

Statement of Philip K. Howard  
author, *Life Without Lawyers: Liberating Americans from too much law* (2009)

Republican Senate Policy Committee  
March 16, 2009

Over the past 40 years, American law has slowly intruded itself into the daily lives of Americans at all levels of responsibility. The effect has been to corrode their freedom to do their jobs.

--Because “due process” was imported into ordinary classroom decisions, teachers lost control of the classroom.

--Because of fear of unreliable justice, doctors routinely practice “defensive medicine”—estimated by some to squander over \$100 billion every year.

--Because of universal fear of lawsuits, children aren’t allowed to take the normal risks of childhood—the Broward County Florida school district even banned running at recess. With nothing in playgrounds to lure them outdoors—no jungle gyms, no merry-go-rounds, no seesaws-- children stay inside, contributing to the crisis of obesity.

Visit any institution in America today and the message is not “Yes We Can” but “No You Can’t.” Distrust of justice is so great that adults will no longer put an arm around a crying child. It’s as if everyone has a little lawyer on their shoulder whispering in their ear—when in doubt, don’t. Washington itself is paralyzed by law. Almost everyone recognizes the need to rebuild America’s aging power grid, yet it will be the year 2020 before most projects can even get started. Environmental impact statements have evolved into a years-long exercise in “no-pebble-left-untuned”—followed by litigation by any disgruntled opponent.

America needs energy and action. It must rekindle the can-do spirit that made America great. The dire economic situation presents both the urgent need and opportunity to overhaul outmoded legal structures that weigh heavy on daily choices, preventing America from picking itself up. It is impossible to contain healthcare costs as long as doctors have the affirmative incentive to order extra tests. It is impossible to have successful schools if teachers lack the authority to maintain order in the classroom. It is impossible for Washington to lead if the machinery of government is so encrusted with legal layers that even basic management decisions, including procurement and personnel decisions, are beyond anyone’s authority.

Area by area, Congress should rebuild the legal infrastructure. The goal is to restore the freedom to take responsibility. This freedom requires rebuilding reliable legal boundaries so that people don’t feel fearful as they go through the day. The new public philosophy must be based on the need to make choices for the common good. A society needs red lights and green lights. Otherwise people creep through the day, fearful of being blind-sided. The old public philosophy is a lowest-common-denominator approach that allows any disgruntled person to throw a monkey wrench into any activity by unilaterally making a legal claim.

Even as America cries out for freedom to take responsibility, there are those who continue to advocate for expanding the power of any individual or lawyer to bring lawsuits, irrespective of the effects on the common good. This instinct of wanting to “get the bad guys” unfortunately has no limiting mechanism, and will only contribute to the economic malaise—like a dog biting its wounds. America did not sue its way to greatness.

Lawsuits enhance the fabric of freedom only when those in positions of public responsibility—legislatures and judges—take the authority to delineate who can sue for what. To feel free in daily choices, people need to know where they stand. That’s what it means to live under the rule of law.

In order to respond to the economic crisis, we must empower Americans at all levels of responsibility to focus on their goals, not on legal self-protection. Overhauling the legal infrastructure in each of the following areas could be transformational.

**Restore Order in Schools.** Learning is impossible if even one student is being disruptive. That’s why it’s not possible to find a good school where disorder is tolerated. Yet disorder is the status quo in many, perhaps most, public schools. A 2001 Public Agenda survey found that 43% of America’s high school teachers spent at least half their time maintaining order. That means the students in those class get half the learning they should.

The causes of disorder are not a secret. As Professor Richard Arum details in *Judging School Discipline*, the rise of due process, with attendant focus on legal process and bureaucracy, had the unintended effect of corroding teacher authority--leading to overly rigid “zero tolerance” rules, and a general belief by some students that they have “rights” to protest any decision. According to a 2004 study by Public Agenda, 85% of teachers believe that the school experience of most students suffers at the hands of a few chronic offenders. The same study reports that 78% of teachers said students are quick to remind them that they have rights or that their parents can sue. In a 2004 study conducted by Common Good, 85% of teachers and principals said that reducing the availability of legal challenges to day-to-day management and disciplinary decisions would help improve the quality of education in their schools.

Principals and teachers need the authority to take back control of the classroom. Federal legislation could clarify their authority. In 2004, Senator Zell Miller introduced two pieces of legislation addressing these concerns. The *Fairness in School Discipline Act of 2004*, S. 2404, 108th Congress, addressed due process protections available to students who face suspension. For suspensions of ten or less days, the bill provided for suspension by the principal without appeal. For suspensions of more than ten days, the bill provided for notice to the parents, a meeting, and appeal to a body established by the school district. The *Restoring Authority to Schools Act of 2004*, S. 2405, 108th Congress, sought to limit the role of federal courts in the administration of public schools by

limiting the relief available for various civil actions. Federal legislation of this sort can be instrumental in decreasing the attractiveness of education suits and ratcheting down expectations of what is required at the state level.

Restoring order is not just a matter of legal authority. Schools also need to provide alternative classrooms and supervision for those students who, for whatever reason, are unable to abide by the norms of civil behavior. Perhaps stimulus money could be allocated for this purpose. Allowing a few students to disrupt the learning of everyone else is too high a price.

**Create Expert Health Courts.** Distrust of justice dramatically skews incentives, towards self-protection instead of doing what makes sense. Doctors almost universally distrust the malpractice system, causing them to squander billions in defensive medicine. When one out of four baseless malpractice claims results in payment, it's no wonder they work with as much an eye to their own legal protection as to their patients' physical health.

A broad coalition has come together behind doing pilot projects of specialized health courts with specially trained judges, neutral experts, and consistent damages valuations. Supporters include AARP, most patient safety organizations and virtually all healthcare providers. Hospitals such as Johns Hopkins and NY Presbyterian have volunteered to be the pilot. The goal is not only to achieve fairness and reliability in medical injury adjudication, but to restore the trust needed to make other needed reforms in healthcare, including cost containment.

The corrosive effects of the current ad hoc malpractice system go far beyond defensive medicine. It has negatively impacted Americans' access to health care, driving doctors out of high-risk fields such as obstetrics, and has repercussions for the quality of the care we do receive. Doctors and other health care professionals are reluctant to discuss errors and near misses openly, hampering efforts that would allow problems to be identified and resolved. Major improvements in patient safety will only be possible if health care providers can work without legal fear. And reducing avoidable errors has the potential to save tens of billions of dollars annually.

In 2007, Senators Enzi and Baucus sponsored the *Fair and Reliable Medical Justice Act*, S. 1481, 110th Congress, which would enable the Secretary of Health and Human Services to authorize grants to individual states of up to \$500,000 to test alternatives to the medical liability system. Several states have indicated that they would be eager to apply for such grants and begin pilot projects for any number of alternatives, including health courts. In 2007, Senator Tom Coburn also introduced the Universal Health Care Choice and Access Act, S. 1019, 110th Congress, to establish independent administrative health care tribunals to provide compensation efficiently and reliably.

**Streamline Review for Green Projects.** The stimulus package signed by President Obama last week includes billions of dollars for infrastructure improvements, including many green projects. It is a noble idea, but the likelihood is small of large projects

providing stimulus in the short or medium term. Environmental reviews have evolved into years-long exercises in no-pebble-left-untuned--followed by years of litigation by any disgruntled opponent.

Congress should establish an expedited framework for environmental review of projects that have desirable environmental effects. To ensure accountability and continued protection of environmental interests, Congress should also establish a special infrastructure board to manage the expedited process. The board should include relevant constituencies, including environmentalists. Congress could also provide broad waivers from the federal contracting bureaucracy, similar to what California Governor Pete Wilson did in 1994 in response to the Northridge earthquake and what was done in response to the Minneapolis bridge collapse in 2007. The stimulus package will be ineffective if the federal dollars do not make it into the marketplace. Urgent times require action, not paralysis.

**Scrape away decades of legal concrete.** Congress passes laws, but rarely goes back to fix unintended effects. Already more than one thousand bills have been proposed in the House of Representatives and the Senate since the first session of the 111<sup>th</sup> Congress opened less than three months ago – that’s on top of the more than 100 million words of binding federal statutes and regulations already on the books.

Congress should create a “spring cleaning commission” to do a systematic review of regulation in each area, making recommendations not to “deregulate” but to make sense of existing public goals. This review would ensure that unnecessary provisions are removed and that the laws on the books reflect our present needs and circumstances.

**Empower Judges.** What people can sue for establishes the boundaries of our freedom. To feel free in daily choices, Americans must trust the system of justice to affirmatively defend their reasonable actions if there’s ever a dispute or accident. But Americans no longer trust American justice. In a 2005 poll, only 16 percent of Americans said they would trust the legal system if someone brought a baseless case against them. Other surveys show that Americans believe that justice is readily available as a tool of self-interest for people to wield against each other.

Restoring public trust in justice requires that judges take the responsibility to draw boundaries of reasonable claims, as a matter of law--dismissing frivolous or baseless claims, managing and limiting discovery, and making legal rulings whenever a claim might affect the public interest. The British Parliament in 2006 empowered British judges to consider how a lawsuit might affect risky but desirable activities and to weigh the real-world impact of litigation. Congress should grant similar authority to federal judges.

**Encourage Alternative Dispute Resolution.** Litigation is costly and time-consuming. In my book, *Life Without Lawyers*, I discuss how fear of lawsuits perverts decision making, often leading to undesirable outcomes both in terms of increased costs and loss

of societal goods that we value. Therefore, I am concerned by the proliferation of legislation already introduced in this Congress which seeks to expand the right to sue. Underlying many of these bills is the assumption that lawsuits are the best way to resolve disputes. This assumption ignores the fact that there are often alternatives that are cheaper, more efficient, more balanced, and more responsive to our common interests. For that reason, I am concerned about the bills that seek to ban arbitration, particularly S. 512 and H.R. 1237 (no arbitration in nursing home contracts), H.R. 1020 (no arbitration in employment, consumer and franchise agreements), H. R. 991 (no arbitration in certain consumer contracts. See also H.R. 1214; S. 263. If there are specific concerns about arbitration in specific areas, those concerns should be addressed--but not by eliminating a quicker and more cost effective way of resolving disputes.

Similarly, I am concerned about the bill (S. 537) that would limit the enforceability of protective orders that would seal discovery in many types of civil cases, because it appears to discourage settlement. Another bill that would seem to encourage litigation is one that would give new tax breaks to personal injury lawyers to deduct loans to clients as upfront business expenses (S.437).

A bill expanding False Claims Act claims would have many pernicious effects, expanding what was originally a system to safeguard against government fraud to a vast range of organizations that receive government funds.

Thank you for this opportunity to appear before you.