

Summary of Testimony of Philip K. Howard

Before the Senate HELP Committee, June 22, 2006

The debate over medical malpractice has focused on one symptom -- the rise in insurance premiums -- without addressing the underlying systemic flaws.

Distrust of justice is tearing at the fabric of American healthcare, chilling open professional interaction and causing doctors to squander billions in unnecessary tests and procedures. The distrust stems from the fact that justice today tolerates inconsistent results for similar conduct, and appears to be inaccurate in over a quarter of the cases. Nor does the system work well for injured patients: meritorious cases often take five years, and consume 33%- 40% of the recovery in lawyers' fees.

Making the choices needed to fix American healthcare-- improving quality, containing costs and providing predictable accountability-- requires a reliable system of justice. That's why a broad coalition of consumer and patient advocates, as well as healthcare providers, have come together behind the idea of creating special administrative health courts. The goal is to create a system of justice reliable for patients and doctors alike, and to act as a foundation for other choices needed to bring order to American healthcare.

Defenders of the system cling to the orthodoxy that each case be tried by a jury. But America has a mounting crisis in health care, and the goal of law is to support society, not the other way around. There is also a flaw in the current orthodoxy: The core idea of the rule of law -- that like cases be decided alike -- is not satisfied when juries make decisions in an *ad hoc* manner without consistent legal rulings on standards of care. America has a long tradition of special courts for disputes needing consistency and special expertise--admiralty courts, bankruptcy courts, workers compensation systems, to name just a few-- and special health courts fit squarely within that tradition.