

Testimony of Michael Kinsley
Subcommittee on Health
House Committee on Energy and Commerce
May 12, 2009

Thanks for this opportunity to testify. I'm here because I was approached last week by Medtronic. But I don't represent Medtronic or anyone except myself. I don't claim to be an expert on federal pre-emption issues or to even have a view on the specific question of different standards for medical devices and pharmaceuticals.

I am here for two reasons. First, as a grateful customer of the pharmaceutical and medical device industries. I have had Parkinson's disease for over 15 years. As I hope you can see for yourselves, my symptoms are pretty mild. They have not affected my ability to work, to travel, to enjoy life. This is true thanks in part to drugs—including several that did not exist when I was first diagnosed. And it is true thanks especially to surgery I had three years ago called Deep Brain Stimulation. Now I walk around with wires in my head and two pacemaker-type batteries in my chest. But if not for these pills and devices, I might not be walking around at all.

I am also here as a journalist who has written quite a bit about the damage done to our economy and to our country by excessive litigation in general and lawsuits over medical care gone wrong in particular. This goes back 30 years to a piece in *The New Republic* about a pregnancy drug called DES, and includes a column in the *Washington Post* just a few weeks ago about the Wyeth case.

So here's the problem. We all want the government to protect us from dangerous drugs and devices. But we don't want the government to prevent us from getting helpful or even lifesaving drugs and devices. Yet the most important drugs and devices are both. They save lives, and they can cost lives. The government's job is to weigh the risks against the benefits.

And here's where it gets messy. We have two completely independent systems for making the same decision of whether a drug or device should be approved for sale.

One is the Food and Drug Administration-- a national government agency staffed by experts and mandated to take into account both the potential benefits and the potential dangers. The decisions it makes set a uniform standard for everyone in every state.

The other system is tort law, administered by thousands of non-expert judges and jurors in 50 state courts. The same issue can and does get relitigated dozens of times. Differences in state law or just the randomness of juries produce dozens of different answers. Some plaintiffs hit the jackpot; most victims never even sue. The direct cost is horrendous: delivering a dollar to a victim costs far more than a dollar in expenses—mostly lawyers' bills.

The indirect cost is immeasurable. Lawsuits focus on the victim of some medical product. By their nature, they undervalue the benefit that same product has brought to other users, or even to the victim herself.

Forced to choose between these two systems for making essentially the same decision, I believe that anyone sensible would choose the FDA. But in real life, the situation is even crazier: we have both systems simultaneously. And basically, whichever one draws a more restrictive line, wins. Add to this the fact that product manufacturers have no idea when or how the standard might change, and you have a perfect arrangement for discouraging drug and device manufacturers from developing new products, like the ones that allow people like me to go about our business, which is making trouble for people like you.

Thank you again.

“Truth in Testimony” Declaration:

I am testifying on behalf of myself (though at the request of Medtronic Corp). I have received no compensation from Medtronic or anyone else for this testimony. I also have received no compensation from and signed no contracts with the United States Government for at least ten years.

Here is my bio:

Michael Kinsley is a columnist for the Washington Post. For many years he was the Editor of The New Republic. He was the founding Editor of Slate. He also served as Editor of Harper's, Editorial and Opinion Editor of the Los Angeles Times, American editor of The Economist, and Managing Editor of The Washington Monthly. He has written regular columns for Time Magazine, the Los Angeles Times, the Wall Street Journal and the Times of London. His writing has appeared in the New Yorker, the Readers Digest, the Daily Beast, Conde Nast Traveler, and other publications. For six years he was co-host of the CNN program "Crossfire," appearing five nights a week opposite Pat Buchanan, John Sununu and Robert Novak. He also was William F. Buckley's regular interlocutor on Firing Line and moderator of the Firing Line debates on PBS.

Kinsley was born in Detroit in 1951. He attended Harvard College, Oxford University and Harvard Law School. He is a member of the District of Columbia Bar and the Screen Actors Guild. He lives in Seattle with his wife, Patty Stonesifer.