Testimony of

The Honorable Patrick Leahy

April 10, 2003

Opening Statement of Senator Patrick Leahy
On the Court of Federal Claims
Business Meeting of the Senate Judiciary Committee
April 10, 2003

On today's agenda we have two additional nominees to the Court of Federal Claims. As evidenced by the recent Washington Post editorial entitled "Court of Extravagance", the existence of the Court of Federal Claims itself is under public suspicion. Some are calling into question the efficacy and the expense of this specialized, Article I court.

An academic expert who specializes on the Court of Federal Claims recently delivered a paper examining its "redundant" and "incoherent" caseload and concluded that it should be abolished. In this report, Professor Schooner compiles data on the surprisingly light caseload of the 24 judges who currently sit on the Court of Federal Claims. The average number of cases per district court judge is 355, while the average number per Court of Federal Claims judge is only 24 cases at its current staffing level.

The Washington Post editorialized that the Court of Federal Claims "seems like an extravagant means of handling an almost random collection of cases." I believe we should investigate these serious criticisms and determine whether future appointments to this court is a prudent use of our fiscal resources.

Republicans have repeatedly asserted that we should not be appointing nominees to courts where the caseload is especially light. Senators Sessions and Grassley have both argued that vacancies on courts such as the D.C. Circuit should remain open due to the enormous costs that are involved in filling such positions. I believe Senator Grassley's report on this matter found that it costs U.S. taxpayers approximately one million dollars per federal judgship. Considering our current fiscal posture, it would be irresponsible to just keep approving additional nominations to this Court simply because the President has referred them to us.

I join several other Committee Members in opposition to the appointment of additional judges to this Court until we can determine the need for such a significant expenditure of funds.

As I explained at our last hearing, appointments to this specialized, Article I court have enjoyed a distinguished tradition of bipartisan cooperation. To my surprise, last week I received a letter from the White House counsel alleging that "there is no established history or tradition or Presidents appointing judges to the Court of Federal Claims who are members of the opposite party." I think it is important to set the record straight for the Administration and perhaps for anyone in the audience who believes their version of reality. Luckily, I have served on this Committee longer than the White House counsel has been working on judicial nominations and I

can assure him that appointments to this court have involved bipartisan appointments dating back to its creation in the early 1980s, under President Reagan. In addition to the examples of bipartisan appointments to the Court cited by the White House Counsel's letter, I can personally recall other instances that perhaps need to be restated.

Some examples that I personally can recall include President Reagan's appointment of Judge John Wiese, who was a known Democrat, to the newly-formed Claims Court in 1982. President Clinton followed this bipartisan example when he re-nominated Christine Miller, a Republican who was a Reagan appointee to the Court of Federal Claims. These are two clear examples of a President of one party specifically appointing a judge of another party. In another instance, I recall that President Clinton had the power to remove Chief Judge Loren Smith from his leadership position and received intense lobbying to remove him from environmentalists who were troubled by the Chief's extreme takings agenda.

Instead of exercising his unilateral power to name his own Chief Judge, President Clinton consulted with Senate Republicans and opted to let Loren Smith continue as Chief Judge as an accommodation to Chairman Hatch and other Republicans. In exchange, Chairman Hatch allowed several Clinton nominees to receive a hearing and a vote. Chairman Hatch also negotiated the inclusion of a former staffer, Edward Damich to be included in President Clinton's slate of nominee to this court. If his nomination was not a clear example of consulting with the opposition party and negotiating a compromise in appointing judges to this specialized court, then I don't know what is.

These four examples of bipartisanship demonstrate that past Presidents of both parties have been involved in bipartisan negotiations and the appointment of judges to the Court of Federal Claims from opposing parties.

In my own experience as Chairman of this Committee during the 107th Congress when the Democrats were in the majority, we took the bipartisan action of expeditiously moving the nomination of Larry Block, another staff member for Senator Hatch, to the Court of Federal Claims at the request of the Ranking Republican.

At that time, I noted that we would expect fairness and consideration in return, including true bipartisan consultation with respect to the remaining Court of Federal Claims nominations. Despite our accommodation to the Administration and to the Ranking Member on Mr. Block's nomination, the White House refused to act on the nomination of Judge Sarah Wilson who until a few months ago was serving with distinction on the Court of Federal Claims.

Judge Wilson is a well respected and talented lawyer who graduated from Columbia Law School, clerked for a federal judge, was a fellow with the Administrative Office of the Courts, and served in the Department of Justice and in a prior White House. Yet, the Administration and the Senate Republicans refused to accommodate our request to consider her nomination for a continued position on the court.

A Senator nearly 100 years ago commented that "there are Senators who have served the Senate for more than a generation," for much longer than any president, "and whose advice and counsel would be valuable to any president. An election to the Presidency does not ipso facto endow one

with all knowledge and all wisdom." I think these words have relevance in this debate even today.

Unlike Mr. Gonzales, I have personally been involved in many bipartisan discussions involving these compromises across the aisle with regard to this Court. It is clear to me that the bipartisan nature of these negotiations have allowed the confirmation process for the Court of Federal Claims nominees to proceed smoothly. This cooperation has broken down, however.

This Administration is acting unilaterally in complete disregard for tradition, bipartisanship and fairness. One clear example is the fact that shortly after his inauguration, President George W. Bush summarily removed the court's Chief Judge and installed Judge Damich as the new and current Chief Judge.

Next, this Administration selected four nominees to the Court of Federal Claims without any consultation with Democratic Senators. In a final stroke against the tradition of bipartisanship, the President he failed to re-nominate Judge Wilson.

If in the future we determine that additional judgeships are necessary for the Court to perform its statutory function, I urge the White House and Chairman Hatch to work with us to assemble the type of bipartisan panel that Senator Hatch helped assemble in 1997 and 1998 to fill the remaining vacancies on the Court of Federal Claims in a way that respects the tradition that has marked appointments to this court.

# # # # #

Statement Of Senator Patrick Leahy
Ranking Member, Senate Judiciary Committee,
Class Action Fairness Act, S. 274
Executive Business Meeting
April 10, 2003

I must oppose the so-called "Class Action Fairness Act" because I believe it is not fair. This legislation would make it harder for citizens to protect themselves against violations of state civil rights, consumer, health, and environmental protection laws by forcing these cases out of convenient state courts into federal courts, with new barriers and burdens on plaintiffs.

Two weeks ago, I joined Senators Kennedy, Biden, Feingold, Durbin and Edwards in respectfully requesting a hearing on class action litigation in order to help the Committee develop consensus reforms to better serve both defendants and plaintiffs. Unfortunately, our request was ignored and our letter went unanswered. I ask that this letter be made a part of the record.

I had hoped that the Committee would undertake a deliberate and careful review of information from parties actually involved in class action litigation to provide a realistic picture of the benefits and problems with class actions. But, instead, we are proceeding with one-sided legislation that has repeatedly failed to pass the Senate in recent years.

I must pause, however, to acknowledge the hard work and dedication displayed by my friend, the Senator from California. Senator Feinstein has undertaken an enormous task in attempting, through her amendment, to rectify some of the harms created by S. 274. I appreciate the sincerity of her concern, and I respect the genuine effort she has made. However, her amendment touches on only a thin sliver of the class action cases that S. 274 would affect, and even then, I am afraid that it may do more harm than good.

At its core, S. 274 deprives citizens of the right to sue on state law claims in their own state courts if the principal defendant is a citizen of another state, even if that defendant has a substantial presence in the plaintiffs' home state, and even if the harm done was in the plaintiffs' home state. Senator Feinstein's amendment does not remedy that problem, and indeed in some circumstances it appears to burden the plaintiffs even more than S. 274 would. I have received numerous letters raising such concerns about this amendment, and I would like to have them made a part of the record.

I also want to recognize the sincere efforts made on the class action issue by my friend from Wisconsin, Senator Kohl. While I may disagree with him about the nature of the problems and the appropriate solutions in this area, I do so respectfully. His efforts are much appreciated by all who work with him on the Committee.

I believe that some special interest groups are distorting the state of class action litigation by relying on a few anecdotes in an ends-oriented attempt to impede plaintiffs bringing class action cases. I believe we can and should take necessary steps to correct problems in class action litigation, but simply shoving most suits into federal court with new one-sided rules will not correct the real problems faced by plaintiffs and defendants.

We should remember that our state-based tort system remains one of the greatest and most powerful vehicles for justice anywhere in the world. One reason for that is the availability of class action litigation to let ordinary people band together to take on powerful corporations or even their own government.

Defrauded investors, deceived consumers, victims of defective products and environmental torts, and thousands of other ordinary people have been able to rely on class action lawsuits in our state court systems to seek and receive justice.

I am old enough to remember the civil rights battles of the 1950s and 1960s and the impact of class actions in vindicating basic rights through our courts.

The landmark Supreme Court decision in Brown v. Board of Education was the culmination of appeals from four class action cases, three from federal court decisions in Kansas, South Carolina and Virginia and one from a decision by the Supreme Court of Delaware.

Only the Supreme Court of Delaware, the state court, got the case right by deciding for the African-American plaintiffs. The state court justices understood that they were constrained by the existing Supreme Court law, but nonetheless held that the segregated schools of Delaware violated the Fourteenth Amendment. Before any federal court did so, a state court rejected separate and unequal schools.

Indeed, many civil rights advocates - including the Lawyers' Committee for Civil Rights Under Law to the Leadership Conference on Civil Rights, the Mexican American Legal Defense and Education Fund, and the National Asian Pacific Legal Consortium - have written to Senators in opposition to this legislation. These civil rights advocates concluded that this legislation "would discourage civil rights class actions, impose substantial barriers to settling class actions and render federal courts unable to provide swift and effective administration of justice." I ask that their letter, dated March 20, 2003, be made a part of the record.

We all know that without consolidating procedures like class actions, it might be impossible for plaintiffs to obtain effective legal representation. Defense lawyers tend to be paid by the hour--and well paid.

Plaintiffs' lawyers in this type of setting tend to work without pay for the possibility of obtaining a portion of the proceeds, if successful. It may well prove uneconomical for counsel to take on governmental or corporate defendants if they must do so on a case-by-case, individual basis. It may be that individual claims are simply too small to be pursued.

Sometimes that is what cheaters count on and how they get away with their schemes. Cheating thousands of people "just a little" is still cheating. Class actions allow the little guys to band together, allow them to afford a competent lawyer, and allow them to redress wrongdoing.

For instance, class actions made it possible for individual tobacco victims to band together to take on the powerful tobacco conglomerates in ways that individual smokers could not afford. It allows stockholders and small investors to join together to go after investment scams.

Another example of class action litigation serving the public interest is the Firestone Tire debacle. The national tire recall was started, in part, from the disclosure of internal corporate documents on consumer complaints of tire defects and design errors that were discovered in litigation against Bridgestone/Firestone, Inc.

Plaintiffs' attorneys turned this information over to the National Highway Traffic Safety Administration, triggering a government investigation. Months later, Bridgestone/Firestone recalled 6.5 million tires after they were linked to 101 fatalities, 400 injuries and 2,226 consumer complaints. As reported by TIME Magazine at the time, it is doubtful that the internal corporate consumer complaint information would have ever seen the light of day absent the civil justice discovery process.

The legal rights and procedures that protect consumers, investors and employees matter now more than ever after the bankruptcies of Enron, Worldcom and other corporate scandals. S. 274 will do nothing to make corporate America more accountable for its actions; indeed, the bill undercuts the Congress's other efforts to make companies more responsible in their actions, more accountable for their misdeeds, and more susceptible to penalties when they do wrong. Legislation that makes it more difficult for the victims of corporate wrong-doing to join together to make those companies accountable is the exact opposite approach we should be taking. Not surprisingly, consumer groups object strongly to the enactment of S. 274, and I would like to include in the record a letter, dated February 5, 2003, from Consumers Union, Consumer Federation of America, and the U.S. Public Interest Research Group.

Last year, a group of investors recovered millions in lost investments under state corporate fraud laws in a state class action case. In Baptist Foundation of Arizona v. Arthur Andersen, mostly elderly investors banded together to successfully recoup $217 million from Arthur Andersen for questionable accounting practices surrounding an investment trust. This case is just one example of how state-based class action litigation may help hold corporate wrongdoers accountable and help defrauded investors recoup their losses.

As a strong supporter of the environment, I am also concerned that this bill will allow polluters and other bad actors responsible for environmental damages to avoid accountability in court.

This legislation would remove almost all important environmental class actions from state to federal court. Not only does this deny state courts the opportunity to interpret their own state=s environmental protection laws, but it also hampers and deters plaintiffs from pursuing important environmental litigation.

Under this bill, environmental class actions may not get litigated, reducing the incentive polluters have to keep our environment clean. Plaintiffs' attorneys may not be willing to take these high-risk, high-cost, and time-consuming cases, particularly when the judicial remedy sought is injunctive relief. This has the potential to leave our environment and the victims of reckless polluters unprotected by our civil justice system. This bill, intentionally or not, protects polluters and ignores the innocent victims of their negligence.

Just recently, we could all read about a horrible situation in Alabama. In Anniston, Alabama, the Monsanto Company manufactured PCBs - carcinogens - from 1929 until 1971. For more than 40 years, Monsanto dumped untreated, unfiltered waste from its PCB plant into the streams and landfills of Anniston, without ever letting the residents, many of whom worked for Monsanto, of the horrific risk to their environment and their health.

When the undeniable truth of Monsanto's malfeasance became clear, several thousand residents of Anniston sued in state court, and have recently won a liability verdict. As the case moves into the damages phase, the defendants' efforts are directed largely toward getting the judge removed - although the Alabama Supreme Court has already held that the trial judge was acting properly, Monsanto continues to oppose his participation. But despite the undeniably sound administration by this local state court judge, S. 274 would send all these plaintiffs into federal court, simply because there are more than one hundred of them.

But such cases as this one provide hard evidence that our state-based civil justice system is working to protect the environment and the victims of polluters, and there is simply no reason to prefer a federal forum for resolution of their claims. State courts, unlike the federal courts, have a sound understanding of evolving local law and the open dockets to resolve conflicts in the efficient manner necessary to protect our society from polluters.

Indeed, the Judicial Conference, headed by Chief Justice Rehnquist, wrote a letter dated March 26, 2003, opposing this bill because its "provisions would add substantially to the workload of the federal courts and are inconsistent with principles of federalism," and singled out serious environmental disasters as an example of class actions that should remain in state courts. Numerous organizations devoted to the protection of the environment have similarly opposed

this bill, including Clean Water Action, Earthjustice, the Environmental Working Group, Friends of the Earth, Greenpeace, the Mineral Policy Center, the Natural Resources Defense Council, the Sierra Club, and the U.S. Public Interest Research Group. These advocates conclude, in a letter dated April 2, 2003, that S. 274 "would benefit polluters at the expense of people and communities harmed by public health and environmental disasters." I would ask that both these letters be made a part of the record.

I intend to offer an amendment to this bill, which would exclude class actions arising under a state environmental protection law. I believe it is appropriate to carve out environmental-related state law claims given the evolving nature of state law and the importance of maintaining efficient litigation to protect our environment. This amendment will make sure that this legislation does not shelter polluters from being held accountable for their actions.

I believe the so-called Class Action Fairness Act will leave many injured parties with valid claims with no effective way to seek relief. As a result, I cannot support this legislation.

# # # # #

Statement of Senator Patrick Leahy
On Judicial Nominations
Judiciary Committee Business Meeting
April 10, 2003

With yesterday's confirmation vote on the nominations of Dee Drell to the United States District Court for the Western District of Louisiana and Richard Bennett to the United States District Court for Maryland, Senate Democrats again demonstrated their bipartisanship toward consensus nominees.

With these confirmations the Senate has now confirmed 18 of President Bush's judicial nominees so far this year and 118 overall. The number of vacancies on the federal courts now stands at 49. During the entire four years of President Clinton's second term as President, Republicans never, not once, allowed the number of vacancies to dip below 50. The last time vacancies hit 49 was seven years ago.

So far this year we have confirmed more judicial nominees of President Bush than the Republican majority was willing to confirm in the entire 1996 session when President Clinton was in the White House. That entire year only 17 judges were confirmed, and that included none to the circuit courts, not one. In contrast, already this session two highly controversial circuit court nominees have been confirmed among the 18 judges the Senate has approved to date. Those confirmations - including one that had more negative votes than the required number to be filibustered, but who was not filibustered - never get acknowledged in partisan Republican talking points.

We are also ahead of the pace the Republican majority set in 1999 when it considered President Clinton's judicial nominees--almost six months ahead. It was not until October that the Senate confirmed as many as 18 judicial nominees in 1999.

In the prior 17 months when I chaired the Judiciary Committee, we were able to confirm 100 judges and vastly reduce the judicial vacancies that Republicans had stored up by refusing to allow scores of judicial nominees of President Clinton to be considered.
We were able to do so despite the White House=s refusal to consult with Democrats on circuit court vacancies and many district court vacancies.

There is no doubt that the judicial nominees of this President are conservatives, many of them quite to the right of the mainstream. Many of these nominees have been active in conservative political causes or groups. Democrats moved fairly and expeditiously on as many as we could consistent with our obligations to evaluate carefully and thoroughly these nominees to lifetime seats in the federal courts. And we continue to do so.

Unfortunately, many of this President=s judicial nominees have proven to be quite controversial and we have had serious concerns about whether they would be fair judges if confirmed to lifetime positions. Those controversial judges take more time and raise more concerns.

So, despite the fact that we are considering more controversial nominees from this President than with President Clinton, and despite the progress we have made in reducing judicial vacancies to the lowest level ever attained while President Clinton was in office, and despite the pace of confirmations, which exceeds that maintained by the Republican majority in 1999, Republicans still do nothing but criticize and castigate Senators if every judicial nominee is not confirmed by the Senate after a short debate.

The question I have been asking, and the one the American people should ask, is why are the Senate Republicans picking fights rather than working with us to make additional progress. The best example of that is the Republican insistence on seeking to proceed with a confirmation vote on the most controversial among the President's nominees instead of the circuit court nomination that Democratic Senators have supported and will support to the Fifth Circuit: the nomination of Judge Edward Prado of Texas.

Judge Prado's nomination was unanimously reported out of this committee on April 3rd. To date, there has been no effort by the Republican leadership to allow the Senate to consider and vote on that nomination. I do not believe the cynical comments of some that Republicans will not allow us to turn to the Prado nomination because he is Hispanic and when the Senate confirms him it would demonstrate yet again that the outrageous charges of anti-Hispanic sentiment that Republicans have tried to make against Democrats were and are ridiculous. That cannot be the case.

When a Democratic President occupied the White House, Senator Hatch denied that even 100 vacancies was a vacancy crisis, according to a column he wrote for the September 5, 1997 edition of USA Today. During the Clinton Administration, Senator Hatch repeatedly said that 67

vacancies was the equivalent of "full employment" in the federal judiciary. With the two district court confirmations yesterday, that number is now at 49. By Senator Hatch's standards we have reached well beyond "full employment" on the federal bench.

Vacancies have dropped to this level in large part because during the 17 months of Democratic control of the Senate, we confirmed 100 of President Bush's judicial nominees, even though Republicans averaged only 38 confirmations per year during their prior six and one-half years of control of the Senate. We inherited 110 vacancies by the time the Committee was permitted to reorganize in the summer of 2001, and we confirmed 100 judicial nominees.

This historic number of confirmations in less than a year and a half, cut the number of vacancies to 60 (there were 40 new retirements in this period). Chairman Hatch never acted as quickly on Clinton nominees.
The Democratic leadership also moved to confirm 17 circuit court nominees, some of them quite controversial, in those 17 months. Chairman Hatch averaged only 7 circuit court confirmations per year during the Clinton Administration. This year, two more circuit nominees of President Bush have been confirmed, although other controversial ones have not.

These 19 confirmations of Bush circuit court nominees have reduced the number of circuit vacancies to 23. During the Clinton Administration, Chairman Hatch and Senate Republicans blocked the confirmation of 22 circuit court nominees through anonymous holds, blue slips, and other procedures. Had those nominees been confirmed, and had Bush won the confirmation of 19 circuit nominees to vacancies that arose during his presidency, the current number of circuit vacancies would be one.

Republicans caused what they call the circuit vacancy crisis. The number of circuit vacancies more than doubled from 16 in January 1995 when Republicans took over the Senate to 33 in the summer of 2001, when the Committee was permitted to reorganize under Democratic control. Still, the Senate has already confirmed 19 of his circuit court nominees in less than two years. By comparison, President Reagan had 19 circuit nominees confirmed in his first two years in office as did President Clinton. The difference is that in both of those administrations, the Presidents were working with Senate majorities of the same political party.

Lately I have heard Republicans complaining that not all of this President's circuit nominees have yet been confirmed. The reason there are so many nominees is because of the unusual number of circuit court vacancies. And that number is a result of the massive obstruction of circuit seats by Republicans in the Clinton administration, doubling the number of circuit vacancies, as opposed to keeping the rate of vacancies steady or reducing them.

Sometimes now you will hear a Republican complain that some circuit court nominees did not get a vote in 1992, but that situation does not compare to the long stall of Clinton's circuit court nominees, and here is why: Only 10 of the circuit nominees of President George H.W. Bush did not get a vote in Committee. That compares to twenty-two of Clinton's circuit nominees who were denied such a vote during Republican control. That is more than twice as many.

Additionally, President George H.W. Bush won the confirmation of 67 percent of his circuit nominees between 1991 and 1992, a presidential election year, which was consistent with prior

presidential election year congresses for President Reagan. In contrast, President Clinton won confirmation of only 15 of 34 circuit nominees in a comparable period, 1999-2000, about 44 percent. Thus, because of the Republican success in blocking appellate judges, President Clinton's circuit court nominees were actually more likely than not to languish unconfirmed, an indignity not suffered by President Bush's nominees.

Of course, this was nothing compared to 1996, the first election year in modern history and recollection in which not a single circuit nominee was confirmed all year, with Republicans in charge. I would also note that six of President Clinton's circuit nominees in 1999-2000 were actually re-nominees, like Judge Richard Paez, who even Chairman Hatch admitted was "filibustered" in 2000 and who waited more than 1,500 days to be confirmed. In fact, when you look at the actual percentage of confirmations by session rather than the combined figure for two years, the percent of Clinton nominees blocked by Republicans is even more shocking.

During 1999, only 7 of 25 Clinton circuit nominees were confirmed, or 28 percent, and 1999 was not a presidential election year. In contrast, in 1991, the first President Bush won the confirmation of 9 of 17 nominees, or 53 percent. In 2000, Clinton won confirmation of 8 out of 25 nominees (including those not acted on in 1999), or 32 percent. In contrast in 1992, Bush won the confirmation of 11 of 21 circuit nominees (including those not acted on in 1991), which again was more than 52 percent.

Despite the wide-scale obstruction or filibustering of Clinton circuit vacancies (filibustering after all comes from the Dutch word for piracy, or taking things that do not belong to you), Democrats worked hard to turn the other cheek and fill vacancies that were allowed to go unfilled due to Republican holds. For example, under Democratic leadership, the Senate held the first hearing for a nominee to the Fourth Circuit in three years and confirmed him and another most controversial nominee, even though seven of President Clinton's nominees to that circuit never received hearings from Republicans.

We proceeded with the first hearing for a nominee to the Fifth Circuit in seven years and confirmed her, even though three of President Clinton's nominees to that circuit never received hearings. In fact, we held hearings for all three of President Bush's nominees to that circuit even though three of President Clinton's nominees, Enrique Moreno, Jorge Rangel, and Alston Johnson, were never allowed hearings by Republicans.

We proceeded with the first hearing on a nominee to the Sixth Circuit in almost five years and confirmed her and another controversial nominee to that circuit even though three of President Clinton's nominees to that circuit never received a hearing. We proceeded with the first hearing on a nominee to the Tenth Circuit in six years and confirmed three, even though two of President Clinton's nominees to that circuit were never allowed hearings. With the confirmation of the controversial Tim Tymkovich to the Tenth Circuit last week we have now filled a total of four vacancies on that court. The seat to which he was nominated had been vacant for more than four years despite President Clinton having nominated two qualified nominees, neither of whom was ever accorded a hearing.

Had President Clinton's circuit court nominees been confirmed, the circuit courts would have been evenly balanced, with six circuits with a majority of Democratic appointees and six circuits

with a majority of Republican appointees and one circuit with an even number of Democratic and Republican appointees.

If President Bush succeeds in winning the confirmation of nominees to every circuit vacancy he inherited plus the ones that have arisen since then, only two circuits will have a majority of Democratic appointees and 11 will have a majority of Republican appointees. In many of those circuits, the Republican appointees will have at least a 2-1 majority on every panel on average. More than 67 percent of the appointments to those courts will be by Republicans.

It is also important to remember when comparing what Republicans did to President Clinton's circuit nominees to what happened in 1992 that Chairman Biden moved through 66 of President Bush's judicial nominees in 1992, President George H.W. Bush's best year for confirmations, despite it being a presidential election year. However, the Senate could not get through all of the nominees following the bipartisan judgeship bill of 1990 which increased the size of the federal courts by more than 100 seats.

In the 102nd Congress, Chairman Biden got through 124 of President George H.W. Bush's nominees, including his nominee to the Supreme Court, Clarence Thomas. In fact, the Republicans did not allow President Clinton to win the confirmation of as many judges in 1999 and 2000 combined as Chairman Biden got through for President Bush in 1992 alone. Finally, I would note that Chairman Biden moved through 20 circuit court nominees for President Bush in the 102nd Congress. As a consequence, the first President Bush was able to appoint 42 circuit judges in his one term as president.

Because of Republicans' blockade of any circuit court nominee to be confirmed in 1996, President Clinton was only able to appoint 30 circuit judges in his first term, more than 25 percent fewer than his predecessor, President George H.W. Bush, who had a Democratic Senate during his entire presidency. When President Clinton was in office and the Republicans controlled the Senate, he was limited to 42 circuit court appointments in six years.

In contrast, this President Bush has already appointed 19 circuit judges and, as I have indicated, the 20th confirmation, that of Judge Prado is stalled only because Republicans have refused to proceed to his consideration. President Bush is poised to appoint at least one-quarter of the federal appellate courts in just one term, due to the large number of circuit court vacancies he inherited from President Clinton which was the result of widespread Republican obstruction.

The solution to the current logjam over circuit court judges is not to move them through more quickly with less scrutiny. The solution is for this President to consult with Senators from both parties in finding mainstream, consensus nominees, rather than this parade of activists and extremists that we have witnessed over these past few months. This President, wants a clean slate on judicial nominees, but he refuses to do any of the work necessary to clean that slate.

Instead of being a uniter in his judicial choices, he has divided this Senate and the American people by deferring to the far right wing of his party to fill the only lifetimes appointments in our entire government. The Senate Judiciary Committee has been ridiculed, and I am sad to say, rightly so, for becoming a rubberstamp, an assembly line for these important nominations to the second highest courts in our federal government. The solution is genuine consultation and accommodation rather than this race to pack the courts and tip the balance with nominees who have shown a lack of respect for individual rights.

# # # # #

Statement Of Senator Patrick Leahy
Ranking Member, Senate Judiciary Committee,
Class Action Fairness Act, S. 274
Executive Business Meeting
April 10, 2003

I must oppose the so-called "Class Action Fairness Act" because I believe it is not fair. This legislation would make it harder for citizens to protect themselves against violations of state civil rights, consumer, health, and environmental protection laws by forcing these cases out of convenient state courts into federal courts, with new barriers and burdens on plaintiffs.

Two weeks ago, I joined Senators Kennedy, Biden, Feingold, Durbin and Edwards in respectfully requesting a hearing on class action litigation in order to help the Committee develop consensus reforms to better serve both defendants and plaintiffs. Unfortunately, our request was ignored and our letter went unanswered. I ask that this letter be made a part of the record.

I had hoped that the Committee would undertake a deliberate and careful review of information from parties actually involved in class action litigation to provide a realistic picture of the benefits and problems with class actions. But, instead, we are proceeding with one-sided legislation that has repeatedly failed to pass the Senate in recent years.

I must pause, however, to acknowledge the hard work and dedication displayed by my friend, the Senator from California. Senator Feinstein has undertaken an enormous task in attempting, through her amendment, to rectify some of the harms created by S. 274. I appreciate the sincerity of her concern, and I respect the genuine effort she has made. However, her amendment touches on only a thin sliver of the class action cases that S. 274 would affect, and even then, I am afraid that it may do more harm than good.

At its core, S. 274 deprives citizens of the right to sue on state law claims in their own state courts if the principal defendant is a citizen of another state, even if that defendant has a substantial presence in the plaintiffs' home state, and even if the harm done was in the plaintiffs' home state. Senator Feinstein's amendment does not remedy that problem, and indeed in some circumstances it appears to burden the plaintiffs even more than S. 274 would. I have received numerous letters raising such concerns about this amendment, and I would like to have them made a part of the record.

I also want to recognize the sincere efforts made on the class action issue by my friend from Wisconsin, Senator Kohl. While I may disagree with him about the nature of the problems and the appropriate solutions in this area, I do so respectfully. His efforts are much appreciated by all who work with him on the Committee.

I believe that some special interest groups are distorting the state of class action litigation by relying on a few anecdotes in an ends-oriented attempt to impede plaintiffs bringing class action cases. I believe we can and should take necessary steps to correct problems in class action litigation, but simply shoving most suits into federal court with new one-sided rules will not correct the real problems faced by plaintiffs and defendants.

We should remember that our state-based tort system remains one of the greatest and most powerful vehicles for justice anywhere in the world. One reason for that is the availability of class action litigation to let ordinary people band together to take on powerful corporations or even their own government.

Defrauded investors, deceived consumers, victims of defective products and environmental torts, and thousands of other ordinary people have been able to rely on class action lawsuits in our state court systems to seek and receive justice.

I am old enough to remember the civil rights battles of the 1950s and 1960s and the impact of class actions in vindicating basic rights through our courts.

The landmark Supreme Court decision in Brown v. Board of Education was the culmination of appeals from four class action cases, three from federal court decisions in Kansas, South Carolina and Virginia and one from a decision by the Supreme Court of Delaware.

Only the Supreme Court of Delaware, the state court, got the case right by deciding for the African-American plaintiffs. The state court justices understood that they were constrained by the existing Supreme Court law, but nonetheless held that the segregated schools of Delaware violated the Fourteenth Amendment. Before any federal court did so, a state court rejected separate and unequal schools.

Indeed, many civil rights advocates - including the Lawyers' Committee for Civil Rights Under Law to the Leadership Conference on Civil Rights, the Mexican American Legal Defense and Education Fund, and the National Asian Pacific Legal Consortium - have written to Senators in opposition to this legislation. These civil rights advocates concluded that this legislation "would discourage civil rights class actions, impose substantial barriers to settling class actions and render federal courts unable to provide swift and effective administration of justice." I ask that their letter, dated March 20, 2003, be made a part of the record.

We all know that without consolidating procedures like class actions, it might be impossible for plaintiffs to obtain effective legal representation. Defense lawyers tend to be paid by the hour--and well paid.

Plaintiffs' lawyers in this type of setting tend to work without pay for the possibility of obtaining a portion of the proceeds, if successful. It may well prove uneconomical for counsel to take on

governmental or corporate defendants if they must do so on a case-by-case, individual basis. It may be that individual claims are simply too small to be pursued.

Sometimes that is what cheaters count on and how they get away with their schemes. Cheating thousands of people "just a little" is still cheating. Class actions allow the little guys to band together, allow them to afford a competent lawyer, and allow them to redress wrongdoing.

For instance, class actions made it possible for individual tobacco victims to band together to take on the powerful tobacco conglomerates in ways that individual smokers could not afford. It allows stockholders and small investors to join together to go after investment scams.

Another example of class action litigation serving the public interest is the Firestone Tire debacle. The national tire recall was started, in part, from the disclosure of internal corporate documents on consumer complaints of tire defects and design errors that were discovered in litigation against Bridgestone/Firestone, Inc.

Plaintiffs' attorneys turned this information over to the National Highway Traffic Safety Administration, triggering a government investigation. Months later, Bridgestone/Firestone recalled 6.5 million tires after they were linked to 101 fatalities, 400 injuries and 2,226 consumer complaints. As reported by TIME Magazine at the time, it is doubtful that the internal corporate consumer complaint information would have ever seen the light of day absent the civil justice discovery process.

The legal rights and procedures that protect consumers, investors and employees matter now more than ever after the bankruptcies of Enron, Worldcom and other corporate scandals. S. 274 will do nothing to make corporate America more accountable for its actions; indeed, the bill undercuts the Congress's other efforts to make companies more responsible in their actions, more accountable for their misdeeds, and more susceptible to penalties when they do wrong. Legislation that makes it more difficult for the victims of corporate wrong-doing to join together to make those companies accountable is the exact opposite approach we should be taking. Not surprisingly, consumer groups object strongly to the enactment of S. 274, and I would like to include in the record a letter, dated February 5, 2003, from Consumers Union, Consumer Federation of America, and the U.S. Public Interest Research Group.

Last year, a group of investors recovered millions in lost investments under state corporate fraud laws in a state class action case. In Baptist Foundation of Arizona v. Arthur Andersen, mostly elderly investors banded together to successfully recoup $217 million from Arthur Andersen for questionable accounting practices surrounding an investment trust. This case is just one example of how state-based class action litigation may help hold corporate wrongdoers accountable and help defrauded investors recoup their losses.

As a strong supporter of the environment, I am also concerned that this bill will allow polluters and other bad actors responsible for environmental damages to avoid accountability in court.

This legislation would remove almost all important environmental class actions from state to federal court. Not only does this deny state courts the opportunity to interpret their own state=s

environmental protection laws, but it also hampers and deters plaintiffs from pursuing important environmental litigation.

Under this bill, environmental class actions may not get litigated, reducing the incentive polluters have to keep our environment clean. Plaintiffs' attorneys may not be willing to take these high-risk, high-cost, and time-consuming cases, particularly when the judicial remedy sought is injunctive relief. This has the potential to leave our environment and the victims of reckless polluters unprotected by our civil justice system. This bill, intentionally or not, protects polluters and ignores the innocent victims of their negligence.

Just recently, we could all read about a horrible situation in Alabama. In Anniston, Alabama, the Monsanto Company manufactured PCBs - carcinogens - from 1929 until 1971. For more than 40 years, Monsanto dumped untreated, unfiltered waste from its PCB plant into the streams and landfills of Anniston, without ever letting the residents, many of whom worked for Monsanto, of the horrific risk to their environment and their health.

When the undeniable truth of Monsanto's malfeasance became clear, several thousand residents of Anniston sued in state court, and have recently won a liability verdict. As the case moves into the damages phase, the defendants' efforts are directed largely toward getting the judge removed - although the Alabama Supreme Court has already held that the trial judge was acting properly, Monsanto continues to oppose his participation. But despite the undeniably sound administration by this local state court judge, S. 274 would send all these plaintiffs into federal court, simply because there are more than one hundred of them.

But such cases as this one provide hard evidence that our state-based civil justice system is working to protect the environment and the victims of polluters, and there is simply no reason to prefer a federal forum for resolution of their claims. State courts, unlike the federal courts, have a sound understanding of evolving local law and the open dockets to resolve conflicts in the efficient manner necessary to protect our society from polluters.

Indeed, the Judicial Conference, headed by Chief Justice Rehnquist, wrote a letter dated March 26, 2003, opposing this bill because its "provisions would add substantially to the workload of the federal courts and are inconsistent with principles of federalism," and singled out serious environmental disasters as an example of class actions that should remain in state courts. Numerous organizations devoted to the protection of the environment have similarly opposed this bill, including Clean Water Action, Earthjustice, the Environmental Working Group, Friends of the Earth, Greenpeace, the Mineral Policy Center, the Natural Resources Defense Council, the Sierra Club, and the U.S. Public Interest Research Group. These advocates conclude, in a letter dated April 2, 2003, that S. 274 "would benefit polluters at the expense of people and communities harmed by public health and environmental disasters." I would ask that both these letters be made a part of the record.

I intend to offer an amendment to this bill, which would exclude class actions arising under a state environmental protection law. I believe it is appropriate to carve out environmental-related state law claims given the evolving nature of state law and the importance of maintaining efficient litigation to protect our environment. This amendment will make sure that this legislation does not shelter polluters from being held accountable for their actions.

I believe the so-called Class Action Fairness Act will leave many injured parties with valid claims with no effective way to seek relief. As a result, I cannot support this legislation.

# # # # #