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same letter sent to:
The Honorable Joseph Biden

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary

Dear Senator Hatch:

As proposals for tort reform reach your committee in this Session of Congress, I would like to bring to your attention several related legal reform proposals that would serve the following purposes:

- curb abuse by plaintiff's lawyers who collect enormous fees by exploiting an unregulated conflict of interest with their own nominal clients in class action suits;
- eliminate an unnecessary but expensive federal court;
- counter the centralization of power in the federal courts and prevent federal interference with state courts and states' rights.

The reforms I recommend will promote the objective of reducing the impact and cost of the federal government. My proposal would also expand and enlarge the scope of the Securities Litigation Reform Bill to limit abuses by the plaintiff's bar in class action suits. In its present form the House Bill addresses only the securities field although the abuses are at least as great in the mass tort context.

The problems that the following proposals address have come to my attention through the efforts of Vietnam Veterans to obtain justice for their Agent Orange injuries. While the federal Agent Orange litigation exemplifies the problems addressed by my proposals, the underlying cause of the problems affects most mass tort cases.

I would like to emphasize at the outset that my proposed legislation would require no budget item or unfunded mandate of any kind. In fact, failure to restore rules of law that traditionally require responsible parties to pay for the damage caused by their wrongdoing means that, in the future, state and federal programs will be burdened by the medical and social consequences of injuries caused by corporate negligence. In an era of federal deregulation, we must be alert to prevent weakening the free market deterrent of state tort law by preemptive federal law.

My legislative proposal incorporates the following three reforms.

I. Abolish the Multidistrict Litigation Panel

My first proposal presents an opportunity for federal budget cuts by simply repealing 28 U.S.C. § 1407. This action would abolish the Multidistrict Litigation ("MDL") Panel, and its annual budget which is spent solely for purposes of transferring cases from one federal district to another. The creation of this "Panel," or special court, was strongly opposed, for persuasive reasons, by the American Bar Association when § 1407 was adopted in 1968.

The enactment of § 1407 did not fix anything that was broken at that time. Courts that need to cooperate in complex multidistrict litigation have the authority to do so, and indeed had done so prior to 1968, in the absence of § 1407.

The MDL Panel serves little purpose but to centralize federal judicial authority in a manner that undermines justice in individual cases as it has done in the Agent Orange litigation. By giving a single federal judge, and hence a single group of plaintiff's lawyers approved by that judge, nationwide authority over the lives of hundreds of thousands of plaintiffs around the country, this Panel was an essential instrument of the injustice the veterans suffered in the *Agent Orange* litigation. It has played the same role in other mass tort cases. One of the wisest judges to sit on the MDL Panel, Judge Weigel, observed that a transfer by the MDL Panel can, in some circumstances, be neither "convenient nor efficient nor just. It appears to reward a plaintiff whose case is assessed as being weak. And it may well encourage institution of frivolous suits by plaintiffs exploiting Section 1407 transfers to force nuisance value settlements." *In re Butterfield Patent Infringement Litigation,* 328 F. Supp. at 518 (dissent).

To advance such ends in cases like *Agent Orange,* the MDL Panel spends the taxpayers' money on perfunctory hearings that amount to little more than junkets to assorted vacation spots six times a year for the seven federal judges appointed to the Panel by the Chief Justice and their staff. For example, the Panel held a January 20, 1995, hearing on an Agent Orange case in Fort Myers, Florida, though the case and none of the parties had any connection with Florida. The judges on the Panel could take no more than about 10 minutes out from their vacation plans to allow the veterans' to present their substantial arguments against transferring their case from California to Brooklyn, New York. Following this expensive hearing, the Panel then, as is typical, issued a two-page formulaic and conclusory order that ignored the veterans' extensive briefs on the legal issues raised and also revealed a lack of care in understanding basic facts about the case.

Whatever work the MDL panel does perform in deciding whether cases should be transferred around the country in certain situations could be as easily, and more fairly and deliberately, performed by the federal district judges that have jurisdiction over those individual

cases. The district court that has the proper venue and jurisdiction over the case could make such a decision in the ordinary course of handling the case without spending taxpayers' money on maintaining offices and staff at the Federal Judiciary Building and on marginally useful trips to vacation spots.

II. <u>Prohibit class action lawyers from settling suits without consent of their clients</u>.

My second proposal is that any settlement or stipulated dismissal of a class action suit shall be by agreement of the parties and not simply by agreement of the class action lawyers who obtain huge fees from defendants in return for settling their clients' claims. It is elementary that no settlement should bind any person who has not received actual notice of both the precise terms of the settlement and their right to reject the settlement or who rejects the settlement after receiving such notice.

> 28 U.S.C. § 2072 states that federal judicial rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment of the Constitution.

Vietnam veterans were denied their right to a trial by jury of their Agent Orange damage claims by expansive interpretations of Rule 23 of the Federal Rules of Civil Procedure in the *Agent Orange* litigation. Federal courts in effect converted the veterans' state tort law claims into federal equity claims for which no jury trial is required. The court-appointed class lawyers accepted the settlement though most veterans in fact strongly opposed it including the representative plaintiffs in the two principal Agent Orange class actions, Ryan and Ivy.

My proposal would assure that Rule 23(e) class action settlement practices developed in the *Agent Orange* case do not exceed the authority granted by Congress to the prejudice of the due process rights of worthy litigants.

In the *Ryan* case a class was certified despite conflicts of interest by the class action lawyers. The presiding judge included in the class both veterans who claimed injuries allegedly caused by Agent Orange and also other absent veterans who had no such claim of injuries and, therefore, no claims that could be adjudicated at the time of the settlement and who were entirely unaware that their potential future claims were being settled. These persons, both present and absent, were lumped together in 1984 as "class members" and their then existing and non-existing claims were settled by attorneys at once representing both groups of veterans, and their families, notwithstanding the conflict between the interests of the two groups.

The settling attorneys were found by the Court of Appeals to have had fee arrangements that aggravated this conflict of interest inducing them to settle all potential claims early and cheaply. *In re Agent Orange Product Liability Litigation,* 818 F.2d 216 (2d Cir. 1987). The case would probably not have settled had the attorneys not also agreed to settle the future claims. 781 F.Supp. 919-20.

In *Ivy v. Diamond Shamrock Chemicals Co.*, 781 F. Supp. 902 (E.D.N.Y. 1991), *aff'd*, 996 F.2d. 1425 (2d Cir. 1993), *cert. denied*, __ U.S. __ (Feb. 22, 1994), veterans who had not manifested any Agent Orange injuries until after the 1984 settlement contended that it was against their interest to have prematurely settled their potential claims before they existed. Their claims would later become valuable as time passed and the epidemiological and scientific evidence eventually became available that would prove that Agent Orange chemicals caused their injuries. *E.g.* National Academy of Sciences' Institute of Medicine, *Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam* (July 27, 1993); Affidavit of Cate Jenkins, Ph.D, (EPA), *Recent Scientific Evidence Developed After 1984 Supporting a Causal Relationship Between Dioxin and Human Health Effects* (September 3, 1991).

But court-appointed lawyers, without the consent or knowledge of the injured veterans, settled their future claims in 1984 for an average of less than $5000 for each death and total disability claim and nothing for any lesser injury. These lawyers had a strong interest in fashioning an early settlement at any price provided it would cover their $13 million fee award.

The district judge approved this "nuisance value" settlement as "fair" although it was opposed by most veterans with claims who were able to present their views and it was clearly unfair to veterans with provable claims. The views of those veterans whose potential future claims were settled without their knowledge, before their claims arose, and who were thereby most prejudiced by the "nuisance value" settlement were not separately represented or heard at the time of the 1984 settlement. When they were finally able to make their views known in *Ivy*, their opposition to the settlement was similarly ignored by the federal courts.

The same presiding judge who was directly engaged in developing the terms of the settlement agreement, and was authorized by the settlement to determine who among the plaintiffs would receive any part of the settlement funds, also acquired direct fiduciary control over a part of the settlement funds. Although this created a judicial conflict of interest without precedent in the law, nothing in current law prevented this judge from allocating $52 million of the settlement funds to a foundation which he directly controlled.

Subsequently, in *Ivy*, veterans and their families who had received no notice of the earlier case or of its settlement in 1984 and had no opportunity to opt out of that case, claimed that the

actual settlement agreement did not by its terms include their claims. Alternatively, they argued that if it settled their claims they were not adequately represented by counsel who approved such an agreement in their absence. A "nuisance value" settlement was clearly against their interests in preserving their right to sue until their claims actually arose and were provable. Notice, opportunity to opt out, and adequate and unconflicted representation are long-standing due process prerequisites for binding an absent person to such a settlement.

But the *Ivy* plaintiffs were forced by federal removal and transfer to litigate these issues before the same presiding judge who imposed the settlement and had gained fiduciary control over settlement funds as a result. This judge predictably denied the *Ivy* plaintiffs their right guaranteed by the Seventh Amendment to present their claims to a jury, although they had made no knowing waiver of that right.

The *Ivy* case illustrates the dangers inherent in current class action practices which invest federal judges with powers free of the usual constraints of juries, the adversarial system, and the actual consent of litigants to agreements purportedly made on their behalf. One judge should neither exercise such unstructured powers through the device of a class action "settlement" nor monopolize all issues arising from an incident affecting the important property and liberty interests of thousands of persons.

My proposal would therefore prohibit the use of Rule 23 for the settlement of claims for money damages by class action lawyers without the knowing consent of the party whose claim they are purportedly settling.

III. Prohibit federal courts from interfering with state courts except in strict accordance with laws whereby Congress clearly permits such interference.

My third proposal would provide that no case be removed from state court except in strict accordance with laws enacted by Congress. Specifically, no federal court should take jurisdiction away from a state court by means of a decree issued under the general equity powers of the federal judiciary.

The federal courts removed the *Ivy* case from Texas state court under the All Writs Act. In nearly 200 years experience with that Act, which grants general equity powers to the federal courts, it had never before been used by any other court as a means to acquire jurisdiction over a state claim in state court. My proposal would make clear that it is improper for a federal court to remove a case from state court other than for one of the specific reasons stated by Congress in the removal statutes and codified in Chapter 89 of Title 28 of the U.S. Code. In this sensitive area of relations between state and federal sovereignties, all removals are expressly provided by act of Congress, and thus are not left to the general interpretations by the courts.

Ivy v. Diamond Shamrock Chemicals Co. was brought in Texas state court against the producers of Agent Orange under state law. It was removed from the Texas state court by the U.S. District Court in Brooklyn, New York, after it was transferred to that court by the Multidistrict Litigation Panel. This procedure for removal of *Ivy* from state court appeared to be an unjustifiable centralization of judicial power and intrusion by the federal judiciary into matters which properly belonged in state court, all without the express support of any enactment of Congress.

On petition to the United States Supreme Court, an unprecedented unanimous coalition of all 50 state Attorneys General agreed that the federal courts had violated existing law and filed *amicus curiae* briefs in support of the *Ivy* veterans. Like these attorneys general, and the 31 veterans organizations representing over 8,000,000 veterans who also filed as *amicus curiae* in support of the veterans, I believe that the veterans who served their country in Vietnam deserve their day in court to claim compensation for their injuries. Because the Supreme Court's refusal to review the highly controversial rulings of the federal courts *in Agent Orange* denied the veterans an opportunity to be heard, it will now be necessary to specially legislate that opportunity if it is to be honored at all.

The above proposals would help reverse rulings used by the federal courts to interpret and invent federal law in such a manner as to prevent state courts from hearing the veterans' state claims and also prevent veterans from presenting their claims to any jury. This was improper and unjust. Legislative reform is necessary to prevent further such abuses by the federal courts.

I would request that you offer my proposals as amendments to the tort reform and securities litigation reform bills referred to the Judiciary Committee.

Many thanks for the opportunity to communicate with you concerning this matter and for your consideration of my proposed legislation.

Respectfully,

E. R. Zumwalt, Jr., Admiral, USN (Ret.)
Chairman, Agent Orange Coordinating Council

cc: The Honorable John W. Warner