, ruling that Congress never gave the agency authority to regulate tobacco and cigarettes.

The ruling was a major victory for the tobacco industry, which has long fought FDA regulation, saying it could lead to a ban on nicotine and cigarettes. It was a major setback for President Bill Clinton, public health advocates, state attorneys general and members of Congress who have pushed for such FDA authority.

"The leverage now seems to be moving in the direction of the tobacco industry, and I'm sure they are very emboldened today," said Michael Moore, the Mississippi attorney general who led dozens of states in negotiating a \$368.5-billion lawsuit settlement in June, 1997 with the tobacco industry that included FDA regulation. After making that settlement tougher against the industry and losing the industry's support, the Senate two months ago killed a bill that was needed to turn the deal into federal law.

"I hope this is a wakeup call for many in the country who were trying to get a perfect deal, which was the enemy of a good enough deal," Moore said.

Several attorneys general are trying to negotiate a new deal that would not require congressional approval. But that settlement would not include FDA regulation, although it might incorporate some proposed FDA rules, such as a

Newsday (New York, NY), August 15, 1998

ban on cigarette billboards.

By a vote of 2-1, the panel of the Fourth U.S. Circuit Court of Appeals in Richmond, Va., reversed a ruling by U.S. District Court Judge William Osteen in Winston-Salem, N.C., that the FDA could regulate tobacco. It did not reverse the other part of Osteen's decision, which said the FDA could not oversee tobacco advertising.

The industry had appealed one part of Osteen's ruling, and the government had appealed the other.

"This is not a case about whether additional or different regulations are needed to address legitimate concerns about the serious health problems related to tobacco use and particularly youth tobacco use in this country," U.S. Circuit Court Judge H. Emory Widener wrote in his majority opinion. He said it is about who has the power to impose those regulations, and "Congress did not intend to delegate jurisdiction over tobacco products to the FDA."

He wrote that it would not make sense for the FDA, which adopted strict rules over tobacco marketing in 1996, to regulate nicotine or cigarettes as a drug under existing law because the agency says they are "unsafe" products. "It is impossible to create regulations which will provide a reasonable assurance of safety," Widener wrote.

The Justice Department said it will ask the full 14-member appeals court to review the decision, which eventually may reach the Supreme Court.

"This decision is further evidence that Congress needs to move forward with the kind of reform on tobacco that is long overdue," said Attorney General Christine Gregoire of Washington state.

"We've always thought that the best way to . . . reduce youth smoking is through congressional action," said Elena Kagan, a White House adviser on tobacco.

But the Republican leadership in the House of Representatives, which had promised to introduce a new slimmed-down tobacco bill, has decided to hold off in the face of resistance from Republican members who say they don't want to stir up the issue again.

In a statement, major tobacco companies said they were pleased by the ruling and that "the industry remains firmly committed to taking meaningful steps to reduce underage tobacco use."

LANGUAGE: English

LOAD-DATE: August 15, 1998

LEVEL 1 - 29 OF 166 STORIES

Copyright 1998 The Washington Post
The Washington Post

The Washington Post, July 06, 1998

July 06, 1998, Monday, Final Edition

SECTION: A SECTION; Pg. A17; THE FEDERAL PAGE; IN THE LOOP

LENGTH: 888 words

HEADLINE: Personless Home

BYLINE: Al Kamen

BODY:

There are many grand U.S. embassies around the world, including those in London, Paris and Prague. But the splendid ambassador's residence in Buenos Aires, just having undergone a major refurbishing completed this month, is said to be the grandest of all.

And yet, the Clinton administration has been having trouble finding someone to fill it. In fact, the palatial residence has been vacant since December 1996, when Clinton pal James Cheek left. Since then, the administration has drifted from one possible candidate to another, but has yet to nominate anyone.

President Clinton wanted to send either former Houston mayor Bob Lanier or Nevada Gov. Robert J. Miller (D). Lanier didn't want to go to Argentina and Miller, after seeing how many people came out urging him to stay in Nevada, also turned it down.

So then the attention shifted to New York, where Iranian American businessman Hassan Nemazee was leading the pack for a while. Then attention drifted to Marife Hernandez, a longtime party contributor and activist in New York City. Now there's talk of sending Democratic contributor Jeffrey Hirschberg, who's vice chairman of government relations for the Washington office of mega-accounting firm Ernst & Young.

But even if a tentative pick is made soon, by the time background checks are completed and the papers get to the Senate, there probably will be no time for confirmation this year. So the residence will be vacant until early 1999 at the earliest, a total of more than two years.

A little further north, veteran diplomat Melvyn Levitsky, ambassador to Brazil and former assistant secretary of state for drug enforcement, is calling it quits after 35 years in the Foreign Service to be a professor of international relations at Syracuse University. Levitsky is taking off in a couple of weeks and there's no successor in sight.

At least there was a selection made last summer of Houston lawyer and contributor H. Lee Godfrey for the post, but Godfrey, apparently frustrated by the system, withdrew his name from consideration before it got to the Senate. The State Department is pushing to have a career person take the job -- which would most likely mean the post could be filled faster -- but so far no one has been selected. At this point, unless someone incredibly wired to the Republicans is nominated, look for Brazil also to be empty well into 1999.

It can't get more pathetic than this.

The Washington Post, July 06, 1998

Latin Leaver

Meanwhile, folks south of the border, including our own diplomats, are upset that the White House Office of the Special Envoy for the Americas is closing up as Thomas F. "Mack" McLarty III heads home to Arkansas and his staff scatters. The Latin Americans had gotten a bit having someone they could call who was so close to the president.

Now, as one White House aide put it, "they'll think we don't care about them anymore."

How could they possibly think that?

The Last 2 Reasons (and a Bonus)

And now, more from outgoing White House deputy chief of staff Sylvia Mathews's list of "Top Ten Reasons why the White House is a better place to work than OMB," the Office of Management and Budget, where she's to be deputy director.

We had eight "reasons" in Wednesday's column and asked readers if anyone knew the other two. A caller from China gave us one: "You have the privilege of hearing [counselor] Rahm [Emanuel] say 10 times a day: 'Well, Elena better come up with some policy!' " [That's Elena Kagan, deputy director of the Domestic Policy Council and regarded by some as the smartest person in the White House.]

The 10th reason, supplied by another Loop fan -- who helpfully included a copy of Mathews's handwritten list -- was: "You don't get lured into tedious jobs with no responsibility and great titles like 'counselor to the president.' "

Mathews's exact line, paraphrased in The Loop on Wednesday, about Chief of Staff Erskine B. Bowles's thinning hair was: "If Erskine keeps up his treatments, he will have as much hair as Jack [Jacob J. Lew, the OMB director, who's got plenty of hair]."

But perhaps the best "reason" of all, one that Mathews didn't use, was originally No. 4: "Never a waiting line at the women's bathroom in the West Wing." The reason being there are so few women working in the top jobs in the White House.

According to Plan

So there was Vice President Gore last week down in Florida surveying the damage caused by out-of-control fires. Let's see, now. Would this be in accordance with the U.S. Forest Service "media plan" for July 1 to Sept. 1 to highlight efforts at "wildfire suppression [and] water quality" and "tie with the vice president's Clean Water Initiative"?

Poll Watcher

Stephen Gaskill, Tipper Gore's '92 campaign press secretary in Little Rock and more recently communications director of the Occupational Safety and Health Administration, is taking off today to be New York senatorial candidate Geraldine A. Ferraro's campaign communications director and spokesman in the

The Washington Post, July 06, 1998

primary brawl and then, if the polls prove out, to take on Sen. Alfonse M. D'Amato (R).

On the Hill, Eric Scheinkopf, who had been legislative assistant to Sen. Olympia J. Snowe (R-Maine) and before that for Sen. Daniel K. Inouye (D-Hawaii), has become public policy coordinator at the Population Institute.

LANGUAGE: ENGLISH

LOAD-DATE: July 06, 1998

LEVEL 1 - 30 OF 166 STORIES

Copyright 1998 Chicago Sun-Times, Inc.
Chicago Sun-Times

June 24, 1998, WEDNESDAY, Late Sports Final Edition

SECTION: NWS; NEWS ANALYSIS; Pg. 6

LENGTH: 244 words

HEADLINE: White House maintains strong Chicago ties

BYLINE: Lynn Sweet

DATELINE: WASHINGTON

BODY:

Throughout President Clinton's first and second terms, the Chicago area has fared well when it comes to high-level appointments in the White House, even with some turnover.

Senior presidential adviser Rahm Emanuel, a Wilmette native, is one of about seven people remaining in the White House who have been working steadily for Clinton since the first presidential campaign in Little Rock, Ark. Patty Solis-Doyle, the scheduling director for first lady Hillary Rodham Clinton (and sister of 25th Ward Ald. Danny Solis), also has been with Clinton since his first-term campaign.

Deputy Chief of Staff John Podesta grew up near Lawrence and Elston. Communications adviser Sidney Blumenthal lived in West Rogers Park. Incoming public liaison director Minyon Moore is from 78th and Honore.

Todd Stern, assistant to the president for special projects, grew up in Glencoe; his family owns a piece of the Chicago Bulls.

Chicagoans figure heavily in domestic policy development. Mary Smith, associate director of policy planning, graduated from the University of Chicago Law School, where Elena Kagan, deputy director of the Domestic Policy Council, taught before going to the White House. Jose Cerda, special assistant to the president for domestic policy, grew up in Back of the Yards.

Chicago Sun-Times, June 24, 1998

Thomas Freedman, senior director for policy planning, also is from the city. Northwestern University economist Rebecca Blank is a member of the Council of Economic Advisors.

GRAPHIC: See also related story.

LANGUAGE: English

LOAD-DATE: July 1, 1998

LEVEL 1 - 31 OF 166 STORIES

Copyright 1998 The Denver Post Corporation
The Denver Post

June 23, 1998 Tuesday 2D EDITION

SECTION: A SECTION; Pg. A-02

LENGTH: 443 words

HEADLINE: U.S. to survey teen smokers

BYLINE: By Jodi Enda, Knight Ridder News Service

BODY:

WASHINGTON - President Clinton on Monday struck back at tobacco companies for their role in killing anti-smoking legislation by announcing that his administration would survey teenagers on which brands of cigarettes they prefer and why.

The announcement signaled Clinton's resolve to forge ahead in his fight against tobacco companies and the members of Congress who continue to side with them. In stern language, the president portrayed himself as being firmly on the side of families as he took aim at companies that he said target the nation's children.

A survey of teens smoking habits, he said, would demonstrate clearly which advertising strategies worked to entice children and which tobacco companies should be held up to public scrutiny.

"Parents, quite simply, have a right to know," Clinton said at the White House. "Once this information becomes public, companies will then no longer be able to evade accountability, and neither will Congress. From now on, the new data will help to hold tobacco companies accountable for targeting children."

The tobacco industry dismissed the plan as a political ploy that would do nothing to further the fight against teen smoking.

Clinton directed the Department of Health and Human Services to add questions about smoking to an annual drug-abuse survey that it has conducted since the 1970s.

While he held out hope Congress still would pass comprehensive tobacco-control legislation, Clinton said the survey would be useful in any

The Denver Post, June 23, 1998 Tuesday

event, if only as a tool to single out tobacco companies that appeal to teenagers.

A survey showing that teenagers overwhelmingly favor particular brands of cigarettes "will clearly demonstrate that there is something in the nature of the advertising that has something to do with this," Clinton said.

"There's a huge value in just knowing who are the bad apples and holding them to account in the court of public opinion," added Elena Kagan, deputy director of Clinton's Domestic Policy Council.

Tobacco-industry spokesman Lance Morgan responded by saying that "the president's plan contributes to the blame game but not to the effort to reduce youth smoking. ... I don't think this takes us very far. What brands youth smoke is not as important as why and what can and should be done about it."

Speaking five days after tobacco-control legislation died in the Senate, Clinton said he would continue to push for its passage and to fight any attempt to enact a "watered-down bill written by the tobacco lobby." The bill backed by Clinton died Wednesday after Senate sponsors fell short of the 60 necessary to put the measure before the chamber for passage.

LOAD-DATE: June 23, 1998

LEVEL 1 - 32 OF 166 STORIES

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The Gazette (Montreal)

June 23, 1998, Tuesday, FINAL EDITION

SECTION: NEWS; Pg. C8

LENGTH: 699 words

HEADLINE: Clinton takes new swipe at tobacco: Youth to be surveyed on cigarette brands

BYLINE: JODI ENDA; KNIGHT RIDDER NEWSPAPERS

DATELINE: WASHINGTON

BODY:

President Bill Clinton yesterday struck back at tobacco companies for their role in killing anti-smoking legislation by announcing that his administration will survey teenagers on which brands of cigarettes they prefer and why.

The announcement signaled Clinton's resolve to forge ahead in his fight against tobacco companies and the members of Congress who continue to side with them. In stern language, the president portrayed himself as being firmly on the side of families as he took aim at companies that he said target the nation's children.

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The Gazette (Montreal), June 23, 1998

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The tobacco industry dismissed the plan as a political ploy that would do nothing to further the fight against teen smoking.

A Useful Tool

Clinton directed the Department of Health and Human Services to add questions about smoking to an annual drug-abuse survey that it has conducted since the 1970s.

While he held out hope Congress still will pass comprehensive tobacco-control legislation, Clinton said the survey would be useful in any event, if only as a tool to single out tobacco companies that appeal to teenagers.

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Politics Over People

Speaking five days after tobacco-control legislation died in the Senate, Clinton said he would continue to push for its passage and to fight any attempt to enact a "watered-down bill written by the tobacco lobby." The bill backed by Clinton died last Wednesday after Senate sponsors fell short of the 60 necessary to put the measure before the chamber for passage.

"A majority of the Senate now stands ready to join us, but last week the Republican leadership placed partisan politics and tobacco companies above our families," Clinton said yesterday. "Their vote was not just pro-tobacco lobby, it was anti-family."

Later, in Nashville for a family conference sponsored by Vice-President Al Gore, Clinton added: "It was a brazen act of putting politics over people and partisanship over progress."

The bill died after the tobacco industry spent an estimated \$ 40 million on an advertising campaign that depicted it as a massive tax hike that would benefit lawyers. The bill, which would have raised the price of a pack of cigarettes by \$ 1.10 over five years, was expected to cost the industry \$ 516 billion. The bill also carried hefty financial penalties for companies that

The Gazette (Montreal), June 23, 1998

failed to meet set reductions in teen smoking.

Although House Speaker Newt Gingrich has said he will put forth a new bill, White House officials say they expect it to be too weak to accomplish their major goal - a significant reduction in youth smoking.

Kagan said that the White House intends to continue to press for three senators to change their votes, giving sponsors of the existing bill the support necessary to end debate and put it to a vote. "We just need to keep the pressure on," she said. "We have three votes to change in the Senate and we're going to try to change those votes and make three senators realize that they made a fundamental mistake."

LANGUAGE: ENGLISH

LOAD-DATE: June 24, 1998

LEVEL 1 - 33 OF 166 STORIES

Copyright 1998 The Pantagraph
THE PANTAGRAPH (Bloomington, IL.)

June 23, 1998, Tuesday

SECTION: News; Pg. A1

LENGTH: 667 words

HEADLINE: Clinton planning survey of teen smoking

BYLINE: Knight Ridder Newspapers

DATELINE: WASHINGTON, D.C.

BODY:

WASHINGTON, D.C. - President Clinton on Monday struck back at tobacco companies for their role in killing anti-smoking legislation by announcing that his administration would survey teen-agers on which brands of cigarettes they prefer and why.

The announcement signaled Clinton's resolve to forge ahead in his fight against tobacco companies and the members of Congress who continue to side with them. In stern language, the president portrayed himself as being firmly on the side of families as he took aim at companies that he said target the nation's children.

A survey of teens' smoking habits, he said, would demonstrate clearly which advertising strategies worked to entice children and which tobacco companies should be held up to public scrutiny.

"Parents, quite simply, have a right to know," Clinton said at the White House. "Once this information becomes public, companies will then no longer be able to evade accountability, and neither will Congress. From now on, the new

THE PANTAGRAPH (Bloomington, IL.) June 23, 1998, Tuesday

data will help to hold tobacco companies accountable for targeting children."

The tobacco industry dismissed the plan as a political ploy that would do nothing to further the fight against teen smoking.

Clinton directed the Department of Health and Human Services to add questions about smoking to an annual drug-abuse survey that it has conducted since the 1970s.

While he held out hope Congress still would pass comprehensive tobacco-control legislation, Clinton said the survey would be useful in any event, if only as a tool to single out tobacco companies that appeal to teen-agers.

A survey that shows that teen-agers overwhelmingly favor particular brands of cigarettes "will clearly demonstrate that there is something in the nature of the advertising that has something to do with this," Clinton said.

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(EDITORS: BEGIN OPTIONAL TRIM)

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(END OPTIONAL TRIM)

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THE PANTAGRAPH (Bloomington, IL.) June 23, 1998, Tuesday

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LANGUAGE: ENGLISH

LOAD-DATE: August 14, 1998

LEVEL 1 - 34 OF 166 STORIES

Copyright 1998 The Hearst Corporation
The Times Union (Albany, NY)

June 23, 1998, Tuesday, THREE STAR EDITION

SECTION: MAIN, Pg. A3

LENGTH: 563 words

HEADLINE: Clinton seeks tobacco survey

BYLINE: JODI ENDA; Knight Ridder

HIGHLIGHT:

President's plan to poll teens a response to endangered anti-smoking legislation

BODY:

WASHINGTON -- President Clinton on Monday struck back at tobacco companies for their role in weakening anti-smoking legislation by announcing that his administration would survey teenagers on which brands of cigarettes they prefer and why.

The announcement signaled Clinton's resolve to forge ahead in his fight against tobacco companies and the members of Congress who continue to side with them. In stern language, the President portrayed himself as being firmly on the side of families as he took aim at companies that he said target the nation's children.

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The Times Union, June 23, 1998

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LOAD-DATE: June 24, 1998

LEVEL 1 - 35 OF 166 STORIES

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May 27, 1998 9:59 Eastern Time

SECTION: NATIONAL DESK

LENGTH: 1660 words

U.S. Newswire, May 27, 1998

HEADLINE: Transcript of White House Briefing by Shalala, Segal, Kagan (1/2)

CONTACT: White House Press Office, 202-456-2100

DATELINE: WASHINGTON, May 27

BODY:

Following is a transcript of remarks by Secretary of Health and Human Services Donna Shalala, CEO and President of the Welfare-to-Work Partnership Eli Segal, and Deputy Assistant to the President for Domestic Policy Elena Kagan, in a White House press briefing today (1 of 2):

The Briefing Room

2:10 P.M. EDT

MR. TOIV: Good afternoon. Here to brief today on this wonderful success story are Secretary of Health and Human Services Donna Shalala and Eli Segal, who is president and CEO of the Welfare to Work Partnership. And they will just take your questions.

SECRETARY SHALALA: Welfare works, Sam.

Q I know that Mr. Morris, Dick Morris, told the President he ought to sign that bill, turns out to be right. Is that your view?

SECRETARY SHALALA: The President made his decision. He believed that welfare could work in this country, and it's working.

Q You were against it, weren't you, in the good old days?

SECRETARY SHALALA: I think the President and I agreed on what we needed for welfare reform and we got it. We restored a number of the cuts that were made in that welfare bill the President said he wanted after the election. But the most important message today that millions of people are moving off welfare. We have the lowest rates we've had since 1969. And the message from the private sector today is that people not only are taking the jobs, but they're staying in the jobs at higher rates than other employees coming in.

And if you'll remember, at one of the early briefings that I did, I said the test of welfare reform is not whether people leave the welfare rolls, but whether they stay in the jobs. The test is retention. The story today that Eli and his colleagues in the private sector told is a story of retention, of staying in the jobs.

Q Let me try a slightly different take on that question. There were a lot of people within your own agency and certainly within the broader community of social activists who had deep reservation about the welfare reform bill. Does he talk with them now and how much skepticism does there remain? Or do they look at this program and do you sense a reappraising?

SECRETARY SHALALA: As Mary Jo Baine was leaving the Department she said, prove me wrong. We're in the process of doing that.

Q Mr. Segal, if I could just ask about the economy. Boon times, low unemployment, people wanting workers. So when it finds that the business cycle has not been repealed and we go into a recession, what happens to all these people?

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MR. SEGAL: Sam, essentially we believe in the United States we have two unemployment systems: one, the chronologically long-term unemployed -- those are the people we say are in the welfare system; the other unemployment system, the people like us, our families, our friends, who are down on their luck, the company closes, the industry changes a little bit, lose their jobs -- they go into the unemployment compensation.

It's no question but that there are a lot of people who are the last hired/first fired, are going to lose their jobs if and when the economy turns south. But they would have been involved in productive labor. It's the reason why we say at the Welfare to Work Partnership every day, we're in a dash -- not in a marathon -- to move as many people as quickly as we can into work, into productive work. If in fact the economy turns bad, they and many other people may well lose their jobs.

One of the other messages of today -- but in short, they may lose their jobs, but they would have been involved in work and they're much more likely to get back up on their feet having an attractive track record in the past.

Q Is there still a safety net if they lose their job?

MR. SEGAL: That's something that I think at some point we're going to need to deal with. At least at this point our responsibility is to move people to work. There will be millions and millions of new people -- there are already hundreds of thousands of people working now who were not working only a year or two ago. And I think if the economy stays strong, we will continue to find jobs, and many people making it into the workplace.

SECRETARY SHALALA: There are actually two experiences that people are having that will be very important no matter what happens to the economy. The first one is they got a job and they kept it for a substantial period of time. The second is that they went through a training process. And that's what's going to keep our economy alive -- the training experience, understanding that to take jobs you have to go through a training experience. And it's companies organizing to move people into different slots as they have needs. And the training may turn out to be as significant for the flexibility of this group of people as actually getting in the job and retaining the job.

Q How do you explain the higher retention rates? Is it because of training programs? Is it because these employees have fewer other options available?

SECRETARY SHALALA: It may be a small part of the latter that you mentioned. But I think the first part is that companies are beginning to learn what it takes to retain people. Many of the companies talked to the President today about mentoring as part -- getting people ready for the job, putting them through internships or through training, but then assigning someone that would just be an ear for them, that would help them make the transition into work.

In addition to that, remember that we've also included child care. There is no children's health insurance available. The earned income tax credit becomes a powerful incentive, because work now pays better than welfare did in the past. So the combination of supports -- but the more personalized the system is, the higher the retention. And I think that's what the private sector reported today.

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Even in my own department, where we've hired 200 welfare recipients, we have substantially changed the employees assistance program that is the support system for all entry, lower-income workers. All of our new workers now have one-stop shopping, a much more supportive human resource operation.

Q You mentioned you've hired 200. Can you update us on how the effort by the federal government as a whole now stands, how many have been hired at the White House also?

SECRETARY SHALALA: Do you want to do that?

MS. KAGAN: We've hired 4,800 as a whole in the federal government -- that's 48 percent of the goal that we set for ourselves of 10,000 by the year 2000. Different departments have different records. Different departments made different pledges, depending upon the character of their work force.

SECRETARY SHALALA: My Department, for instance, has hired two-thirds of our goal already, so we're going to exceed our goal substantially.

MS. KAGAN: Many departments are finding that there are very few departments that are running back of their goal.

Q What about the White House?

MS. KAGAN: The White House has met its goal, exceeded its goal. It had a goal of six, which given the White House's small staff was approximately equivalent to many other agencies' goals. And we have hired seven.

Q Doing what kind of tasks? House people are doing, but ours are mostly entry-level jobs, though a couple of people have gotten promoted pretty quickly into the system as they've learned the job.

MR. SEGAL: You asked about retention. The businesses are saying there are about four reasons they almost all give together.

First, they talk about mentoring or some kind of on-site coaching. Second, they talk about public/private partnerships, the need to do it not by themselves -- something that represents a dramatic change from where they were a year ago. They need help. They need help from government; they need help from nonprofit organizations. The third thing they talk about all the time is the nature of the benefit package they're offering and they have to make it a good benefit package. And fourth, probably most surprising, no compromise with quality. They require and expect those coming off the welfare rolls to be as good employees as any other entry-level employee.

One other thing that was interesting today. You probably have a stereotype of what a welfare to work person is. One of the things we're learning over and over again is these are not always only entry-level people. We're finding in some companies people are moving from welfare to jobs, white-collar jobs sometimes paying as much as \$30,000. And we're finding an incredibly varied experience based simply on the commitment of the company to do things the way they knew best. They know how to solve problems in the shop floor; they know how to solve problems in the office; and now they're knowing how to solve this problem. They're all figuring out a different way to do it.

SECRETARY SHALALA: We also have new statistics on the percentage of people that are leaving welfare who are going into the work force. And the new

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analysis of the Census Bureau data between 1976 and '77 indicates that 20 percent more actually are moving to work. And remember, people always moved off welfare -- some of them got married, some of them moved back in with their families. But what we're finding is a higher and higher percentage of people are going into jobs, number one. And number two, this discussion today, a higher percentage of them are staying in their jobs.

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LOAD-DATE: May 27, 1998

LEVEL 1 - 36 OF 166 STORIES

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May 27, 1998 9:59 Eastern Time

SECTION: NATIONAL DESK

LENGTH: 1169 words

HEADLINE: Transcript of White House Briefing by Shalala, Segal, Kagan (2/2)

CONTACT: White House Press Office, 202-456-2100

DATELINE: WASHINGTON, May 27

BODY:

Following is a transcript of remarks by Secretary of Health and Human Services Donna Shalala, CEO and President of the Welfare-to-Work Partnership Eli Segal, and Deputy Assistant to the President for Domestic Policy Elena Kagan, in a White House press briefing today (2 of 2):

Q Is there any sense that these companies sort of picked the low- hanging fruit and it's getting harder and harder to find qualified welfare recipients to

--

SECRETARY SHALALA: Why don't you take a shot at it. I actually think the answer is no.

MR. SEGAL: I think the answer is mixed.

SECRETARY SHALALA: Good controversy.

MR. SEGAL: Some companies, like Cessna, ask no questions about your background -- you want to come to work there, they'll invest in making this work for you. For the most part companies are looking at the most job-ready person first and there's nothing wrong with it. We're happy to debate creaming or skimming, whatever else we call it. Companies need to get their feet on the ground on this, like any other practical problem, let's have some successes.

I think with the passage of time that they've learned a lot more, they're going to go deeper and deeper into the welfare pool with much, much more

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success because they've seen it work just the way businesses have always done. They've dealt with reality and they've made success and they will go on from there.

So for the most part, I think we are finding the most job-ready people, people that are ready to work today, and if not today, tomorrow. But I do think you're going to see other companies, some of these same companies step it up going forward.

SECRETARY SHALALA: The reason that I was less hesitant about that is because I think the states have sorted out their welfare rolls. Those that were eligible for SSI that were really, truly disabled have been moved to those programs, and I think that the group that's left on welfare -- remember, we're talking about a new group going into welfare over the last year or so in which a larger percentage are going into jobs. So it's harder to make that old argument that we creamed during the first couple of years. So I would suggest to you that the companies are more sophisticated, as Eli has indicated. The government is more sophisticated about support systems. That the states are getting their act together on getting their child care out. We're giving them lots of technical assistance. Children's health insurance will certainly help. The Earned Income Tax Credit will have a great effect.

But people themselves, in their neighborhoods -- the difference between a demonstration program and having everyone in your community having to think now about getting into the work force is that the culture is beginning to change both in the welfare office and in the communities to move more people out and to find appropriate opportunities for people.

MS. KAGAN: If I could just add one thing to that on behalf of Secretary Herman, who isn't here, because the \$3 billion Welfare to Work program is really meant to be geared towards exactly those hardest to employ people that you're talking about. I think the President understood that there was a need for additional funds to go towards those people to make sure that those hardest to employ people also got an entry into the work force. And that the grants that Secretary Herman gave out in the first part of the 25 percent of the program that is in competitive grants, towards agencies mostly community based, that really works with those very difficult to employ people and makes sure that they also get the leg up that they need.

SECRETARY SHALALA: I listened very closely to the private sector leaders today and if they have in their heads from now on that these are better employees, that they're more likely to keep them, which saves them money -- it's always cheaper to keep someone than to go out and hire -- and that as some of them describe it, they're more enthusiastic about working in those places, less cynical.

If that's the attitude they're going into this with, we couldn't be in a better situation at this point in time. And I can't emphasize enough how significant the retention report is today and the fact that more people are going into the job force. Because that was really our test. Our test was never just moving people from welfare to work; it was whether they were going to stick with it in the work force. And we always talked about the first or the second job, because that's what the literature previously told us.

But if there is retention going on now and if the private sector is

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beginning to see that as significant and economically important to them, then what's going on now is very significant.

Any other questions?

Q We at ABC think this is very important and I will personally brief NBC and CBS and CNN -- (laughter).

MR. SEGAL: Can I make a comment on that? You know, I was last here the day AmeriCorps became the law of the land; there was a similar number of people here. I actually want to say that, at the risk of sounding like a cheerleader or a boosterism, this is a big deal. The policy issues were pretty much decided in August '96. This was turned over to the states, to the people, to the private sector. And it is extraordinary to think that a year ago this was just an idea. Today we have 5,000 companies -- it's not easy to get 5,000 anythings to do something together -- all of whom with a common mission: they all want to hire welfare recipients.

Now, that might not sound very big from a policy perspective, but in terms of changing America, in terms of changing the hiring practice of America, the fact that these companies have put themselves on the line -- some for clearly reasons of charity and being good citizens, but mostly because it's a smart solution for business. I think it is a big deal, and I think we're going to continue to see next year -- 135,000 this year, the President challenged them next year to do twice as many next year. When they do this next year, when we do this next year, and you're going to start talking about the people who move from welfare to work, and you're going to compare it with the size of the welfare rolls a year from now, you're going to see that quietly, in 1996, began a process that ended welfare as we know it.

Now, whether we want to give credit or not give credit, not being the point right now, I think it's a big deal. And whether people --

SECRETARY SHALALA: And the important thing of Eli's companies is three-fourths are small companies, which is where the growth is in the system.

THE PRESS: Thank you.

END 2:24 P.M. EDT

LANGUAGE: ENGLISH

LOAD-DATE: May 27, 1998

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MAY 27, 1998, WEDNESDAY

SECTION: WHITE HOUSE BRIEFING

LENGTH: 2703 words

Federal News Service, MAY 27, 1998

HEADLINE: SPECIAL WHITE HOUSE BRIEFING

TOPIC: WELFARE-TO-WORK PARTNERSHIP

BRIEFERS:

DONNA SHALALA,
SECRETARY OF HEALTH AND HUMAN SERVICES
ELI SEGAL,
PRESIDENT AND CEO,
WELFARE-TO-WORK PARTNERSHIP
ELENA KAGAN,
DEPUTY ASSISTANT TO THE PRESIDENT,
DOMESTIC POLICY COUNCIL
BARRY TOIV,
DEPUTY ASSISTANT TO THE PRESIDENT,
DEPUTY PRESS SECRETARY

BODY:

Q I never miss a Shalala briefing -- never.

SEC. SHALALA: Thank you, Sam.

Q He's on the record --

Q (Chuckles.)

(Cross talk.)

MR. TOIV: Good afternoon. Good afternoon. Here to brief today on this wonderful success story are Secretary of Health and Human Services Donna Shalala and Eli Segal, who is president and CEO of the Welfare-to-Work Partnership. And they're -- they'll just take your questions.

SEC. SHALALA: Welfare works, Sam.

Q Well, I know that Mr. Morris, Dick Morris, told the president he ought to sign that bill. Turns out to be right. Is that your view?

SEC. SHALALA: Well, the president made his decision. He believed that welfare could work in this country, and it's working.

Q If I could follow up --

Q You were against it, weren't you, (though ?), in the good old days?

SEC. SHALALA: I think the president and I agreed on the -- on what we needed for welfare reform, and we got it. We restored a number of the cuts that were made in that welfare bill the president said he wanted after the election.

But the most important message today is that millions of people are moving off welfare. We have the lowest rates we've had since 1969. And the message from the private sector today is that people not only are taking the jobs, but they're staying in the jobs at higher rates than other employees coming in.

And if you'll remember that one of the early briefings that I did, I said the test of welfare reform is not whether people leave the welfare reforms -- leave the welfare rolls, but whether they stay in the jobs. The test is retention.

The story today that Eli and his colleagues in the private sector told is a story of retention, of staying in the jobs.

Q Can I just try a slightly different take on that question? There was a lot of people within your own agency -- and certainly within the broader community of social activists -- who had deep reservations about welfare -- the welfare reform bill. As you talk with them now, how much skepticism does there remain? Or do they look at this program and do you sense a reappraisal?

SEC. SHALALA: As Mary Jo Bane was leaving the department, she said, "Prove me wrong." We're in the process of doing that.

MR. SEGAL: I have a --

Q Mr. Segal, if I could just ask about the economy -- boom times, low unemployment, people wanting workers.

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So, when it finds that the business cycle has not been repealed, and we go into a recession, what happens to all these people?

MR. SEGAL: Sam, essentially we believe that in the United States we have two unemployment systems. One, the chronologically long-term unemployed; those are the people we say are in the welfare system. The other unemployment system are people like us, our families, our friends, who when they're down on their luck, a company closes, the industry changes a little bit, they lose their jobs. They go onto the unemployment compensation. There's no question but that there are a lot of people who are the last hired, first fired, are going to lose their jobs if and when the economy turns sour. But they would have been involved in productive labor. It's the reason why we say at the Welfare-to-Work Partnership every day we're in a dash, not in a marathon, to ve as many people as quickly as we can into work, into productive work. If, in fact, the economy turns bad, they and many other people may well lose their jobs.

One of the other messages of today -- but in short, they may lose their jobs, but they would have been involved in work, and they're much more likely to get back up on their feet having had a track record in the past.

Q Is there still a safety net if they lose their job?

MR. SEGAL: That's something that I think at some point we're going to need to deal with. At least at this point, our responsibility is to move people to work. There will be millions and millions of new people, there are already hundreds of thousands of people working now who were not working only a year or two ago. And I think if the economy stays strong, we will continue to find jobs and many people making it into the workplace.

SEC. SHALALA: There are actually two experiences that people are having that will be very important no matter what happens to the economy. The first one is they got a job and they kept it for a substantial period of time. The second is that they went through a training process. And that's what's going to keep our economy alive, the training experience, understanding that to take jobs, you have to go through a training experience. And it's companies organizing to move people into different slots as they have needs. And the training may turn out to be as significant for the flexibility of this group of people as actually getting in the job and retaining the job.

Yes?

Q How do you explain the higher retention rates? Is it because of training programs or is it because these employees have fewer other options available to them?

SEC. SHALALA: It may be a small part of the latter that you mentioned, but I think the first part is that companies are beginning to learn what it takes to retain people. Many of the companies talked to the president today about mentoring as part -- getting people ready for the job, putting them through internships or through training, but then assigning someone that would just be an ear for them, that would help them make the transition into work. In addition to that, remember that we've also included child care.

There's now children's health insurance available. The earned income tax credit becomes a powerful incentive because work now pays better than welfare did in the past. So the combination of support -- but the more personalized the system is, the higher the retention. And I think that's what the private sector reported today.

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Q You mentioned you hired 200. Can you update us on how the federal government as a whole now stands, how many have been hired at the White House, also?

SEC. SHALALA: Elena, do you want to do that?

MS. KAGAN: We've hired 4,800 as a whole in the federal government. That's 48 percent of the goal that we set for ourselves of 10,000 by the year 2,000. Different departments have different records. Different departments made different pledges, depending upon the character of their work force.

SEN. SHALALA: My department, for instance, has hired two-thirds of our goal already. So we're going to exceed our goal substantially.

MS. KAGAN: Many departments are finding that. There are very few departments that are running back of their goal. And --

Q How about the White House?

MS. KAGAN: The White House has met its goal, exceeded its goal. It had a goal of six, which, given the White House's small staff, was approximately equivalent to many other agencies' goal. And we acquired seven.

Q Doing what kind of tasks?

SEN. SHALALA: Well, I don't know what the White House people are doing, but ours are mostly entry level jobs, though a couple people have gotten promoted pretty quickly into the system as they've learned the job.

MR. SEGAL: Could I --

Q (Off mike)?

MR. SEGAL: You asked about retention. There are essentially -- the businesses are saying there are about four reasons that almost all give together. First they talk about mentoring or some kind of on-site coaching. Second, they talk about public-private partnerships. They need to do it not by themselves, something that represents a dramatic change from where they were a year ago. They need help. They need help from government, they need help from nonprofit organizations. The third thing they talk about all the time is the nature of the benefit package they're offering, and they have to make it a good benefit package. And fourth, probably most surprising, no compromise with quality. They require and expect those coming off the welfare rolls to be as good employees as any other entry level employee.

One other thing that was interesting today. You would probably have our stereotypes of what a welfare to work person is. One of the things we're learning over and over again is these are not always only entry level people.

We're finding in some companies, people are moving from welfare to white-collar jobs sometimes paying as much as \$30,000. We're finding an incredible varied experience based simply on a commitment of the company to do things the way they knew best. They know how to solve problems on the shop floor, they know how to solve problems in the office, and now they're knowing how to solve this problem. They're all figuring out a different way to do it.

SEC. SHALALA: We also have new statistics on the percentage of people that are leaving welfare who are going into the work force. And the new analysis of the Census Bureau data, between 1976 (sic) and '77 (sic), indicates that 20 percent more actually are moving to work. And remember, people always moved off welfare; some of them got married, some of them moved back in with their families. But what we're finding is a higher and higher percentage of people are going into jobs, number one; and number two, this discussion today, a higher percentage of them are staying in their jobs.

Q Is there any sense that these companies are sort of picking the low-hanging fruit, and it's getting harder and harder to find qualified welfare recipients to take these jobs. (Laughter.)

MR. SEGAL: I am happy to --

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SEC. SHALALA: Yeah. Yeah. Why don't you take a shot at it, and I actually think the answer is no.

MR. SEGAL: I think the answer is mixed. I think some companies --

SEC. SHALALA: A good controversy.

MR. SEGAL: Some companies, like Cessna, asks no questions about your background. You want to come to work there; they'll invest in making this work for you. For the most part, companies are looking at the most job-ready person first, and there is nothing wrong with it. We are happy to debate creaming or skimming or whatever else we call it. Companies need to get their feet on the ground in this. "Like any other practical problem, let's have some successes." I think with the passage of time, as they've learned a lot more, they are going to go deeper and deeper into the welfare pool with much, much more success because they've seen it work. Just the way businesses have always done, they've dealt with reality, and they've made success. And they will go on from there. So for the most part, I think we are finding the most job-ready people are people ready to work today, and if not today, tomorrow. But I do think you are going to see other companies -- some of these same companies step it up going forward.

SEC. SHALALA: The reason that I was less hesitant about that is because I think the states have sorted out their welfare rolls. Those that were eligible for SSI that were really truly disabled, have been moved to those programs. And I think that the group that's left on welfare -- remember, we're talking about a new group going into welfare, over the last year of so, in which a larger percentage are going into jobs. So it's harder to make that old argument that we "creamed" during the first couple of years.

So I would suggest to you that the companies are more sophisticated, as Eli has indicated. The government's more sophisticated about support systems; that the states are getting their act together on getting their child care out.

We're giving them lots of technical assistance. Children's health insurance will certainly help. The Earned Income Tax Credit will have a great effect. But people themselves, in their neighborhoods -- the difference between a demonstration program and having everyone in your community having to think now about getting into the work force is that the culture is beginning to change, both in the welfare office and in the communities, to move more people out and to find appropriate opportunities for people.

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SEC. SHALALA: I listened very closely to the private-sector leaders today, and if they have in their heads from now on that these are better employees, that they're more likely to keep them, which saves them money -- it's always cheaper to keep someone than to go out and hire -- and that, as some of them describe it, they're more enthusiastic about working in those places, less cynical -- if that's the attitude they're going into this with, we couldn't be in a better situation at this point in time.

And I can't emphasize enough how significant the retention report is today and the fact that more people are going into the job force, because that was

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really our test. Our test was never just moving people from welfare to work; it was whether they were going to stick with it in the work force. And we always talked about the first or the second job, because that's what the literature previously told us. But if there is retention going on now, and if the private sector is beginning to see that as significant and economically important to them, then what's going on now is very significant.

Any other questions? All right. Eli? Thank you. Q We at ABC think this is very important, and I will personally brief NBC and CBS and CNN -- (inaudible). (Laughter.)

Q The AP?

Q AP also.

MR. SEGAL: I'd like to make a comment on that. You know, I was last here the day AmeriCorps became the law of the land -- there was a similar number of people here. I actually want to say that -- at the risk of sounding like a cheerleader --

SEC. SHALALA: Oh, go ahead.

MR. SEGAL: -- or a boosterism, this is a big deal. The policy issues were pretty much decided in August '96. This was all turned over to the states, to the people, to the private sector. And it is extraordinary to think that a year ago, this was just an idea. Today we have 5,000 companies -- it's not easy to get 5,000 anythings to do something together -- all of whom with a common mission; they all want to hire welfare recipients.

Now, that might not be -- sound very big from a policy perspective, but in terms of changing America, in terms of kind of changing the hiring practices of America, the fact that these companies have put themselves on the line, some for clearly reasons of charity and being good citizens, but mostly because it's a smart solution for business, I think is a big deal.

And I think we're going to continue to see next year -- 135,000 this year. The president challenged them next year to do twice as many next year. When they do this next year -- when we do this next year -- and you're going to start talking about the people who moved from welfare to work and you're going to compare it with the size of the welfare rolls a year from now, you're going to see that quietly in 1996 began a process that ended welfare as we know it. Now, whether we want to give credit or not give credit, not being the point right now, I think it's a big deal. And whether people are here or not to do it --

SEC. SHALALA: And Eli -- the important thing of Eli's companies is three-fourths are small companies, which is where the growth is in the system.

Q Thank you.

END

LANGUAGE: ENGLISH

LOAD-DATE: May 28, 1998

LEVEL 1 - 38 OF 166 STORIES

Public Papers of the Presidents

May 26, 1998 / May 29, 1998

CITE: 34 Weekly Comp. Pres. Doc. 1001

LENGTH: 218 words

Public Papers of the Presidents

HEADLINE: Checklist of White House Press Releases

BODY:

The following list contains releases of the Office of the Press Secretary that are neither printed as items nor covered by entries in the Digest of Other White House Announcements.

Released May 26

Transcript of a press briefing by Press Secretary Mike McCurry

Transcript of a press briefing by National Economic Council Director Gene Sperling, Council of Economic Advisers Chair Janet Yellen, and Office of Management and Budget Acting Director Jack Lew on fiscal year 1998 and future budget surpluses

Released May 27

Transcript of a press briefing by Press Secretary Mike McCurry

Transcript of a press briefing by Health and Human Services Secretary Donna Shalala, Welfare to Work Partnership President Eli Segal, and Deputy Assistant to the President for Domestic Policy Elena Kagan on the Welfare to Work Partnership

Statement by the Press Secretary: Elections in Hong Kong

Statement by the Press Secretary: Official Working Visit by Bahraini Amir Shaikh Isa bin Salman al-Khalifa

Statement by the Press Secretary: President Clinton To Attend the National Ocean Conference in Monterey, California

Released May 28

Transcript of a press briefing by Press Secretary Mike McCurry

Released May 29

Transcript of a press briefing by Press Secretary Mike McCurry

LANGUAGE: ENGLISH

LOAD-DATE: June 22, 1998

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May 20, 1998 Wednesday

The Hill May 20, 1998 Wednesday

SECTION: Pg. 1

LENGTH: 706 words

HEADLINE: Senate Dems say Clinton ignored them on tobacco

BYLINE: By Laura Dunphy and Philippe Shepnick

BODY:

Democratic senators are angry with the White House for ignoring their concerns while negotiating with Republicans on the tobacco legislation.

Sens. Barbara Boxer (Calif.), Joseph Biden (Del), Edward Kennedy (Mass.) and Frank Lautenberg (N.J.) were among those who vented their anger at a closed meeting of the Democratic caucus with White House Chief of Staff Erskine Bowles on Thursday.

They were incensed over the White House's deal-cutting with Sen. John McCain (R-Ariz.), principal architect of the tobacco bill and were concerned that the White House would cut a deal with McCain that would preclude any Democratic input. They particularly objected to White House attempts to dissuade Democrats from supporting a \$ 1.50 per-pack increase.

The hour-long meeting, in the Lyndon Baines Johnson Room off the Senate floor, was described by one Democratic staffer as "vocal, but not shouting." The senators were most concerned over raising caps and liability, most specifically an increase in the price of packs of cigarettes.

"I wasn't frustrated," Biden told The Hill. "What I did was told the administration that they should make clear exactly what they agreed to with McCain" so the Democrats would be prepared when the bill came to the floor.

The Senate Democrats' anger brought to mind the outrage of House Republicans who were ignored by President Reagan, who frequently cut deals with the Democrats who controlled the House through out his tenure.

One of the sticking points was whether the Clinton administration's cooperation with McCain would undermine the more stringent \$ 1.50 per-pack increases favored by some Democrats, a staffer said.

Bowles said that Democratic senators had been involved in the negotiations, and Minority Leader Tom Daschle (D-S.D.) had been informed every step of the way, according to a White House spokesman.

McCain's bill, which calls for a per-pack increase of \$ 1.10, was supported by the president. Other senators, such as Kent Conrad (D-N.D.) who sponsored an amendment to raise the price increase to \$ 1.50, didn't understand why the administration favored the \$ 1.10 proposal.

A source at the Finance Committee said that until Thursday morning there was "no inkling that the White House would not be supporting the \$ 1.50." Nor was there any idea that Conrad's amendment would be proposed that day, as Senate Minority Leader Tom Daschle (S.D.) had been equivocating on bringing the amendment forth.

The Hill May 20, 1998 Wednesday

Some senators were surprised when Conrad's bill mandating a \$ 1.50 was passed that day at a Finance Committee hearing, a staffer said. Some senators were hoping it would have been introduced later, which would have given it a better chance of remaining in the bill.

The point is moot, since Majority Leader Trent Lott (R-Miss.) deleted the amendment Monday night. Lautenberg and Kennedy plan to introduce their own \$ 1.50 per pack tax increase proposal tomorrow.

Regardless, the issue raised some heads -- and voices -- at the Bowles meeting. "Lautenberg was very vocal that the administration was stuck on a \$ 1.10 and that he wouldn't go to a \$ 1.50. Bowles said that's where the president has been for six months. That's where the president is, "the staffer said.

Bowles added that the president would support the \$ 1.50 increase if it passed with such a provision.

Some felt that the Clinton administration had left Democrats out to dry. One staffer said "the triangle offense of the president (putting himself between the Republicans and Democrats) has made Democrats unhappy for a long time."

One staffer went even further. "This is nothing about triangulation, it's strangulation. This will keep the Democrats in the minority party for the next 10 years. What's the point of having a meeting with Bowles if he's gonna go back and double deal ya?"

One Democratic staffer noted that Bowles' trip to the Hill marked a significant effort to win back the favor of the influential Democrats the White House alienated on this issue. Bowles brought with him administration figures, such as Larry Stein, assistant to the president and director for legislative affairs, Bruce Reed, assistant to the president for legislative policy and his deputy Elena Kagan.

GRAPHIC: Photo 1, Sen. Joe Biden (D-Del.); Photo 2, Sen. John McCain (R-Ariz.); Photos 1 and 2, FILE PHOTO

LANGUAGE: ENGLISH

LEVEL 1 - 40 OF 166 STORIES

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May 19, 1998, Tuesday 20:17 Eastern Time

SECTION: Washington - general news

LENGTH: 817 words

HEADLINE: HOUSE GIRDS FOR ITS DAY TO DEBATE TOBACCO With TOBACCO-MONEY. By REBECCA CARR

BODY:

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Cox News Service, May 19, 1998

WASHINGTON As the Senate debates a sweeping tobacco bill that would generate half a trillion dollars in new revenue and try to dramatically cut the number of teens who smoke, House members are working behind the scenes to be ready for when the spotlight turns there.

There is just one problem.

With House Speaker Newt Gingrich, R-Ga., loudly denouncing the Senate bill as a 'money grab' by liberals, groups fighting for comprehensive legislation may find it difficult to build support for a bill as broad as the one being debated in the Senate.

That bill, by Senate Commerce Committee Chairman John McCain, R-Ariz., calls for raising the price of a pack of cigarettes by \$ 1.10 over next five years, expanding the authority of the Food and Drug Administration to regulate tobacco, and imposing steep fines on tobacco companies if they fail to reduce the number of youth smokers.

One of the more contentious provisions in the McCain bill is a cap on payments that the tobacco companies would pay in damage claims each year. Already there are signs that the liability measure would be hotly contested in the House as well.

Given the fight and almost certain court battle over such tobacco legislation, there is a move in the House to piece together a more modest bill aimed at teen smoking.

Rep. Sanford Bishop, R-Ga., thinks he has just bill.

Bishop, whose southwest Georgia district is home to tobacco farmers, wholesalers and tobacco plant workers, said a bill like McCain's would have an adverse impact on his district. He has crafted a bill that would target teen smoking by holding the teenagers themselves accountable as well as the retailers. The bill would: Require businesses to obtain a license to sell tobacco and face the possibility of revocation for selling to minors. Levy fines against minors caught purchasing or consuming tobacco, and possibly cost them their drivers' license. Restrict cigarette vending machines be areas that ban minors, such as a bar.

Bishop's bill has come under attack because it does not address adult smokers and because it does not seek to force the tobacco companies to pay for anti-smoking campaigns as the McCain bill would.

But that does not worry Bishop.

'Hopefully, when the dust settles, people will see this as a realistic way to curb teen smoking without punishing the people who are working in law-abiding professions,' said Bishop.

Raising the price of cigarettes alone is not enough, Bishop said. When teenagers are spending \$ 100 on a pair of sneakers, even McCain's proposed increase would hardly be daunting.

Bishop, who does not smoke, thinks smoking cigarettes should be a personal choice for adults and remain outside the government's jurisdiction. 'People

Cox News Service, May 19, 1998

have to make decisions and I don't know if Big Brother is the best to make that decision," Bishop said. Bishop said he hoped that the House would be more reasonable in its approach to passing a tobacco bill. "I hope reasonable heads will prevail in the House," Bishop said. "I hope we can move away from the hysteria and the emotionalism and get down to work."

But any bill that comes out of Congress would have to be signed by President Clinton, and the White House wants to see comprehensive legislation along the lines of the McCain bill.

Elena Kagan, a senior domestic policy adviser to President Clinton who helped negotiate the McCain bill, said she hoped that the action in the Senate would give the House impetus to pass similar legislation.

"I don't think there is any doubt that what emerges in the Senate will place enormous pressure on the House to act," Kagan said.

At this point, she said, it was too early to tell what would emerge from the Senate.

The Senate fought throughout the day over the McCain bill, killing a Republican amendment to limit lawyers' fees and battling over what to do about the nation's 124,000 tobacco farmers.

"They negotiate settlements in the millions and billions of dollars and they take fees in the millions and billions of dollars," said Sen. Lauch Faircloth of North Carolina, one of several Republicans behind the proposal to limit fees to \$ 250 per hour.

But that was hardly the most contentious part of the debate. Senate Majority Leader Trent Lott, R-Miss., angered Democrats from tobacco states by backing an amendment that would have gotten rid of a provision to protect the tobacco farmers.

Lott used his prerogative on Monday night to advance an amendment relating to tobacco farmers that was vehemently opposed by Sens. Wendell Ford, D-Ky., and Ernest Hollings, D-S.C. because it would dismantle the government subsidy program for tobacco farmers.

"Let me provide fair warning," Ford said. "I will keep my pledge to tobacco farmers. I will do everything in my power to oppose attempts to ... attack the federal tobacco program."

LANGUAGE: ENGLISH

LOAD-DATE: May 20, 1998

LEVEL 1 - 41 OF 166 STORIES

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MAY 18, 1998

SECTION: White House Watch; Pg. 21

LENGTH: 1588 words

HEADLINE: WONDERWONK

BYLINE: Dana Milbank

BODY:

In December 1996, Elena Kagan quit her job as a lawyer in the White House counsel's office to return to the University of Chicago, where she was a tenured professor of constitutional law. She had already scheduled the movers, and 120 law students in Chicago had registered for her class. Colleagues had even given her a sendoff in the White House mess. But Bruce Reed, Clinton's new domestic policy chief, begged her to stay, offering her the number two spot on the Domestic Policy Council and promising her an equal partnership running the White House policy shop. It was an unconventional choice, and some in the West Wing wondered why Reed would pick a lawyer to be top wonk.

They don't wonder anymore. Kagan, though virtually unknown outside the White House, has become the administration's lead negotiator on tobacco, crafting much of Senator John McCain's tobacco legislation. The story of Kagan's involvement in hammering out a deal with Senate Republicans illustrates just how active the administration has been in shaping tobacco legislation behind the scenes. Although Reed and White House Chief of Staff Erskine Bowles are the public faces of Clinton's tobacco team, Kagan engineered the White House's most significant win in the tobacco talks so far: convincing McCain and his fellow Senate Republicans to give the Food and Drug Administration full regulatory authority over tobacco, while keeping the administration's bureaucrats at bay.

Giving the FDA broad power over tobacco (which the industry dodged in last year's settlement with state attorneys general) should do more than the blunt instrument of taxes to wipe out smoking. Even if the McCain legislation fails, which seems increasingly likely in light of Republican opposition in the House, the groundwork has been laid for including FDA regulation in whatever tobacco legislation eventually passes. As Kagan puts it: "Having McCain's and Tennessee Republican Senator Frist's agreement on this means we have a fairly broad, bipartisan approach, and it will make it into the final legislation regardless of what else is in it."

Ironically, Kagan was a teenage smoker herself and quit only in 1993 after 17 years. "I love smoking, and I still miss it," she says. "It's completely clear to me how addictive this product is. But it's also clear to me how much people can enjoy smoking." Now 38 years old, she has a no-frills appearance and a New York accent left over from her childhood on Manhattan's West Side. Kagan met Bruce Reed at Princeton, when she was opinion editor of The Daily Princetonian and he was a columnist. After an Oxford fellowship and Harvard Law School, she clerked for Thurgood Marshall and worked on the Dukakis campaign, then joined the law faculty at Chicago.

Kagan's legal training came in handy in her forays into the minutiae of tobacco legislation. Her moment came in late March, when Reed was vacationing in Europe and Kagan squared off with Republican senators and their staffs on the eve of the Senate Commerce Committee's April 1 markup of the legislation. An earlier proposal by Republican senators James Jeffords and Orrin Hatch had

fallen apart over the question of giving regulatory authority to the FDA.

The White House started by arguing that the FDA should regulate tobacco under the "drug and device" chapter in the law, essentially codifying the authority that the agency has already claimed for itself--and which the tobacco industry is currently challenging in court. Senators McCain, Frist, Hatch, and Jeffords all objected, as did the pharmaceutical industry, which feared that it would get harsher treatment along with tobacco. But the FDA insisted on the "drug and device" chapter, figuring that losing this would weaken the regulations and make the agency more vulnerable to court challenges. That might have been the end of it, but Kagan hatched a plan for a separate title under the law for tobacco, giving the FDA virtually the same regulatory language and legal standing it demanded, but moving the wording to another part of the law to soothe the Republicans.

That seemed to hold, but, as late as Friday, March 27, the agreement again was in danger of falling apart when Frist raised new concerns. He worried that, under the new title, the FDA would get authority over tobacco farmers, not just tobacco, and that the FDA might go too far in limiting retail sales of tobacco or in banning nicotine. Kagan pleaded for 24 hours to work out a deal, and she went through each point with the senator in painstaking detail. Negotiations stretched into the wee hours of the morning. They finally agreed that the FDA would delay by two years any serious action--say, eliminating a class of tobacco product or reducing or eliminating nicotine content--so Congress could review the decision. She also convinced the agencies to accept this token recognition of Congress's prerogatives. Congress, she argued, can reverse FDA decisions anyway. By late Saturday, the deal was done.

Kagan broke a third impasse in the FDA talks when McCain demanded language guaranteeing that the FDA would examine whether its actions could stimulate a black market in tobacco. If, for example, the FDA required all cigarettes to taste awful, smokers would turn to contraband. The FDA balked at such an economic restriction, and talks bogged down. But Kagan "finessed the issue," says Rich Tarplin of the Department of Health and Human Services, who negotiated alongside Kagan and the FDA's William Schultz. She found a legalistic way to give over to McCain without unduly restricting the FDA. Specifically, she agreed to language calling on the FDA to make the black market a "consideration" but assured the FDA it would never be held legally accountable if a black market did develop. Hearing the law professor's case, Schultz and Tarplin consented, and the talks went on.

The Commerce Committee endorsed McCain's bill with a 19 to one vote, and the bill is due to reach the Senate floor the week before Memorial Day. Although it got most of what it wanted, the Clinton administration is still haggling to toughen the bill's so-called "look back" provisions by making penalties for missing teen-smoking reductions company-specific. It also wants to tighten the bill's indoor-air-quality provisions. But these considerations, and even the \$1.10-per-pack tax increase over five years, should turn out to be less significant than giving the FDA say over what, where, how, and to whom the tobacco industry sells. The FDA provision was "the toughest nut to crack," says Reed. Without it, "the whole thing would've blown up."

Kagan has become something of an all-purpose brain in a place full of people who are more smart than wise. Last Tuesday, when aides were preparing the president for a meeting, he was stumped about a question on Supreme Court

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LEVEL 1 - 1 OF 6 CASES

RICHLAND BOOKMART, INC., d/b/a TOWN AND COUNTRY,
Plaintiff-Appellee, v. RANDALL E. NICHOLS,
Defendant-Appellant.

No. 96-6472

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

137 F.3d 435; 1998 U.S. App. LEXIS 3161; 1998 FED App. 0070P
(6th Cir.)

December 1, 1997, Argued
February 27, 1998, Decided
February 27, 1998, Filed

SUBSEQUENT HISTORY: [**1] Rehearing Denied April 23, 1998, Reported at: 1998
U.S. App. LEXIS 9545.

PRIOR HISTORY: Appeal from the United States District Court for the Eastern
District of Tennessee at Knoxville. No. 95-00349. Leon Jordan, District Judge.

DISPOSITION: Vacated and remanded.

CORE TERMS: regulation, establishment, adult, First Amendment,
sexually-explicit, ordinance, theatre, secondary effects, content-neutral,
neighborhood, sex, adult-oriented, preamble, sexually, booths, vagueness,
selling, erotic, preliminary injunction, equal protection, genitals, video,
erotic literature, motion pictures, content neutral, permanent injunction,
sexual activity, paraphernalia, predominant, misdemeanor

COUNSEL: ARGUED: Steven A. Hart, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL
JUSTICE DIVISION, Nashville, Tennessee, for Appellant.

Frierson M. Graves, Jr., BAKER, DONELSON, BEARMAN & CALDWELL, Memphis,
Tennessee, for Appellee.

ON BRIEF: Steven A. Hart, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE
DIVISION, Nashville, Tennessee, Michael J. Fahey, II, OFFICE OF THE ATTORNEY
GENERAL, Nashville, Tennessee, for Appellant.

Frierson M. Graves, Jr., BAKER, DONELSON, BEARMAN & CALDWELL, Memphis,
Tennessee, for Appellee.

JUDGES: Before: MERRITT, BATCHELDER, and FARRIS, * Circuit Judges.

* The Honorable Jerome Farris, Circuit Judge of the United States Court of
Appeals for the Ninth Circuit, sitting by designation.

OPINIONBY: MERRITT

OPINION:

[*436] OPINION

137 F.3d 435, *436; 1998 U.S. App. LEXIS 3161, **1;
1998 FED App. 0070P (6th Cir.)

MERRITT, Circuit Judge. The defendant below, Randall E. Nichols, District Attorney for Knox County, Tennessee, [*437] appeals a permanent injunction entered by the district court against enforcement of statutory amendments to the Tennessee Adult-Oriented Establishment Act. [*2] The new statute limits the hours and days during which adult entertainment establishments can be open and requires such establishments to eliminate the closed booths in which patrons watch sexually-explicit videos or live entertainment.

The injunction was entered after plaintiff, Richland Bookmart, Inc., an adult bookstore in Knox County, Tennessee, challenged the constitutionality of the state law on the grounds that it violates the First Amendment and the Equal Protection Clause of the United States Constitution. The district court held that although the statute was content-neutral, the hours and days limitation violated the First Amendment because it was not narrowly tailored to address the stated goal of the statute -- the alleged deleterious "secondary effects" on neighborhoods and families caused by the presence of adult establishments. Having decided the case on the First Amendment ground, the district court did not reach plaintiff's equal protection argument. For the reasons stated below, the judgment of the district court is reversed and the case is remanded to the district court with instructions to vacate the permanent injunction.

I. The Statute in Question [*3]

On June 26, 1995, plaintiff, Richland Bookmart, Inc., a seller of sexually-explicit books, magazines and videos, filed a complaint for preliminary injunction, permanent injunction and declaratory judgment requesting that the district court declare Tennessee's Adult Oriented Establishment Act (1995 Tenn. Pub. Act 421, codified at Tenn. Code Ann. @@ 7-51-1401 et seq.) to be unconstitutional on its face or as applied to plaintiff. After a hearing on the preliminary injunction, the district court issued a preliminary injunction enjoining enforcement of the act. The injunction was made permanent on September 26, 1996, and defendant, District Attorney General for Knox County Randall Nichols, appealed to this Court.

Presumably in anticipation of expected First Amendment challenges, the act contains a lengthy preamble. Because the district court carefully summarized the long preamble, we will highlight only relevant portions here.

The preamble discusses the need to outlaw closed video booths because these booths are often used by patrons to stimulate themselves sexually, creating a public health problem. This provision does not apply to plaintiff. It does not have closed booths on its [*4] premises. Plaintiff sells adult books and magazines and sells and rents adult videos for off-premises viewing only. The preamble also lists detrimental health, safety and welfare problems caused by shops selling graphic sexual material -- the so-called "secondary effects," of the establishments on the communities that surround them -- and cites specific land-use studies done by other cities on the subject. The "secondary effects" identified include "increased crime, downgrading of property values and spread of sexually transmitted and communicable diseases."

The preamble continues with a list of "unlawful and/or dangerous sexual activities" associated with adult-oriented establishments and ends with a list of citations to judicial decisions supporting such legislation.

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1998 FED App. 0070P (6th Cir.)

The act defines "adult-oriented establishment" as "any commercial establishment . . . or portion thereof" selling as its "predominant stock or trade . . . sexually oriented material." n1

-Footnotes-

n1 The complete definition is as follows:

any commercial establishment, business or service, or portion thereof, which offers, as its principal or predominant stock or trade, sexually oriented material, devices, or paraphernalia or specified sexual activities, or any combination or form thereof, whether printed, filmed, recorded or live and which restricts or purports to restrict admission to adults or to any class of adults.

Chapter 421, Section 2(4).

-End Footnotes-

[**5]

"Sexually-oriented material" is defined as any publication "which depicts sexual activity . . . or which exhibits uncovered human genitals or pubic region in a lewd or lascivious manner or which exhibits human male genitals [*438] in a discernibly turgid state, even if completely covered." n2

-Footnotes-

n2 The complete definition of "sexually oriented material" is as follows:

any book, article, magazine, publication or written matter of any kind, drawing, etching, painting, photograph, motion picture film or sound recording, which depicts sexual activity, actual or simulated, involving human beings or human beings and animals, or which exhibits uncovered human genitals or pubic region in a lewd or lascivious manner or which exhibits human male genitals in a discernibly turgid state, even if completely covered.

Chapter 421, Section 2(10).

-End Footnotes-

Section 3 prohibits adult-oriented establishments from opening before 8 a.m. or after midnight Monday through Saturday, and from being open at all on Sundays or the legal holidays listed in the Tennessee Code Annotated. [**6]

Section 4 prevents the use of private booths, stalls or partitioned rooms for sexual activity. Because plaintiff here does not have any private booths, the district court did not address this portion of the act.

Section 5 describes the criminal penalties under the act. A first offense for a violation is a Class B misdemeanor punishable by a fine of \$ 500. Subsequent violations are Class A misdemeanors with no penalty specified in the statute. The Tennessee Code provides that Class A misdemeanors carry a penalty for a fine not to exceed \$ 2500, imprisonment not to exceed 11 months and 29 days or both, unless the statute provides otherwise. Tenn. Code Ann. @ 40-35-111.

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1998 FED App. 0070P (6th Cir.)

Section 6 states that live stage shows, adult cabaret and dinner theatre are excepted from the closing hours requirement. Section 7 allows local governments to impose other "lawful and reasonable" restrictions on adult-oriented establishments.

Plaintiff contends that the law violates both its First Amendment rights through the closing hours requirement and its equal protection rights by exempting certain other establishments that sell or trade in adult-oriented goods [*7] or services as at least part of their business.

The district court granted a preliminary injunction, later made permanent, against enforcement of the act, finding that the closing hours restrictions violate the First Amendment. The district court concluded that plaintiff was likely to succeed on the merits of its constitutional challenge because the act (1) goes beyond what is necessary to further the state's legitimate interest in regulating the secondary effects described in the act's preamble, (2) is overbroad and (3) is vague. The district court did not reach plaintiff's equal protection argument.

II. Analysis of Facial Validity of the Statute

This case arises from the tension between two competing interests: free speech protection of erotic literature and giving communities the power to preserve the "quality of life" of their neighborhoods and prevent or clean up "skid-rows." The tension arises because the First Amendment offers some protection for "soft porn," i.e., sexually-explicit, nonobscene material -- although "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled [*8] political debate. . . ." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976). The Supreme Court most recently restated this view that "porn-type" speech is generally afforded less-than-full First Amendment protection in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 115 L. Ed. 2d 504, 111 S. Ct. 2456 (1991) (nude dancing).

The normal starting point for a discussion of the facial validity of statutory regulation of speech requires an analysis of the so-called "content-neutrality" of the regulation. Here, the bookstore contends that the act is a "content-based" regulation and therefore presumptively unconstitutional and subject to "strict scrutiny." The defendant prosecutor argues that the act is content-neutral and that the closing requirements are permissible "time, place and manner" regulation subject to the less exacting "intermediate scrutiny."

We agree with plaintiff that the legislation at issue here is obviously not content-neutral. The statute focuses on and regulates only [*439] "sexually-explicit" or porn-type speech. This is no more content neutral than a statute designed to regulate only political campaign advertising, newspaper [*9] want ads or computer graphics. The law singles out certain establishments for regulation based only on the type of literature they distribute. But see *Barnes*, 501 U.S. at 585 (Souter, J., concurring) and *Mitchell v. Commission on Adult Entertain. Estabs.*, 10 F.3d 123 (3d Cir. 1993) (describing regulation of such sex literature as content neutral because it is designed to counter bad behavior in the neighborhood where it is sold).

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1998 FED App. 0070P (6th Cir.)

The fact that such regulation is based on content does not necessarily mean that regulation of nonobscene, sexually-explicit speech is invalid. The law developed under the First Amendment offers such speech protection "of a wholly different, and lesser magnitude." *Young v. American Mini Theatres*, 427 U.S. at 70. In *American Mini Theatres*, the Court expressly ruled that the City of Detroit may legitimately use the content of adult motion pictures as the basis for treating them differently from other motion pictures. In order to prevent and clean up skid-rows, the ordinance confined theatres showing sex movies to a few areas of the city. A plurality of the Court upheld a content-based zoning ordinance restricting the location of adult [**10] movie theatres. The Court held that even though such sexually-explicit literature, unlike obscenity, is protected from total suppression, "the State may use the content of these materials as the basis for placing them in a different classification from other motion pictures." *Id.* at 70-71. Justice Steven's opinion is straightforward and clear. It says that "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance." *Id.* at 61. The Court concluded that the classification made by the City of Detroit was justified by the City's interest in preserving its neighborhoods from deterioration -- the now so-called "secondary effects" of erotic speech. The ordinance was upheld because it did not unduly suppress access to lawful speech. *American Mini Theatres* recognized that regulation based on content may be necessary to protect other legitimate interests. The Court did not try to maintain that the ordinance was, in fact, content-neutral; it stated only that it might be treated as if it were content-neutral [**11] because, like commercial speech, it is less than fully protected.

Justice Powell, concurring in *American Mini Theatres*, elaborated on the special circumstances presented when reviewing regulation of erotic or sexually-explicit speech:

Moreover, even if this were a case involving a special government response to the content of one type of movie, it is possible that the result would be supported by a line of cases recognizing that the government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated.

American Mini Theatres, 427 U.S. at 82 n.6 (cases omitted). Justice Powell specifically pointed out that sexually-explicit speech is different from other kinds of speech and, although protected to a certain degree, is offered less protection because other important social interests are at stake when sexually-explicit speech is at issue. Erotic or sexually-explicit literature is in a unique category, a category unto itself that the Supreme Court has decided may be regulated without subjecting the regulation to so-called "strict scrutiny" with its accompanying presumption [**12] of unconstitutionality.

Many have severely criticized the holding and rationale of *American Mini Theatres*, n3 [**440] including initially the four dissenters led by Justice Stewart, but a majority of the Court has adhered to its view allowing anti-skidrow, content-based regulation of establishments selling pornographic literature, movies, dancing and other hard-core erotic material. In a subsequent case, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986), the Court upheld a content-based zoning ordinance enacted by the City of Renton, Washington, that prohibited adult motion picture

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theatres from locating within 1,000 feet of family dwellings, churches, parks or schools.

- - - - -Footnotes- - - - -

n3 Criticism of the analysis used in American Mini Theatres and later in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986), is extensive in the legal literature. For a representative sample, see, e.g., Laurence Tribe, American Constitutional Law @ 12-3 (2d ed. 1988); Ashutosh Bhagwat, Purpose Scrutiny in Constitutional Analysis, 85 Cal. L. Rev. 297, 351-53 (1997); Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 483-91 (1996); Marjorie Heins, Viewpoint Discrimination, 24 Hastings Const. L. Q. 99, 125-28 & n.137 (1996); Robert Post, Recuperating First Amendment Doctrine, 47 Stan. L. Rev. 1249, 1265-67 (1995); Keith Werhan, The Liberalization of Freedom of Speech on a Conservative Court, 80 Iowa L. Rev. 51, 68-70 (1994); Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. Chi. L. Rev. 46, 104, 114-17 (1987).

- - - - -End Footnotes- - - - -

[**13]

The intervening years had reduced the number of dissenters on the Court from four to two. Now it was only Justices Brennan and Marshall in dissent. Relying primarily on American Mini Theatres, the Court in Renton analyzed the ordinance as a form of time, place and manner regulation, although recognizing that a law that focuses on such films is obviously not content neutral. The Court acknowledged candidly that both ordinances treated adult theatres differently than other types of theatres, the traditional touchstone of content-based legislation.

The Court went on in City of Renton to explain that the ordinance did not contravene the fundamental principles that underlie concerns about content-based speech regulations because its stated purpose is to curb the "secondary effects" of adult establishments. Accordingly, the Court in City of Renton, like the Court in American Mini Theatres, decided that the zoning ordinances at issue could be reviewed under the standard applicable to content-neutral regulations, even though the ordinances were plainly content-based. The stated rationale is that a distinction may be drawn between adult theatres and other kinds of theatres [**14] "without violating the government's paramount obligation of neutrality in its regulation of protected communication" because it is seeking to regulate the secondary effects of speech, not the speech itself. City of Renton, 475 U.S. at 49 (quoting American Mini Theatres, 427 U.S. 50 at 70).

Over the last decade, some courts reviewing these type of regulations started simply referring to them as content-neutral without explaining, as the Supreme Court carefully did in both American Mini Theatres and City of Renton, that they are in fact content-based but are to be treated like content-neutral regulations for some purposes. See, e.g., North Ave. Novelties, Inc. v. City of Chicago, 88 F.3d 441, 444 (7th Cir. 1996), cert. denied, 136 L. Ed. 2d 609, 117 S. Ct. 684 (1997); 11126 Baltimore Blvd., Inc. v. Prince George's County, Md., 58 F.3d 988, 995 (4th Cir. 1995); ILQ Investments, Inc. v. City of Rochester, 25 F.3d 1413, 1416 (8th Cir. 1994); TK's Video, Inc. v. Denton County, Tx., 24 F.3d 705, 707 (5th Cir. 1994); Mitchell v. Commission on Adult Entertain. Estabs., 10 F.3d 123, 128-31 (3d Cir. 1993). Thus, in some cases, a kind [**15] of legal

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1998 FED App. 0070P (6th Cir.)

fiction has been created that calls regulation of such literature "content neutral" when what is meant is only that the regulation is constitutionally valid.

Under present First Amendment principles governing regulation of sex literature, the real question is one of reasonableness. The appropriate inquiry is whether the Tennessee law is designed to serve a substantial government interest and allows for alternative avenues of communication. Does the law in question unduly restrict "sexually explicit" or "hard-core" erotic expression?

Reducing crime, open sex and solicitation of sex and preserving the aesthetic and commercial character of the neighborhoods surrounding adult establishments is a "substantial government interest." The Tennessee legislature reasonably relied on the experiences of other jurisdictions in restricting the hours of operation. It is not unreasonable to believe that such regulation of hours of shops selling sex literature would tend to deter prostitution in the neighborhood at night or the creation of drug "corners" on the surrounding streets. By deterring [*441] such behavior, the neighborhood may be able to ward off high vacancy rates, deteriorating store front[s], a blighted appearance and the lowering of the property values of homes and shopping areas. Such regulation may prevent the bombed-out, boarded-up look of areas invaded by such establishments. At least that is the theory, and it is not unreasonable for legislators to believe it based on evidence from other places.

The legislation leaves open alternative avenues of communication. Access to adult establishments is not unduly restricted by the legislation. Adult establishments may still be open many hours during the week.

III. Overbreadth and Vagueness

Plaintiff contends, and the district court agreed, that the act is also unconstitutionally vague in that certain terms are not defined. We believe the terms are sufficiently defined so that a reasonable person would understand them.

Specifically, the district court found that the act's alleged vagueness may have a "chilling effect" on erotic literature that has "literary, artistic or political value." It also found that the word "paraphernalia" as used in the act might include places such as lingerie shops.

First, the plaintiff's establishment here clearly falls within the purview of the statute. In *American Mini Theatres*, the Court found that it was unnecessary to consider vagueness when an otherwise valid ordinance indisputably applies to the plaintiff -- when there is no vagueness as to him. 427 U.S. at 58-59. See also *City of Renton*, 475 U.S. at 55 n.4. Plaintiff is clearly an "adult-oriented establishment" as defined in the act. Any element of vagueness in the act does not affect this plaintiff.

Second, the law is not as vague as the bookstore contends. To be included within the purview of the act, an establishment must (1) have as its "principal or predominant stock or trade" sexually-oriented materials, devices or paraphernalia and (2) restrict admission to adults only. The terms used in the act are understandable common terms. Most buyers, sellers and judges know what such materials are and who are adults and who are children.

137 F.3d 435, *441; 1998 U.S. App. LEXIS 3161, **17;
1998 FED App. 0070P (6th Cir.)

The Supreme Court examined overbreadth in detail in *New York v. Ferber*, 458 U.S. 747, 773-74, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982). In *Ferber*, the Court refused to find as unconstitutionally overbroad a state statute prohibiting persons from knowingly promoting sex by children under 16 by selling such material. The Court held that the [**18] mere possibility that some protected expression, some erotic literature, could arguably be subject to the statute was insufficient reason to find it unconstitutionally overbroad. The Court said that we should not assume that state courts would broaden the reach of a statute by giving it an "expansive construction." This is consistent with Tennessee law that provides that such regulation of speech should be construed narrowly. *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 526 (Tenn. 1993).

* * *

Plaintiff also contends that the act violates its equal protection rights because the act exempts from regulation establishments offering "only live, stage adult entertainment in a theatre, adult cabaret, or dinner show type setting." The district court did not reach this issue and did not issue an injunction on this ground. We express no opinion on whether the act violates plaintiff's equal protection rights because this argument has not been fully developed or reviewed in the district court.

Accordingly, the preliminary injunction issued by the district court is vacated and set aside and the case remanded for further proceedings consistent with this opinion. [**19]

LEVEL 1 - 2 OF 6 CASES

RABBI ABRAHAM GROSSBAUM and LUBAVITCH of INDIANA, INC.,
Plaintiffs-Appellants, v. INDIANAPOLIS-MARION COUNTY
BUILDING AUTHORITY and RONALD L. REINKING, in his Capacity
as General Manager, Defendants-Appellees.

No. 95-3976

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

100 F.3d 1287; 1996 U.S. App. LEXIS 30216

September 6, 1996, Argued
November 20, 1996, Decided

SUBSEQUENT HISTORY: [**1] Certiorari Denied May 19, 1997, Reported at: 1997
U.S. LEXIS 3126.

PRIOR HISTORY: Appeal from the United States District Court for the Southern
District of Indiana, Indianapolis Division. No. 94 C 1801. David F. Hamilton,
Judge.

DISPOSITION: AFFIRMED.

CORE TERMS: motive, retaliation, display, viewpoint, regulation, nonpublic,
lobby, religious, content-neutral, fora, menorah, public forum, preliminary
injunction, first amendment, ban, constitutional rights, discriminate,
applicable rule, free speech, subjective, injunction, neutrality, ordinance,
banned, facade, discrimination claim, discretionary, retaliate, illicit,
constitutional law

COUNSEL: For ABRAHAM GROSSBAUM, Rabbi, LUBAVITCH OF INDIANA, INCORPORATED,
Plaintiffs - Appellants: Nathan Lewin, Niki Kuckes, David S. Cohen, MILLER,
CASSIDY, LARROCA & LEWIN, Washington, DC USA. B. Keith Shake, HENDERSON, DAILY,
WITHROW & DEVOE, Indianapolis, IN USA.

For INDIANAPOLIS-MARION COUNTY BUILDING AUTHORITY, RONALD L. REINKING, in his
capacity as General Manager, Defendants - Appellees: Thomas J. Costakis, KRIEG,
DEVAULT, ALEXANDER & CAPEHART, Indianapolis, IN USA.

JUDGES: Before CUMMINGS, BAUER, and KANNE, Circuit Judges.

OPINIONBY: KANNE

OPINION: [*1290] KANNE, Circuit Judge. This case presents the issue of what
role a government body's motive plays in constitutional analysis when that body
tries to regulate speech in a nonpublic forum. The Indianapolis-Marion County
Building Authority amended its rules and regulations to prohibit private groups
and individuals from exhibiting displays in the lobby of its City-County
Building. This rule prevented the plaintiffs from displaying a menorah in the
lobby as they had done for eight years [**2] between 1985 and 1992. The
plaintiffs sought a preliminary injunction against the new rule so they could
again display their menorah. The plaintiffs contended that even though the rule
is viewpoint-neutral, its adoption was motivated by an unconstitutional desire
to retaliate against the plaintiffs for previous litigation and to

discriminate against their religious viewpoint. The District Court denied the motion for the preliminary injunction. Because we hold that the motive of a government body is irrelevant when it enacts a content-neutral rule that regulates speech in a nonpublic forum, we affirm.

I. HISTORY

This is the second time that this case has come before us. See Grossbaum v. Indianapolis-Marion County Building Authority, 63 F.3d 581 (7th Cir. 1995) (Grossbaum I). In the previous appeal, Rabbi Grossbaum and Lubavitch of Indiana, Inc. n1 ("Lubavitch") successfully challenged a policy of the Indianapolis-Marion County Building Authority ("Building Authority") that prohibited religious displays and symbols (such as the plaintiffs' menorah) in the lobby of the City-County Building n2 in Indianapolis. We held that "the prohibition of the menorah's message because of [**3] its religious perspective was unconstitutional under the First Amendment's Free Speech Clause." Grossbaum I, 63 F.3d at 592. This second appeal now challenges a new Building Authority policy that prohibits all private displays, religious or otherwise.

- - - - -Footnotes- - - - -

n1 Lubavitch is "an organization of Hasidic Jews who follow the teachings of a particular Jewish leader, the Lubavitch Rebbe. The Lubavitch movement is a branch of Hasidism, which itself is a branch of orthodox Judaism." County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 587 n.35, 106 L. Ed. 2d 472, 109 S. Ct. 3086 (1989) (citations omitted).

n2 The City-County Building in downtown Indianapolis is the seat of government for the City of Indianapolis and the County of Marion, Indiana. The defendant Building Authority is a municipal corporation that administers the building.

- - - - -End Footnotes- - - - -

From 1985 to 1992, Rabbi Grossbaum displayed a five foot high, wooden menorah each year in the City-County Building lobby. In 1993, however, the Indiana Civil Liberties Union [**4] ("ICLU") and the Jewish Community Relations Council ("JCRC") both asked the Building Authority to change its policy. The ICLU argued that religious displays in a nonpublic forum violated the Establishment Clause and that the Building Authority should therefore designate the lobby as a "public forum" to make it clear that all groups would have access to the lobby. The JCRC, meanwhile, wrote a letter to the Building Authority asking that all religious displays be banned so that groups such as the Ku Klux Klan could not use the menorah's presence as an argument for letting in their religious displays.

Expressing concern about losing control over the lobby if it became a public forum, the Building Authority Board of Directors in late 1993 banned all religious displays, thus simultaneously satisfying the JCRC and mooted the ICLU's Establishment Clause complaint. Lubavitch, however, sought a preliminary injunction against the policy, alleging that it was an unconstitutional exclusion of speech protected by the First Amendment. As mentioned above, this court agreed and granted Lubavitch injunctive relief. 63 F.3d at 582.

After our August 1995 decision, however, the Building Authority Board [**5] again modified [*1291] its lobby display policy. At its October 2, 1995 meeting, the Board amended Rule 13 of its "Rules and Regulations Governing The CityCounty Building and Grounds" to read, in part:

No displays, signs or other structures shall be erected in the common areas by any non-governmental, private group or individual since such objects may interfere with unobstructed and safe ingress and egress by employees of the governmental tenants and by the general public conducting business with government offices and courts in the City-County Building.

On November 29, 1995, Lubavitch amended its original complaint and again sought a preliminary injunction to allow the display of its menorah. Although Rule 13 is content-neutral, Lubavitch claimed that the Board enacted the new rule with an unconstitutional intent. More specifically, Lubavitch alleged two counts under 42 U.S.C. @ 1983: 1) that the Board intended to retaliate against Lubavitch for exercising its right to seek judicial relief and its right to speak in the City-County Building lobby, and 2) that the Board intended to perpetuate the viewpoint discrimination that the Board had earlier attempted when it banned all religious [**6] displays in the lobby.

Lubavitch offered three general categories of evidence to support its claims of unconstitutional motive. First, Lubavitch claimed that the Building Authority enacted Rule 13 in a surreptitious manner. Rule 13 was adopted less than two months after this court's decision in favor of Lubavitch, and the only public notice that the Board might change Rule 13 at its October 1995 meeting was a vague agenda item referring to "Policies on Use of Common Areas." The Building Authority responded, however, that it had at all times followed Indiana's Open Door Law procedures. Second, Lubavitch disputed the Board's justification for the new Rule 13. According to the Board's minutes, the Board banned private displays to assure the free flow of pedestrian traffic in the lobby. The minutes also state that lobby congestion was a particular concern of the Board after it had approved new security measures (such as metal detectors in the lobby) in June 1995. Lubavitch, however, argued that there was no history of displays disrupting lobby traffic that would justify banning all private displays. Third, Lubavitch cited deposition testimony by Board members that it was the Board's intent [**7] to ban religious displays. The Building Authority countered that the testimony was taken out of context in that the admission of a desire to ban religious displays was merely a logical implication of the Board's broader desire to ban all private displays.

The District Court denied Lubavitch's motion for a preliminary injunction, finding that the plaintiffs had not shown a reasonable likelihood of prevailing on either their retaliation or their viewpoint discrimination claim. 909 F. Supp. 1187, 1211 (S.D. Ind. 1995). The court held that although the new Rule 13 was a response to Lubavitch's prior litigation, the rule "remedied the constitutional violation and was not motivated by any desire to punish plaintiffs or to get even with them for filing suit." Id. Similarly, the court found that the Board's decision was not "a mask for a desire to prohibit the expression of these plaintiffs' or others' religious beliefs." Id. Because the balance of harms to the parties was not lopsided, the District Court therefore denied the preliminary injunction. Lubavitch appealed pursuant to 28 U.S.C. @ 1292(a)(1), which gives us jurisdiction to review interlocutory orders that deny injunctive [**8] relief.

II. ANALYSIS

A. Standard of Review

In considering a motion for a preliminary injunction, a district court must first determine whether the moving party has demonstrated 1) some likelihood of prevailing on the merits, and 2) an inadequate remedy at law and irreparable harm if preliminary relief is denied. If the movant demonstrates both, the court must then consider 3) the irreparable harm the nonmovant will suffer if preliminary relief is granted, balanced against the irreparable harm to the movant if relief is denied; and 4) the public interest, meaning the effect that granting or denying the injunction will have on nonparties. *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1067 (7th Cir. 1994).

When we review a trial court's grant or denial of a preliminary injunction, we subject findings of fact to clear error review, Fed. R. Civ. P. 52(a); we review a trial court's discretionary balancing of factors under an abuse of discretion standard, *Gould v. Lambert Excavating, Inc.*, 870 F.2d 1214, 1217 (7th Cir. 1989); and we review a trial court's legal conclusions de novo, *West Allis Memorial Hosp., Inc. v. Bowen*, 852 F.2d 251 (7th Cir. 1988).

B. [**9] The Role of Motive in Constitutional Doctrine

Before addressing Lubavitch's specific claims of retaliation and viewpoint discrimination, a few words are appropriate to consider exactly when and why the motives of government actors are relevant in constitutional analysis. Both parties in this case seem to assume that if the Building Authority Board was motivated by an intent to retaliate against Lubavitch or to discriminate against religious viewpoints then ipso facto the Board violated the Constitution. This leap from nefarious motive to constitutional violation, however, is by no means an automatic one under constitutional case law.

Motive is, of course, relevant to a number of constitutional claims. In Equal Protection Clause analysis, for example, courts often must inquire into the motives of legislators or other government actors. n3 See, e.g., *Miller v. Johnson*, 132 L. Ed. 2d 762, 115 S. Ct. 2475, 2488 (1995) (voting district violates Constitution if race was "the predominant factor motivating the legislature's decision to place a significant number of voters within or without" the district); *Batson v. Kentucky*, 476 U.S. 79, 93, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986) (prosecutor's peremptory challenges are unconstitutional [**10] if based solely on purposeful racial discrimination). Similarly, cases under the Establishment Clause or the Bill of Attainder Clauses n4 may require courts to query the subjective intentions of legislators for possible illicit motives. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 585, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987) (legislature's "actual purpose" to promote religion invalidates statute); *United States v. Lovett*, 328 U.S. 303, 313-14, 90 L. Ed. 1252, 66 S. Ct. 1073 (1946) (circumstances of bill's passage showed that its purpose was to punish particular individuals).

- - - - -Footnotes- - - - -

n3 Although courts are often loose in their phraseology, the inquiry that courts occasionally make into the subjective "intent," "motive," or "actual purpose" of government actors should not be confused with the inquiry courts always must make in Equal Protection Clause cases to determine whether a

classification advances any legitimate government "purpose," "interest," or "end". The former inquiry requires courts to examine whether the actual thoughts of government officials were constitutionally pure. In Justice Cardozo's words, it requires judges to "psychoanalyze" legislators. See *United States v. Constantine*, 296 U.S. 287, 299, 80 L. Ed. 233, 56 S. Ct. 223 (1935) (Cardozo, J., dissenting). The latter inquiry, however, requires courts to consider only whether "any state of facts reasonably may be conceived to justify" the classification. *McGowan v. Maryland*, 366 U.S. 420, 426, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961); see also Alexander M. Bickel, *The Least Dangerous Branch* 209 (1962) ("[A] determination of 'purpose' . . . is either the name given to the Court's objective assessment of the effect of a statute or a conclusionary term denoting the Court's independent judgment of the constitutionally allowable end that the legislature could have had in view.").

The subjective motivations of government actors should also not be confused with what the Supreme Court recently referred to, in a Free Exercise Clause case, as the "object" of a law. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 2227, 124 L. Ed. 2d 472 (1993). The Court there determined that three ordinances impermissibly "had as their object the suppression of religion." *Id.* at 2231. The Court made this determination by analyzing both the text and the effect in "real operation" of the ordinances. *Id.* at 2226-31. The Court did not, however, analyze the motive behind the ordinances. Justice Kennedy's investigation into motive (in Part IIA-2 of his opinion) was joined by only Justice Stevens. [**11]

n4 Article I, @ 9, cl. 3 of the U.S. Constitution provides: "No Bill of Attainder or ex post facto Law shall be passed." Article I, @ 10, cl. 1 provides: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts"

- - - - -End Footnotes- - - - -

The relevance of motive in these instances of constitutional adjudication does not, however, allow the inductive conclusion that a [*1293] universal, all-purpose cause of action exists whenever a plaintiff can allege an unconstitutional motive.

In a Free Speech Clause case, for example, the Supreme Court went so far as to say that "it is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968). Although that statement may be hyperbole, one constitutional commentator has concluded that, rather than focusing on motive, "most descriptive analyses of First Amendment law, as well as most normative discussions . . . have considered the permissibility of governmental [**12] regulation of speech by focusing on the effects of a given regulation." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 413 (1996); cf. *McCray v. United States*, 195 U.S. 27, 56, 49 L. Ed. 78, 24 S. Ct. 769 (1904) ("The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.").

Even in the Equal Protection Clause context, the Supreme Court has occasionally been reluctant to question legislative and administrative motive. In *Palmer v. Thompson*, 403 U.S. 217, 29 L. Ed. 2d 438, 91 S. Ct. 1940 (1971), the City of Jackson, Mississippi had decided to close its public swimming pools rather than desegregate them under court order. The Supreme Court, faced with facts obviously analogous to the case we now consider, explicitly declined to inquire into the city council's motives for closing the pools. *Id.* at 224-26. The Court upheld the closings because the petitioners had shown "no state action affecting blacks differently from whites." *Id.* at 225.

A number of factors explain this [**13] reluctance to probe the motives of legislators and administrators. For starters, the text of the Constitution prohibits many government actions but makes no mention of governmental motives (i.e., guilty minds). The First Amendment, for example, forbids Congress and (through the Fourteenth Amendment's Due Process Clause) the States from making laws "abridging the freedom of speech"--a far different proposition than prohibiting the intent to abridge such freedom. "We are governed by laws, not by the intentions of legislators." *Conroy v. Aniskoff*, 507 U.S. 511, 113 S. Ct. 1562, 1567, 123 L. Ed. 2d 229 (1993) (Scalia, J., concurring in judgment). Just as we would never uphold a law with unconstitutional effect because its enactors were benignly motivated, an illicit intent behind an otherwise valid government action indicates nothing more than a failed attempt to violate the Constitution. See *Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2240 (Scalia, J., concurring in part and concurring in judgment); see also Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 *Sup. Ct. Rev.* 1, 23.

Beyond these theoretical objections [**14] to investigating motive, practical considerations also suggest caution. Government actions may be taken for a multiplicity of reasons, and any number of people may be involved in authorizing the action. Doubting the propriety of judicial searches for corrupt motives, Chief Justice Marshall thus asked:

Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?

Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130, 3 L. Ed. 162 (1810). Moreover, once a court finds an illicit motive, may the legislature or administrative body ever take the same action again without the imputation of improper intent? The Court in *O'Brien* declined to strike down a law allegedly tainted by improper motive in part because Congress could then reenact the law "in its exact form if the same or another legislator made a 'wiser' speech about it." 391 U.S. at 384; see [**1294] generally John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *Yale L.J.* [**15] 1205, 1212-17 (1970).

In short, the relevance of motive to constitutional adjudication varies by context. No automatic cause of action exists whenever allegations of unconstitutional intent can be made, but courts will investigate motive when precedent, text, and prudential considerations suggest it necessary in order to give full effect to the constitutional provision at issue.

C. Lubavitch's Retaliation Claim

Turning now to the plaintiffs' specific claims, Lubavitch first alleges that the Building Authority's adoption of Rule 13 was in retaliation for plaintiffs' exercise of their free speech rights and for their exercise of their right to petition the courts for redress of grievances. Lubavitch undoubtedly has such rights. n5 Whether Lubavitch also has a legitimate cause of action for retaliation, however, is another matter.

-Footnotes-

n5 Lubavitch presumably is referring to its rights under the Free Speech Clause and the Petition Clause. The Petition Clause of the First Amendment prohibits Congress from making any law "abridging . . . the right of the people . . . to petition the Government for a redress of grievances." The Supreme Court has held that this right to petition includes the right of access to the courts. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972). The Court has also held that both the Free Speech Clause and the Petition Clause apply to the States through the Fourteenth Amendment's Due Process Clause. See Gitlow v. New York, 268 U.S. 652, 666, 69 L. Ed. 1138, 45 S. Ct. 625 (1925); Edwards v. South Carolina, 372 U.S. 229, 235, 9 L. Ed. 2d 697, 83 S. Ct. 680 (1963).

-End Footnotes-

[**16]

The plaintiffs cite numerous cases for the general proposition that "an act in retaliation for the exercise of a constitutionally protected right is actionable under Section 1983 even if the act, when taken for different reasons, would have been proper." Howland v. Kilquist, 833 F.2d 639, 644 (7th Cir. 1987). Indeed, there seems to have been an assumption in this litigation that Lubavitch would win if it could show that the Building Authority enacted Rule 13 out of a desire to punish Lubavitch for the exercise of its constitutional rights.

Claims of retaliation admittedly almost always turn on the issue of motive. See, e.g., Perry v. Sindermann, 408 U.S. 593, 598, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972) (holding that a public employee must show "the decision not to renew his contract was, in fact, made in retaliation for his exercise of the constitutional right of free speech"). An examination of the cases cited in the briefs, however, indicates that both parties fundamentally misconceive the nature of retaliation claims. The broad, sweeping language cited by the parties is belied by the facts of the cases themselves. Indeed, to allow a retaliation cause of action against the Building Authority in this case [**17] would be a huge and unwarranted extension of established retaliation doctrine.

Of the 21 cases cited in the briefs and referenced in the District Court's opinion regarding the proper standard for retaliation claims, 16 were claims brought by either public employees or prisoners. n6 Those numbers alone should have suggested caution when considering Lubavitch's atypical retaliation claim. More tellingly, however, all of the cases cited involved challenges to discretionary government actions taken vis-a-vis individual citizens. None of these cases involved [*1295] a challenge to the mere adoption of a rule, let alone a prospective and generally applicable rule like the Building Authority's Rule 13.

-Footnotes-

n6 Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 76 L. Ed. 2d 277, 103 S. Ct. 2161 (1983); Board of Education v. Pico, 457 U.S. 853, 73 L. Ed. 2d 435, 102 S. Ct. 2799 (1982); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977); Johnson v. University of Wisconsin-Eau Claire, 70 F.3d 469 (7th Cir. 1995); Hale v. Townley, 19 F.3d 1068 (5th Cir. 1994); Gagliardi v. Village of Pawling, 18 F.3d 188 (2d Cir. 1994); Cromley v. Board of Education, 17 F.3d 1059 (7th Cir. 1994); Gooden v. Neal, 17 F.3d 925 (7th Cir. 1994); Brookins v. Kolb, 990 F.2d 308 (7th Cir. 1993); Holland v. Jefferson Nat'l Life Ins. Co., 883 F.2d 1307 (7th Cir. 1989); Rakovich v. Wade, 850 F.2d 1180 (7th Cir. 1988) (en banc); Harris v. Fleming, 839 F.2d 1232 (7th Cir. 1988); Howland v. Kilquist, 833 F.2d 639 (7th Cir. 1987); Button v. Harden, 814 F.2d 382 (7th Cir. 1987); Harvey v. Merit Systems Protection Bd., 256 U.S. App. D.C. 6, 802 F.2d 537 (D.C. Cir. 1986); Perry v. Larson, 794 F.2d 279 (7th Cir. 1986); Knapp v. Whitaker, 757 F.2d 827 (7th Cir. 1985); Matzker v. Herr, 748 F.2d 1142 (7th Cir. 1984); Egger v. Phillips, 710 F.2d 292 (7th Cir. 1983); Buise v. Hudkins, 584 F.2d 223 (7th Cir. 1978); Burton v. Kuchel, 865 F. Supp. 456 (N.D. Ill. 1994).

- - - - -End Footnotes- - - - -
 [**18]

Indeed, retaliation case law demonstrates that retaliation causes of action are challenges to the application of governmental rules, not to the rules themselves. Consider a typical retaliation case. A public employee will claim that she was denied a promotion because she has exercised some right, say affiliating with a certain political party. The government employer typically responds that the employee failed to get the promotion not because of her politics but because of some independent, neutral rule (e.g., she was less qualified than other applicants). The employee never disputes that the independent reason is a valid criterion. Rather, the employee will allege only that the rule is being applied arbitrarily or unequally to her.

Retaliation claims are undoubtedly vital to constitutional law. No matter how constitutionally sound a given rule may be, the repeated misapplication or selective application of the rule could create an entirely unconstitutional policy. An official hiring policy that disregards political affiliation, for example, could be no different in its objective, discernible effect than a policy of hiring only Democrats if the official policy is misapplied or ignored.
 [**19]

Nonetheless, courts will not sustain a retaliation claim where a plaintiff challenges only the enactment of a prospective, generally applicable rule. Executive and legislative branches of government must not be paralyzed by the prospect of a retaliation claim (and the attendant factbased motive inquiry n7) whenever they make new policy that is arguably in response to someone's speech or lawsuit. Suppose, for example, that a group of drug addicts successfully sues to get disability benefits for their addiction and Congress subsequently amends the law to prohibit benefits to drug addicts. No one would reasonably suggest that Congress's motives would then be subject to a retaliation inquiry just because it acted in response to the addicts' success in the courts.

- - - - -Footnotes- - - - -

n7 Pretext and motive are almost automatically relevant in retaliation cases because courts cannot easily determine whether the government is applying its

rules equally and fairly. Because cases come before courts one at a time, the details of any particular case may obscure a covert pattern of discrimination against those exercising certain constitutional rights. The only indicator a judge may have of what policy was really being followed may be the motives of the government actors. Motive is relevant not because government officials' thoughts have any constitutionally cognizable psychokinetic effect on constitutional rights, but rather because those thoughts are the best indicator to the courts of what policy the government is actually putting into effect. Cf. Kagan, supra, at 457 (discussing how courts cannot easily determine, in the context of administrative action, when a content-based decision has occurred).

- - - - -End Footnotes- - - - -

[**20]

Plaintiffs can, of course, attack the substance of a rule as being facially unconstitutional. See, e.g., Saia v. New York, 334 U.S. 558, 559-60, 92 L. Ed. 1574, 68 S. Ct. 1148 (1948) (striking down ordinance giving unfettered discretion to local officials regarding speaker permits); United Pub. Workers v. Mitchell, 330 U.S. 75, 100, 91 L. Ed. 754, 67 S. Ct. 556 (1947) (Congress may not "enact a regulation providing that no Republican . . . shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work"). And government officials cannot escape a retaliation claim simply by dressing up individualized government action to look like a general rule. A policy that prohibited all lobby displays by groups that had put up displays during the previous December, for example, would be neither prospective nor generally applicable. Plaintiffs may not, however, use a retaliation claim to challenge a truly prospective and generally applicable rule that is even-handedly enforced.

In short, retaliation claims protect constitutional rights only against their unequal infringement. We recognized as much in Vukadinovich v. Bartels, 853 F.2d 1387 (7th Cir. 1988), where a teacher brought both [**21] retaliation and equal protection claims after he was dismissed, allegedly for statements he had made to a local newspaper. After disposing of the retaliation claim, we said his equal protection claim alleged "only that he was treated differently because he exercised his right to free speech" and thus was "a mere rewording of plaintiff's First Amendment-retaliation claim." [*1296] Id. at 1391-92; see also Thompson v. City of Starkville, Miss., 901 F.2d 456, 468 (5th Cir. 1990) (dismissing plaintiff's equal protection claim in retaliation case because it "amounted to no more than a restatement of his first amendment claim"). In other words, retaliation doctrine protects citizens against those individualized, discretionary government actions where the government's coercive power is greatest, not against government rules that affect both majority and minority alike. n8

- - - - -Footnotes- - - - -

n8 We do not imply, however, that retaliation claims arise under the Equal Protection Clause. That clause does not establish a general right to be free from retaliation. Ratliff v. DeKalb County, Ga., 62 F.3d 338, 341 (11th Cir. 1995); see also Nestor Colon Medina & Sucesores, Inc. v. Custodio, 964 F.2d 32, 43-45 (1st Cir. 1992). We suggest only that the retaliation protection provided by other clauses of the Constitution is limited to claims against the unequal application of discretionary government power.

- - - - -End Footnotes- - - - -
[**22]

Returning to the specifics of this case, Rule 13 is unequivocally a prospective and generally applicable rule because it bans all private displays henceforth. Furthermore, no one has even hinted that the rule has been or is being applied unequally. Lubavitch therefore has not stated facts sufficient for a retaliation claim. To hold otherwise would be a significant expansion of retaliation doctrine and would encourage only litigiousness and governmental paralysis.

D. Lubavitch's Viewpoint Discrimination Claim

Although its retaliation claim can be dismissed with relative ease, Lubavitch presents a more colorable viewpoint discrimination claim. Here Lubavitch alleges that, regardless of whether the Building Authority wanted to retaliate because of Lubavitch's litigation success, the Building Authority's overarching intent to discriminate against the menorah display (and against religious displays generally) makes Rule 13 an unconstitutional viewpointbased regulation of speech. n9

- - - - -Footnotes- - - - -

n9 Although Lubavitch's viewpoint discrimination claim clearly derives from a long line of Free Speech Clause case law, Lubavitch argues on appeal that amended Rule 13 also violates the Establishment Clause. Lubavitch's general invocation of the First Amendment in its complaint, however, is far too broad to preserve an Establishment Clause claim raised for the first time on appeal. Like the Fourteenth Amendment, the First Amendment is "a vast umbrella, and to preserve a claim under it for consideration by an appellate court you must tell the court just what spot of ground beneath the umbrella you're standing on." *Yatvin v. Madison Metro. Sch. Dist.*, 840 F.2d 412, 420 (7th Cir. 1988).

- - - - -End Footnotes- - - - -
[**23]

Because the City-County Building lobby is government property, the constitutionality of a regulation of speech on that property hinges on what has been called "forum analysis." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985). Although "nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property," *id.* at 799-800, any regulation of speech on government property must still withstand some constitutional scrutiny.

The exact constitutional standard depends on whether the government is trying to regulate a "public forum" or a "nonpublic forum." Property can be designated as a public forum either by tradition or by law. *Capitol Square Review and Advisory Bd. v. Pinette*, 132 L. Ed. 2d 650, 115 S. Ct. 2440, 2446 (1995). Traditional public fora are properties like streets and parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983) (quoting [**24] *Hague v. Committee for Industrial Organization*, 307 U.S.

496, 515, 59 S. Ct. 954, 83 L. Ed. 1423 (1939) (opinion of Roberts, J.)). Legally created public fora are fora such as school board meetings and municipal theaters where the government has intentionally--not by inaction or by permitting limited discourse--opened a nontraditional forum for public discourse. See *Cornelius*, 473 U.S. at 802; *Perry*, 460 U.S. at 45-46. [*1297] Any remaining government property is considered a nonpublic forum. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-79, 120 L. Ed. 2d 541, 112 S. Ct. 2701 (1992).

Given their greater importance to the free flow of ideas, public fora receive greater constitutional protection from speech restrictions. Any speech regulation in a public forum must be either 1) a reasonable, content-neutral time, place, and manner restriction, or 2) narrowly drawn to advance a compelling state interest. *Capitol Square*, 115 S. Ct. at 2446. As Justice Brennan explained in his *Perry* dissent, content-neutrality is a particularly strong constitutional standard that "prohibits the government from choosing the subjects that are appropriate for public discussion." *Perry*, 460 U.S. at 59 (Brennan, J., dissenting). [**25] In other words, content-neutrality not only forbids discrimination against particular viewpoints on a subject (what Justice Brennan called "censorship in its purest form," *id.* at 62), but also prevents the government from even limiting discussion in public fora to specific subjects. A content-neutral regulation is thus both viewpoint-neutral and subject-neutral. See *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 132 L. Ed. 2d 700, 115 S. Ct. 2510, 2517 (1995) ("Discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination.").

The constitutional standard governing speech regulations in nonpublic fora is less certain. The Supreme Court has elaborated on the standard in a number of cases, but the Court's language has not always been entirely consistent. The cases have unequivocally held that any speech regulation in a nonpublic forum must be "reasonable in light of the purposes served by the forum." *Rosenberger*, 115 S. Ct. at 2517; *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 113 S. Ct. 2141, 2147, 124 L. Ed. 2d 352 (1993); *Cornelius*, 473 U.S. at 806; *Perry*, 460 U.S. at 49; see also *Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 131 n.7, 69 L. Ed. 2d 517, 101 S. Ct. 2676 (1981). The cases have been less definitive, however, regarding the neutrality standard that a nonpublic forum speech regulation must meet. In *Postal Service v. Council of Greenburgh Civic Ass'ns*, the Court said that such speech restrictions must be content-neutral. *Id.* In *Perry* and *Cornelius*, however, the Court shifted its focus to viewpoint discrimination and particularly to the intent to discriminate against specific viewpoints. The Court stated that a regulation must not be "an effort to suppress expression merely because public officials oppose the speaker's view," *Perry*, 460 U.S. at 46, and similarly that a regulation must not be "in reality a facade for viewpoint-based discrimination," *Cornelius*, 473 U.S. at 811. In its most recent cases, meanwhile, the Court has said that nonpublic forum regulations must be viewpoint neutral, making no mention of impermissible intent. See *Rosenberger*, 115 S. Ct. at 2517; *Lamb's Chapel*, 113 S. Ct. at 2147.

We need not decide whether the City-County Building lobby is a public forum because Lubavitch has conceded for the purposes of its preliminary [**27] injunction motion that the lobby is a nonpublic forum. We must determine, however, the appropriate standard under which to review Rule 13. The Court has clearly abandoned the content neutrality standard, but the relevance of motive

in the Court's opinions has varied. We must therefore determine whether the subjective language in Perry and Cornelius (suggesting that the mere intent to discriminate against a viewpoint is sufficient for a constitutional violation) survives the more recent cases that suggest a more objective measure of viewpoint-neutrality.

Whatever the Court's language in recent cases, the Court's actions are both more telling and more binding than any mere dicta. And the motive language in earlier cases cannot be dismissed as mere dicta because the Court in Cornelius remanded the case to determine whether the speech restriction at issue was "impermissibly motivated by a desire to suppress a particular point of view." [*1298] 473 U.S. at 812-13. Nonetheless, we view the present case as distinguishable from these prior precedents because the Court never considered a content-neutral speech restriction like Rule 13. Rather, the Court's concern about motivation arose [**28] only in cases where the Court was considering speech restrictions that explicitly discriminated on the basis of content.

Motive becomes keenly relevant in cases that involve content discrimination because the line between viewpoints and subjects is such an elusive one. Because subject matter discrimination is clearly constitutional in nonpublic fora, see Perry, 460 U.S. at 49, classifying a particular viewpoint as a subject rather than as a viewpoint on a subject will justify discrimination against the viewpoint. This inherent manipulability of the line between subject and viewpoint has forced courts to scrutinize carefully any content-based discrimination. See *Airline Pilots Ass'n v. Department of Aviation*, 45 F.3d 1144, 1159-60 (7th Cir. 1995) (warning courts against retreating to an exaggerated level of generality when examining content-based regulations). Courts thus have struggled, for example, with the issue of whether religious discussion should be categorized as a subject (and therefore excludable from a nonpublic forum) or as a viewpoint (and therefore constitutionally protected). See *Rosenberger*, 115 S. Ct. at 2517-18; *Grossbaum I*, 63 F.3d at 589-92. The [**29] Supreme Court faced a similar issue in *Cornelius* where it was understandably dubious of the argument that excluding all advocacy groups, regardless of political orientation, from a government charity drive was just subject matter discrimination rather than viewpoint discrimination. 473 U.S. at 811-12. Because the government was distinguishing among groups based on the content of their messages (either advocacy or nonadvocacy), the Court remanded the case to see whether the government was really targeting certain viewpoints.

Where, however, the government enacts a content-neutral speech regulation for a nonpublic forum, there is no concern that the regulation is "in reality a facade for viewpointbased discrimination," *Cornelius*, 473 U.S. at 811. Whatever the intent of the government actors, all viewpoints will be treated equally because the regulation makes no distinctions based on the communicative nature or impact of the speech. A facade for viewpoint discrimination, in short, requires discrimination behind the facade (i.e., some viewpoint must be disadvantaged relative to other viewpoints). Courts do have a hard call to make when they review content-based speech regulations [**30] because the government could be shutting out some viewpoints by labelling them as subjects. Motive may thus be a vital piece of evidence that courts must use to judge the viewpoint-neutrality of the regulation. When the government restricts speech in a content-neutral fashion, however, all viewpoints--from the Boy Scouts to the Hare Krishnas--receive the exact same treatment. n10

n10 It should be noted that content-neutrality requires not only facial neutrality but also some semblance of general applicability. Cf. Church of the Lukumi Babalu Aye, 113 S. Ct. at 2226-33 (discussing neutrality and general applicability as the touchstones of Free Exercise Clause analysis); id. at 2239 (Scalia, J., concurring in part and concurring in the judgment); Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 879-81, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990). A regulation that prohibited all private groups from displaying nine-pronged candelabra may be facially neutral, but it would still be unconstitutionally discriminatory against Jewish displays. The lack of general applicability is obvious not from the government's motives but from the narrowness of the regulation's design and its hugely disproportionate effect on Jewish speech. Cf. Tribe, supra, at 34.

- - - - -End Footnotes- - - - -
[**31]

Indeed, the Supreme Court suggested in Capitol Square that content-neutral regulations are free from motive inquiries even in public forum cases. The Court there considered the denial of a permit to the Ku Klux Klan for the erection of a Latin cross in a public forum, even after the government had granted permission for a Christmas tree and a menorah to be displayed. Eight members of the Court joined behind the proposition that the State of Ohio "could ban all unattended private displays in [the forum] if it so desired." Capitol Square, [*1299] 115 S. Ct. at 2457 (Souter, J., concurring in part and concurring in the judgment); see also id. at 2446; id. at 2467-68 (Stevens, J., dissenting). This proposed course of action would seem impossible, however, if Ohio's undisputed desire to keep the Klan off of government property would be sufficient to establish viewpoint discrimination. And if eight justices thought Ohio was free, even after it had discriminated against the Klan, to ban all private displays in a public forum, then the Building Authority a fortiori should have the same freedom to prohibit all private displays in its nonpublic forum. n11

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n11 Our holding today is expressly limited to speech regulations in nonpublic fora. We express no opinion on the harder issue of whether motive is relevant in public forum cases. The nonpublic forum case is easier because of the stronger government interest in controlling property not dedicated to public discourse, see Perry, 460 U.S. at 49, and because of the lesser role that nonpublic fora generally play in the marketplace of ideas, see Richard A. Posner, Free Speech in an Economic Perspective, 20 Suffolk U. L. Rev. 1, 52 (1986).

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[**32]

In sum, content-neutral speech regulations in nonpublic fora pass constitutional muster regardless of motive for the same reason that retaliation claims are inoperative against generally applicable rules. When a government body acts at a sufficiently high level of generality, there is no need for courts to search the minds of government actors for invidious motives that might indicate unconstitutional discriminatory effect. And it is this unconstitutional effect that ultimately matters. "[A] facially neutral government action that

does not in fact . . . violate anyone's constitutional rights or any constitutional principle . . . should not be rendered unconstitutional, or even suspect, just by virtue of the factors considered by, or the attitudes or intentions held by, the public officials responsible for that action" Tribe, supra, at 28-29; cf. Kagan, supra, at 505-17.

Moreover, we are mindful of Judge Easterbrook's observation that real world actors such as the Building Authority need ex ante guidance from our decisions, not just ex post judicial critiques:

People are entitled to know the legal rules before they act, and only the most compelling reason [**33] should lead a court to announce an approach under which no one can know where he stands until litigation has been completed. Litigation is costly and introduces risk into any endeavor; we should struggle to eliminate the risk and help people save the costs. Unless some obstacle such as inexperience with the subject, a dearth of facts, or a vacuum in the statute books intervenes, we should be able to attach legal consequences to recurrent factual patterns.

Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring). The past year of litigation, the more than 900 pages of depositions fishing for an inculpatory admission by the Building Authority, and the thousands of taxpayer dollars spent on legal expenses for this case only underscore the point. This motive game is not worth the candle.

The only possible issue remaining is whether Rule 13 is reasonable in light of the purposes served by the CityCounty Building lobby. Although Lubavitch did not explicitly challenge Rule 13 on reasonableness grounds separate from its viewpoint discrimination claim, Lubavitch clearly did argue that the unreasonableness of Rule 13 was evidence that the Building [**34] Authority's motives were pretextual. Assuming for the sake of argument that this was sufficient to raise the reasonableness issue, we are confident that the District Court did not abuse its discretion when it denied Lubavitch's motion for a preliminary injunction. "The Government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808. The District Court found a number of reasonable justifications for the new Rule 13, 909 F. Supp. at 1205, 1207, 1209-10, and all are well within the bounds of what rational basis scrutiny permits.

In closing, nothing in this opinion should be construed as undermining Lubavitch's hardfought success in its previous appeal to this court. Lubavitch clearly struck a blow for the freedom of speech when it challenged [*1300] the Building Authority's earlier policy that discriminated against religious displays. Lubavitch's prior victory against the Building Authority does not, however, give Lubavitch immunity against all subsequent Building Authority actions that, although nondiscriminatory, happen to be disadvantageous to Lubavitch.

The decision [**35] of the District Court to deny preliminary injunctive relief is AFFIRMED.