

“A RADICAL PROPOSAL”:  
THE MULTIDISTRICT LITIGATION ACT OF 1968

*Andrew D. Bradt*

ABSTRACT

One of the central stories in current procedural law is the recent and rapid ascendance of federal multidistrict litigation. As the class action has declined in prominence, MDL has surged: to wit, currently more than a third of the cases on the federal civil docket are part of an MDL. With MDL’s growth has come attention from scholars, much of it critical. One recurring aspect of this criticism is that MDL judges have expanded the statute beyond its modest ambitions. But what were the original purposes of MDL, and where did the statute come from? This paper unearths the origins of MDL by examining the papers of its principal drafters. Those papers reveal that the aims of the small group—a handful of federal judges and one scholar—who developed and lobbied for the statute’s passage were anything but modest. Rather, the group believed that a mass-tort “litigation explosion” was coming, and that a mechanism was needed to centralize power over nationwide litigation in the hands of individual judges committed to the principles of active case management. Moreover, the papers show that the judges were relentless in their pursuit of the statute’s passage and engaged in sharp-elbowed tactics and horse-trading to succeed. In short, MDL was a power grab—a well-intentioned and brilliant one, but a power grab, all the same. Understanding the roots of the judges’ accomplishment clarifies current debates about MDL, and should shift those debates away from fights over the scope of the statute to more normative assessments of the concentration of power the drafters sought and successfully achieved. In short, MDL currently does what its creators intended—critiques of the statute should proceed on those terms, not from the position that MDL has somehow grown beyond its modest ambitions.

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## INTRODUCTION

As recently as a decade ago, it would have been reasonable to say that multidistrict litigation, the statutory authorization for consolidating cases filed around the country in a single federal district court for pretrial proceedings,<sup>1</sup> was a second banana compared to the class action, which had long demanded the lion's share of public and scholarly attention.<sup>2</sup> Despite several high-profile examples, scholars have characterized the device, commonly referred to as "MDL" as an obscure device or as a "disfavored judicial backwater."<sup>3</sup>

To the extent MDL ever was appropriately considered a bit player, things have changed. With the Supreme Court and lower courts cutting back the viability of the class action under Rule 23 for decades and the Congress providing for expanded jurisdiction over class actions in the federal courts,<sup>4</sup> MDL has become the leading mechanism for resolving mass torts.<sup>5</sup> As of

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<sup>1</sup> 28 U.S.C. §1407.

<sup>2</sup> See Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883, 887 (2000) (suggesting that concern that the focus on class actions might be "misplaced" and that MDL might be more important as an aggregation mechanism); Howard M. Erichson, *Multidistrict Litigation and Aggregation Alternatives*, 31 SETON HALL L. REV. 877 (2000); Judith Resnik, *From Cases to Litigation*, 54 LAW & CONTEMP. PROBS. 5, 29-35 (1991) (explaining the importance, and under-the-radar quality of MDL); Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1471 (1987) (describing MDL as one of several "dubious packaging strategies that are supposedly provisional but that in substantive terms may be irremediable").

<sup>3</sup> Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 552 (2013) (describing MDL as "once a little-utilized and disfavored judicial backwater for managing complex cases"); DAVID F. HERR, MULTIDISTRICT LITIGATION I (1986) (describing the Judicial Panel on Multidistrict Litigation's "obscurity in the vast majority of cases" and its "relative inconspicuousness").

<sup>4</sup> See JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION (2015) 132 ("After a long, steady, retreat for nearly two decades, the domain of the class action has substantially shrunk, much like a grape in the sun, slowly drying into a raisin."); Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Perspective: A Preliminary View*, 156 U. PA. L. REV. 1439, 1507 (2008) (describing how the "federal appellate courts pretty quickly put an end" to mass-tort class actions and how "the Supreme Court made it difficult for the lower federal courts to certify" settlement classes).

<sup>5</sup> See, e.g., William B. Rubenstein, *Procedure and Society: An Essay for Steve Yeazell*, 61 UCLA L. REV. DISC. 136, 144 n.40 (2013) ("In the wake of *Amchem* and *Ortiz*, however, MDLs have become *the* form for resolution of mass tort matters."); Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339, 1346 (2014) ("As reliance on Rule 23 has diminished, MDL has ascended as the most important federal procedural device to aggregate (and settle) mass torts."); Thomas E.

June 2014, 35.6% of all filed federal cases were part of a pending MDL, up from 16% in 2002.<sup>6</sup> That now amounts to over 120,000 cases, the vast majority of which are mass-tort matters, including products liability or defective drugs, cases that had, at least for a moment, been considered by some courts as appropriate subjects for class actions.<sup>7</sup> As astute an observer as Professor Coffee has lauded the rise of MDL and has said that this “achievement may have been the product of dumb luck.”<sup>8</sup>

The central aim of this paper is to demonstrate that the preeminence of MDL is not the product of dumb luck. The small group of scholars and judges that invented MDL and shepherded it to enactment were remarkably prescient. They predicted in the early 1960s a “litigation explosion” arising from the increased prevalence of mass torts and recognized the need for a device to efficiently process that litigation by centralizing it in the federal courts. Moreover, these judges believed deeply that control of these cases could not be left in the hands of the parties or their attorneys—or even in the hands of federal judges scattered throughout the country committed to what they considered outmoded norms of party control of the litigation process.

But, although they saw the need, the proponents of MDL also recognized the radical nature of their proposal in a world where massive “aggregate” litigation was not yet part of the legal vocabulary. As a result, the judges acted strategically at every phase of MDL’s development: drafting the statute in limited terms to avoid resistance from the bar, carefully attracting support from key players in the Judicial Conference and the Congress, and eventually overcoming resistance from the defense bar. As those current federal litigation statistics amply demonstrate, their project

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Willing & Emery E. Lee, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 798 (2011) (contending that after the Supreme Court’s decisions in *Amchem* and *Ortiz*, the federal courts “have seen a massive increase in MDL aggregate litigation”).

<sup>6</sup> Duke Law Center for Judicial Studies, *MDL Standards for Best Practices at x-xi* (Sept. 2014), available at <https://law.duke.edu/judicialstudies/>. See also Emery G. Lee III, et al., *Multidistrict Centralization: An Empirical Analysis*, 12 J. EMPIRICAL LEGAL STUD. 211, 222 (2015).

<sup>7</sup> Thomas Metzloff, *The MDL Vortex Revisited*, 99 JUDICATURE 36, 41 (Autumn 2015) (explaining that MDL is “in fact dominated by mass tort cases at a remarkable level”); See Richard L. Marcus, *Bending in the Breeze: American Class Actions in the Twenty-First Century*, 65 DEPAUL L. REV. 497, 504 (2016) (describing the brief “golden age” of the mass-tort class action).

<sup>8</sup> Coffee, *supra* note 4, at 155. See also Richard L. Marcus, *America’s Dynamic and Extensive Experience with Collective Litigation*, in *RESOLVING MASS DISPUTES* 148, 166 (Christopher Hodges & Astrid Stadler, eds., 2013) (“As with modern Rule 23, it is difficult now to determine whether the framers of this new judicial body foresaw in the 1960s the importance it would assume in later decades.”).

was remarkably successful. Not only were they ahead of their time, their creation was built to last. Some fifty years on, MDL is dominant.

A natural way to begin to understand MDL's effectiveness in tort cases is by comparing it to its more famous and now diminished cousin, the class action. In a class suit, a representative files and pursues litigation on behalf of a group of absent plaintiffs. By contrast, in MDL, a panel of federal judges transfers already pending and to-be-filed cases sharing a common question of fact to a single district judge for "pretrial proceedings." After pretrial proceedings are concluded, the statute mandates that cases be remanded to the courts from which they were transferred.<sup>9</sup> Remand, however, happens less than 3% of the time—like most cases, in or out of an MDL, the vast majority of transferred cases are terminated or settled before pretrial proceedings conclude, that is, while they are within the control of the MDL judge.<sup>10</sup>

In sum, this structure makes MDL, according to one prominent federal district judge, "a once-in-a lifetime opportunity for resolution of mass disputes by bringing similarly situated litigants from around the country, and their lawyers, before one judge in one place at one time."<sup>11</sup> Indeed, as another prominent district judge has described it, "it is almost a point of honor among transferee judges . . . that cases so transferred shall be settled rather than sent back to their home courts for trial."<sup>12</sup> While the concept of the "settlement class" under Rule 23(b)(3) did not survive Supreme Court scrutiny and CAFA, MDL has begun to accomplish essentially the same end.<sup>13</sup>

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<sup>9</sup> 28 U.S.C. §1407(a); *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 34 (1998).

<sup>10</sup> Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 400 (2014). In many MDL cases, the parties agree to allow newly filed cases to bypass the transfer process altogether through a stipulation for "direct filing" of cases into the MDL court. See Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759 (2012).

<sup>11</sup> Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2340 (2008); see also Howard M. Erichson & Benjamin C. Zipursky, *Consent versus Closure*, 96 CORNELL L. REV. 265, 270 (2011) (explaining that MDL "creates the perfect conditions for an aggregate settlement"); Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245, 2272 (2008) (describing how MDL "produces settlement out of the chaos"); Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423, 482 n.234 (1992) (noting that the "goal of judicial economy is [the courts'] dominant consideration" in MDL).

<sup>12</sup> *DeLaventura v. Columbia Acorn Trust*, 417 F. Supp. 2d 147, 151 (D. Mass. 2006).

<sup>13</sup> COFFEE, *supra* note 4, at 116 (describing MDL as "group litigation that is the functional equivalent of a class action has come to supplant the class action in the mass tort field"); Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of*

Courts and lawyers on both sides of the “v.” appear to be adjusting to this new era of MDL ascendancy. Plaintiff-side firms have come to appreciate the ability to join forces to achieve parity with well-resourced defendants.<sup>14</sup> Defendants recognize the opportunity to litigate all claims in a single forum where they can both efficiently perform discovery and motion practice and eventually achieve peace, whether through victory on a dispositive motion or settlement.<sup>15</sup> And, for judges, the power of MDL to vacuum thousands of cases filed nationwide into one courtroom carries significant docket-clearing benefits.<sup>16</sup>

Scholars’ reactions are more mixed. Some laud MDL for its success in achieving settlement of massive cases and for the flexibility it provides transferee judges.<sup>17</sup> But others contend that MDL is a raw deal for individual plaintiffs, who, compared to a class action, have fewer formal protections from unfairness but equally little control over the day-to-day conduct of the litigation.<sup>18</sup> For instance, although an MDL is not a

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*Due Process and Lawyers’ Powers*, 79 GEO WASH. L. REV. 628, 657 (2011) (“MDL process helped to make plausible the bundling of mass torts”); Willging & Lee, *supra* note 5, at 801 (citing empirical evidence suggesting that “the MDL process has supplemented and perhaps displaced the class action device as a procedural mechanism for large settlements”).

<sup>14</sup> See John G. Heyburn & Francis E. McGovern, *Evaluating & Improving the MDL Process*, 38 LITIGATION 26 (2012) (“Overall, counsel believe the panel is accomplishing its basic objective of easing the burdens of multiparty, multijurisdictional litigation on parties, counsel, and courts.”); D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1192-98 (2013) (describing benefits to plaintiffs of non-class aggregation).

<sup>15</sup> Burch, *supra* note 10, at 414 (“Centralization likewise advantages defendants by making meaningful closure possible through a global settlement.”).

<sup>16</sup> See, e.g., Edward F. Sherman, *When Remand is Appropriate in Multidistrict Litigation*, 75 LA. L. REV. 455 (2014) (describing judges’ view of MDL as “reducing the costs in both time and money of full-bore individual litigation”); Eldon E. Fallon, Jeremy T. Grabill, Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2324 (2008).

<sup>17</sup> See COFFEE, *supra* note 4, at 155 (“the most successful step taken in the administration of aggregate litigation in the United States was the creation of the JPML in 1968 . . . This achievement may have been the product of dumb luck because the JPML was created before the modern class action even arose”); Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action is Not Possible*, 82 TUL. L. REV. 2205, 2208-09 (2008) (defending MDL as achieving efficiencies of class actions within a “looser and more flexible structure”).

<sup>18</sup> Martin Redish & Julie Karaba, *One Size Doesn’t Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 110 (2015) (“the current practice of MDL actually makes the modern class action look like the pinnacle of procedural due process by comparison”); Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 391 (2011) (arguing MDL has “stripped away” the protections afforded by the class action); Elizabeth Chamblee Burch, *Aggregation, Community, and the Line Between*, 58 U. KAN. L. REV. 889, 898 (2010)

representative suit, unlike a class action, there is no right to opt out of an MDL proceeding—once you're in, you're in, often for years, until “pretrial proceedings” have concluded.<sup>19</sup> Moreover, while the litigation is within the jurisdiction of the MDL court, the cases are prosecuted primarily by “steering committees” of lawyers appointed by the court. These lawyers, who receive additional fees, take charge of discovery and motion practice and eventually play the most prominent role in negotiating global settlements.<sup>20</sup> In addition, unlike a class action, there is no requirement that a judge review a settlement for fairness,<sup>21</sup> but judges nevertheless play an active role in brokering global settlement deals, and some of those agreements (most notably in the Vioxx cases) have been criticized as unduly coercive to the individual plaintiffs.<sup>22</sup> MDL, to these critics, presents the worst of both worlds—a statute that provides inadequate power to protect plaintiffs but also no real limitations on judges’ acting imperially to manage cases and essentially mandate settlement.<sup>23</sup>

Underlying both the criticism and laurels is the sense that MDL is a second-best, jury-rigged alternative to the now-unavailable class action that was never intended to play the leading role it now does.<sup>24</sup> Dotting these

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(describing MDL as a “procedural no-man’s land”).

<sup>19</sup> See, e.g., Redish & Karaba, *supra* note 18, at 111 (“all MDLs are mandatory”); Troy A. McKenzie, *Toward A Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 994-95 (2012) (“a plaintiff drawn into MDL proceedings has little power to opt out in any meaningful sense”).

<sup>20</sup> Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 73 (2015) (describing importance of steering committees); Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 541 (2003) (finding MDL committees “dominate the conduct of pretrial litigation”).

<sup>21</sup> Compare 28 U.S.C. § 1407(a) with Fed. R. Civ. P. 23(e).

<sup>22</sup> Compare Howard M. Erichson, *The Trouble With All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979, 1000 (2010) (describing ethical issues raised by Vioxx), with Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 218.

<sup>23</sup> Charles Silver & Geoffrey P. Miller, *The Quasi-Class-Action Method of Managing Multidistrict Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 111 (2010) (describing MDL: “judges have compromised their independence, created unnecessary conflicts of interest, intimidated attorneys, turned a blind eye to ethically dubious behavior, and weakened plaintiffs’ lawyers’ incentives to serve their clients”).

<sup>24</sup> See, e.g., Burch, *supra* note 20, at 79 (“Congress never envisioned transferee judges concluding multidistrict cases; the plan was simply to streamline the discovery and pretrial process and the return cases to their home district for trial”); Redish & Karaba, *supra* note 18, at 132 (MDL only “originally envisioned as a temporary transfer to facilitate convenience and avoid duplicative discovery”); Mullenix, *supra* note 3, at 553 (contending that parties and courts are “manipulating MDL procedure to accomplish ends that the mechanism was never intended to perform”); Jeremy T. Grabill, *The Pesky Persistence of Class Action Tolling in Mass Tort Multidistrict Litigation*, 74 LA. L. REV. 433, 457 (2014) (MDL “merely brings related lawsuits before one judge so that they can be organized and

assessments is the perception that MDL “has clearly become much more important than was envisioned by Congress back in the 1960s,”<sup>25</sup> and that what was only a modest tweak to the venue statute intended to provide only meager powers to transferee judges has now expanded to become an “end run” around the protective strictures of the class-action rule.<sup>26</sup> Given MDL’s recent ascendance, this perception is wholly understandable. The MDL statute attracted very little controversy after it passed in 1968, and not much public attention for decades thereafter.<sup>27</sup> And MDL *is* being used more than it ever has been in the past, and its use is primarily in the service of attaining large-scale settlements, settlements that are accurately characterized as built to secure mass resolution.<sup>28</sup>

But the story of MDL, after all, begins not in the 1990s when the Supreme Court began in earnest its cutback on class actions, but in the 1960s, when the statute was created. Compared to the well-chronicled 1966 amendments to Rule 23 that spawned the modern era of class actions, relatively little has been written about the development of the Multidistrict Litigation Act of 1968 beyond review of its sparse legislative history.<sup>29</sup> There was actually almost no debate in Congress; after languishing in committee for several years the legislation suddenly passed on the consent calendar of both houses, with no dissenting votes.<sup>30</sup> And the idea of transfer to a different district for pretrial proceedings seems to appear almost out of thin air, with no pedigree in procedure at law or equity.

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managed collectively to avoid the need to conduct duplicative discovery”).

<sup>25</sup> See, e.g., RICHARD L. MARCUS, EDWARD F. SHERMAN & HOWARD M. ERICHSON, *COMPLEX LITIGATION* 140 (5th ed. 2010); Metzloff, *supra* note 7, at 38 (contending “MDL was intended to be the exception rather than the rule”); Mullenix, *supra* note 18, at 424-425 (stating that the MDL statute “actually describes a meager and vague set of powers for MDL judges” and only a “limited delegation of authority”); Sherman, *supra* note 17, at 2205 (describing MDL as a “modest procedural development”).

<sup>26</sup> Mullenix, *supra* note 18, at 424 (“The MDL statute and MDL procedure was never intended to confer such broad power and authority on a federal court”); Willging & Lee, *supra* note 5, at 806 (noting lack of “systematic judicial or other regulatory oversight” of settlements reached in MDL cases).

<sup>27</sup> See also Resnik, *supra* note 2, at 47 (describing MDL as a “sleeper—having enormous effect on the world of contemporary litigation but attracting relatively few critical comments”).

<sup>28</sup> See, e.g., Howard M. Erichson, *The Role of the Judge in Non-Class Settlements*, 90 WASH. U. L. REV. 1015, 1026 (2013);

<sup>29</sup> Cf. David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953-1980*, 90 WASH. U. L. REV. 587 (2013); John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking*, 24 MISS. C. L. REV. 323 (2005). Histories of the class action’s development prior to the amendments are also comprehensive. See, e.g., STEPHEN C. YEAZELL: *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987).

<sup>30</sup> 90 CONG. REC. H4927-4928 (March 4, 1968).

This paper unearths MDL's origins, drawing primarily on the papers of the statute's two principal drafters: Judge William H. Becker of the Western District of Missouri and Dean Philip C. Neal of the University of Chicago Law School.<sup>31</sup> Becker was the chairman of the Coordinating Committee on Multiple Litigation, which was created in 1962 by the Judicial Conference to address a deluge of antitrust litigation spawned by revelations of price-fixing in the electrical-equipment industry. Neal, a professor and later dean of the University of Chicago Law School, was the Coordinating Committee's executive secretary. These two men, along with Chief Judge Alfred Murrah of the Tenth Circuit and Judge Edwin Robson of the Northern District of Illinois, spearheaded the effort to turn the experimental methods the Committee used to handle the electrical-equipment litigation into a permanent feature of the federal-litigation system. Becker, in particular, kept voluminous records of this effort, documenting the evolution of what became the MDL statute and the judges' efforts to push the statute through Congress.

What stands out most from the drafters' papers is that they did not intend the role of the MDL statute, or the powers it confers on judges, to be modest or meager. Nor did they intend its use to be rare or exceptional. Quite the opposite is true. The drafters believed that their creation would reshape federal litigation and become the primary mechanism for processing the wave of nationwide mass-tort litigation they predicted was headed the federal courts' way.

And the drafters believed that for their creation to work effectively, it needed to endow the judges overseeing these litigations with plenary power to manage them and flexibility to innovate when doing so. The creators of the statute had the conviction that a litigation explosion was coming that would overwhelm the federal courts—a litigation explosion caused by booms in population, technology, and expanded rights of action created by the Congress. In these judges' view, the only way to meet the demands created by the litigation explosion was through centralized judicial power over national controversies. In short, to these judges individual litigants and judges could not be left in charge of litigation. Litigants, particularly defendants, for whom delay was a weapon, would only perpetuate backlogs. Control of these cases therefore had to be centralized in the hands of a

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<sup>31</sup> Papers of Philip C. Neal, University of Chicago, Chicago, IL [hereinafter, Neal Papers]; Papers of Judge William H. Becker, Records of the Administrative Office of the United States Courts, Record Group 116, Coordinating Committee on Multiple Litigation, 1962-1968, National Archives, Kansas City, MO [hereinafter Becker Papers]. The papers pertinent to this research are divided into two sets: (1) Administrative Files, 1962-1967 [hereinafter Becker Papers] and (2) Chronological Files, 1964-1968 [hereinafter Becker Chronological Files].

single and active judge—in particular, a judge committed to strong pretrial case management—who would direct the conduct of the nationwide litigation from the bench.

But although these judges believed that such centralization of power was necessary, they also recognized that their idea was a “radical proposal,” one without precedent in a system whose norms were party control of the conduct of cases and decentralized district courts with little national coordination. So, the papers reveal, they devised a political answer to this problem: consolidation for pretrial proceedings with eventual remand for trial. Such a “limited transfer” structure would insulate the statute from both the resistance of plaintiffs’ lawyers who might fear loss of control over their cases (and their fees) and district judges who might fear invasion of their jurisdiction, but also create the necessary central control for a single judge to manage the litigation.<sup>32</sup>

Having settled on pretrial consolidation as the mechanism for centralizing power, the judges entered the political fray to turn their idea into a solid statutory reality. In so doing, they were politically savvy. First, they understood that such a significant departure from past practice would have to be embodied in a statute, not a Federal Rule of Civil Procedure, which could be vulnerable to challenge under the Rules Enabling Act. Second, they understood the necessity of achieving support of the Judicial Conference and Department of Justice. And third, the judges came to see that to succeed they would have to overcome the opposition of the powerful antitrust defense bar, which believed that any mechanism facilitating aggregation of litigation would be harmful to their clients’ interests. So, the judges engaged in an aggressive campaign of lobbying both legislators and lawyers, culminating in a face-to-face meeting with the lawyers opposing the statute, at which the judges attempted to persuade them to change their minds. The lawyers’ change of heart, perhaps due to the judges’ including them in the process of drafting the first *Manual for Complex Litigation*, led to passage of the bill and the creation of the Judicial Panel on Multidistrict Litigation, which was staffed primarily by the men who drafted the statute.<sup>33</sup>

In telling this story, this paper makes three contributions. First, it is the first to describe in detail the development and passage of MDL. Becker and Neal’s papers reveal both the determination of the statute’s drafters and their canny strategy for getting it passed. Ultimately, on their terms, this is a success story born of a particular historical moment when federal judges could exercise significant influence on procedural matters, and Congress was well disposed to reforms in judicial administration that would enhance

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<sup>32</sup> *Infra* Part III.

<sup>33</sup> *Infra* Part IV.

the ability of private plaintiffs to enforce their claims. These judges both knew how, and were willing, to use the tools at their disposal, including twisting the arms of lawyers who would appear before them.

Second, in this era of MDL ascendancy, a better understanding of the statute's history should inform future debates about how MDL is used. The judges did not intend MDL to live in the shadow of the class action, nor did they intend it to be a stand-in should the mass-tort class action ultimately prove to be unviable. They intentionally drafted the statute as a device that would allow for easy aggregation and provided no ability to opt out. The guiding light of the judges' efforts was their perception that power over litigation must be centralized in the hands of a single judge with national authority and maximum flexibility. The intent of the drafters does not necessarily determine how courts should construe it today, in a litigation world that is admittedly quite different.<sup>34</sup> But the story of the statute's origins should disabuse commentators of the notion that what was meant to be only a modest innovation has been perverted into an authoritarian device. MDL is now working essentially as its creators intended, and critics of the statute should train their fire on how judges use their power, not on whether the statute provides it.

Third, and relatedly, the paper highlights the particular genius of the statute's drafters: the political compromise that led to the development of partial transfer for pretrial proceedings. In prior work, I have referred to the dual nature of MDL in the sense that MDL cases exist simultaneously as a tightly consolidated unitary proceeding and as a temporary collection of individual cases.<sup>35</sup> It is the retention of the individual identity of the component lawsuits that gives doctrinal cover to the judges' aggressive control of the litigation. In other words, the patina of individual control within a coercive mechanism makes MDL tolerable as a matter of due process. How this works today as a matter of procedural doctrine on the ground, and whether MDL ultimately makes litigants better off than possible alternatives are subjects for future work. But the origins of the statute reveal that its creators understood that retaining the individual identity of cases—embodied in choice of forum, choice of law, and eventual remand—was necessary to secure MDL's passage and legitimacy, particularly in an era when aggregate litigation was more of an anomaly. Essentially, MDL is an iron fist in a velvet glove. It is the surface-level modesty of the statute that facilitates the achievement of its creators' aims, and the creators of the statute understood this well.

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<sup>34</sup> See, e.g., Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1034 (1982) (in a different context, noting that “the history is not a Baedeker”).

<sup>35</sup> Bradt, *supra* note 10, at 791; see also R. Marcus, *supra* note 11, at 2265 (noting “an inherent tension in the split authority arrangement Congress built into the statute”).

The paper proceeds as follows. In Part I, I briefly describe how MDL works, its current prominence, and why after a long period of relative neglect it has become a lightning rod for academic criticism. In Part II, I turn to the roots of the MDL statute, in particular the creation of the Judicial Conference and its committee system and the electrical-equipment litigation that spawned the particular committee that wrote the MDL statute. In Parts III and IV, I lay out in detail the process of drafting and passage of the statute, drawing on Becker and Neal's papers. In Part V, I offer some observations about the implications of this story in the era of MDL ascendancy.

Today, procedure scholars and lawmakers understand well that procedure is about power, both in terms of the law determining who controls litigation and who gets to make that law.<sup>36</sup> The story of MDL is a story about the power of procedure. In particular, it is a story of how a small group of judges developed a tool to transfer power in large-scale litigation away from the parties and judges scattered around the country to individual judges committed to the principles of active case management. It is also a story of how that small group of judges used the tools at their disposal to make their idea a statutory reality that was built to last, essentially invulnerable to future interference. MDL is a success story, and its impact is lasting. Far from being a modest innovation that has metastasized into the dominant structure of mass-tort litigation, MDL today is essentially what its creators hoped it would be: an exceptionally powerful tool.

## I. WHAT IS MDL, AND WHY IS IT IMPORTANT AND CONTROVERSIAL?

To set the stage: Consolidation and coordination of multidistrict litigation in the federal courts is authorized by 28 U.S.C. § 1407. The statute provides: “When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.”<sup>37</sup> To accomplish these transfers, the statute mandates creation of a panel of seven federal judges, appointed by the Chief Justice, called the Judicial Panel on Multidistrict Litigation (the “Panel”).<sup>38</sup> Upon its own motion, or the motion of any party in any action to potentially be transferred, the Panel may initiate proceedings to create an MDL.<sup>39</sup> After notice to any affected party and a hearing, if the Panel decides that it “will be for the convenience of parties and witnesses and will promote the just and efficient conduct of

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<sup>36</sup> Stephen B. Burbank, *Procedure and Power*, 46 J. LEGAL EDUC. 513, 513 (1996).

<sup>37</sup> 28 U.S.C. § 1407(a).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* § 1407(c).

[the] actions,” it may transfer all of the pending cases to a single district judge of its choosing, commonly referred to as the “MDL judge,” for pretrial proceedings.<sup>40</sup> All later-filed cases involving the same subject matter are transferred rather seamlessly as “tagalong cases” to the MDL judge.<sup>41</sup> The Panel’s transfer orders are reviewable only by extraordinary writ; the Panel’s orders denying transfer are not reviewable at all.<sup>42</sup> The statute mandates that the cases be remanded to the districts from which they came at the conclusion of pretrial proceedings.<sup>43</sup>

During pretrial proceedings, all actions in the transferor courts are stayed, and the MDL judge possesses all of the powers of any district judge, including the power to manage discovery, dismiss cases, exclude evidence, and grant summary judgment or other dispositive motions. The upshot is that the MDL judge has complete authority over the mass of cases, whose numbers can run into the thousands, until pretrial proceedings have concluded and the cases have to be returned to their original courts. In practice, however, the MDL judge actively attempts to guide the litigation to a conclusion, typically through a “global settlement” that resolves most, if not all, of the component cases in the litigation.<sup>44</sup> As a result of the MDL judge’s power to terminate and assist in settling the cases, very few cases are ultimately remanded to their home districts; historically, the remand rate is around 3 percent.<sup>45</sup> Moreover, when cases involving the same subject matter are pending in federal MDL proceedings and state-court MDL analogs, the state-court judges often coordinate with and defer to the federal MDL judge to reach a resolution.<sup>46</sup>

Although the MDL statute was little noticed when it was passed in 1968, and for the first decades of its existence, today it is central. The numbers are staggering—and become more so every year. According to a recent report by the Duke Law School Center for Judicial Studies:

More than one third of the civil cases pending in the nation’s federal courts are consolidated in multidistrict litigations. In 2014, these MDL cases make up 36% of the civil case load. In 2002, that number was 16%. Removing 70,328 prisoner

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<sup>40</sup> *Id.* § 1407(a).

<sup>41</sup> 15 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3865, at 490-91 (4th ed. 2015).

<sup>42</sup> 28 U.S.C. § 1407(e).

<sup>43</sup> *Id.* § 1407(a). *See also* *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 32 (1998) (mandating remand at conclusion of pretrial proceedings).

<sup>44</sup> Bradt, *supra* note 10, at 788.

<sup>45</sup> Burch, *supra* note 20, at 73 (“transferee judges have remanded a scant 2.9% of cases to their original districts”).

<sup>46</sup> Thomas, *supra* note 5, at 1357.

and social security cases from the total, cases that typically (though not always) require relatively little time of Article III judges, the 120,449 pending actions in MDLs represented 45.6% of the pending civil cases as of June 2014.<sup>47</sup>

Strikingly, 96% percent of these cases are what are commonly considered “mass tort” cases—that is tort claims involving similar claims by a large group of plaintiffs—and the vast majority of those are products-liability cases. Some MDLs are enormous. For instance, the pelvic-mesh product-liability cases, consolidated in the Southern District of West Virginia, contain nearly 50,000 pending cases.<sup>48</sup> Those are at the high end of the spectrum, but there are currently 23 pending MDLs containing more than one thousand component cases, amounting to over 125,000 cases.<sup>49</sup>

Without belaboring things, it is fair to say that MDL has exploded, particularly in the area of mass-tort products cases. Why the recent surge? It is apparently because such cases at least for a brief period were class actions (typically settlement class actions) brought under Rule 23(b)(3) in federal court or, when those class actions became more difficult to maintain in federal court, in state court.<sup>50</sup> Those class actions have become harder to maintain in federal court due to restrictive lower appellate court decisions and the Supreme Court’s decisions in *Amchem* and *Ortiz*. When lawyers turned to comparatively friendly state courts, Congress responded by federal jurisdiction over class actions in the Class Action Fairness Act of 2005.<sup>51</sup> The catch-22 created by that combination (there is federal jurisdiction over these class actions, but under the Rule 23 they can’t be certified as class actions) created a vacuum for aggregate mass-tort litigation.<sup>52</sup> Hiding in plain sight was the MDL statute, which has emerged

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<sup>47</sup> Best Practices, *supra* note 6, at x.

<sup>48</sup> Metzloff, *supra* note 7, at 41-42 (“The results are stunning: mass-tort MDL dockets consolidated over 125,000 civil actions constituting over 96 percent of all pending actions included in all of the MDL dockets.”).

<sup>49</sup> *Id.*; see generally *In re Pelvic Repair Sys. Prod. Liability Litig.*, MDL Nos. 2187, 2325, 2326, 2327, 2387, 2440, 2511 (S.D. W. Va. 2015).

<sup>50</sup> See Richard L. Marcus, *Bending in the Breeze: American Class Actions in the Twenty-First Century*, 65 DEPAUL L. REV. 497, 504 (2016).

<sup>51</sup> See Burbank, *supra* note 4, at 1507; Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371 (2014) (“Presently, with the passage of the Class Action Fairness Act (CAFA) and the general disfavor of nationwide class actions expressed by several U.S. circuit courts, multidistrict litigation is playing an increasingly significant quantitative role in all civil litigation in the United States.”); Willging & Lee, *supra* note 5, at 804.

<sup>52</sup> See Robert Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013); Myriam Gilles, *Tribal Rituals of the MDL*, 5 J. TORT L. 173, 176 (2012).

as the primary alternative for mass-tort litigation.<sup>53</sup> Although it is not as blunt an aggregation tool as the class action—because the plaintiffs file and formally pursue their own cases rather than being represented by a class representative—it achieves many of the same efficiencies, namely coordinated discovery and motion practice controlled by small committees of lawyers appointed by the court, and gathering most parties together into a single proceeding for a potential global resolution.<sup>54</sup> From an efficiency perspective, there is much to be said for the flexibility offered by the MDL process. The MDL judge has the ability to coordinate and manage the litigation to its ultimate conclusion, relieving the federal courts of the burden of resolving the cases individually.<sup>55</sup> Essentially, the parties and courts get a lot of bang for their aggregation buck without having to surmount the many hurdles to class certification.

Although many courts and lawyers have come to embrace MDL, it has come under attack in the academy. Why? It's precisely *because* MDL achieves many of the efficiencies of class actions without all of the procedural protections for absent plaintiffs.<sup>56</sup> By way of comparison, in order to sustain a mass-tort class action under Rule 23(b)(3), a class representative must fulfill all of the prerequisites of Rule 23(a),<sup>57</sup> plus show that the common questions predominate over individual questions, that the class action is a superior way of proceeding, and provide notice and the opportunity to opt out to the class members.<sup>58</sup> MDL requires none of that. All that is necessary for consolidation is one common question of fact. And there is no opportunity to opt out. Once a plaintiff's case has been transferred into an MDL it remains there until pretrial proceedings have been concluded, which, in practice, typically means until it is terminated or settled.

In a class action, all of these procedural hurdles are thought to be necessary because most of the plaintiffs are not actively participating in the litigation. Instead, they are represented by the class representative and they

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<sup>53</sup> See Burbank, *supra* note 4, at 1538; Rubenstein, *supra* note 5, at 144 n. 40; Deborah Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Torts*, 26 REV. LITIG. 883, 907 (2007) (noting major increase in products-liability MDLs.).

<sup>54</sup> Willging & Lee, *supra* note 5, at 804; Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245, 2292 (2008).

<sup>55</sup> Sherman, *supra* note 17, at 2223 ("The MDL model, applied creatively, can be an effective alternative in certain situations to class treatment for accomplishing an aggregate or global settlement.").

<sup>56</sup> Elizabeth Chamblee Burch, *Aggregation, Community, and the Line Between*, 58 U. KAN. L. REV. 889, 898 (2010) (describing MDL as "procedural no-man's land").

<sup>57</sup> FED. R. CIV. P. 23(a)(1)-(4). See generally GEOFFREY C. HAZARD, JR., JOHN LEUBSDORF, DEBRA LYN BASSETT, CIVIL PROCEDURE (6th ed. 2011) §§ 7.21-7.22.

<sup>58</sup> FED. R. CIV. P. 23(b)(3); (c)(2).

must be protected from incompetent or unscrupulous representation. In MDL, none of these additional protections exists because the plaintiff prosecutes her own case with her own attorney.<sup>59</sup> This, however, is not an accurate portrayal of how MDL actually works. The MDL process actually looks in many ways very much like the class-action process, with judge-appointed steering committees of attorneys representing the plaintiffs as a whole, many of whose cases have been transferred to a far-flung location selected by the Panel.<sup>60</sup>

The three most prominent strands of criticism of MDL are: (1) MDL insufficiently protects individual plaintiffs' due-process rights, including the right to a meaningful day in court,<sup>61</sup> (2) there are no established rules governing MDL judges' procedures, resulting in unpredictability and inconsistency,<sup>62</sup> and (3) MDL cases take a very long time to litigate and languish before the MDL judge for years.<sup>63</sup> These critiques are detailed and complex, but for brevity's sake, I will boil them down: critics think that the MDL statute gives MDL judges unlimited discretion and deprives plaintiffs of control over their cases with little procedural protection. The result for many plaintiffs is a coercive global settlement negotiated in a faraway court by someone else's lawyer that the plaintiffs have little practical choice but to accept.<sup>64</sup> In sum, what makes MDL such an effective means of resolving mass litigation is also what makes it a target of intense criticism: the almost unlimited discretion of the district judge the Panel puts in charge of the litigation. Yet, unlike the class action, the MDL structure has been unmolested by due-process-based attacks to its legitimacy.<sup>65</sup> In one sense,

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<sup>59</sup> Bradt, *supra* note 10, at 791.

<sup>60</sup> Burch, *supra* note 20, at 73 ("judges appoint steering committees and other lead lawyers to conduct discovery, disseminate information, draft motions, negotiate settlements, and try bellwether cases."); Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519 (2003).

<sup>61</sup> Redish & Karaba, *supra* note 18, at 115.

<sup>62</sup> Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519 (2003).

<sup>63</sup> Heyburn & McGovern, *supra* note 14, at 31 (noting delays as "the single most prominent complaint about multi-district litigation"); Burch, *supra* note 10, at 400 ("Multidistrict litigation has frequently been described as a 'black hole' because transfer is typically a one-way ticket.").

<sup>64</sup> See, e.g., Silver & Miller, *supra* note 23, at 124 ("Being stuck forever in a court that cannot preside over a trial and that wants a global settlement at all costs, plaintiffs caught up in MDLs have little bargaining leverage."); Mullenix, *supra* note 18, at 391 (describing MDL as having "stripped away" the protections of Rule 23).

<sup>65</sup> See Redish & Karaba, *supra* note 18, at 115 ("no court appears to have even considered, much less ruled upon, a due process challenge to MDL"); R. Marcus, *supra* note 11, at 2248 (MDL has "not caused the same kind of controversy the class action produced").

the crackdown on alleged lawlessness in the conduct of class actions has facilitated a shift to MDL and potentially lawlessness—in the other direction.<sup>66</sup>

Compared to the class action, until recently MDL was relatively underemphasized in the academic literature, with notable exceptions.<sup>67</sup> But now that MDL is in the spotlight, it has begun to attract significant attention and to spawn trenchant commentary. This commentary proceeds from the accurate idea that MDL has emerged only after the demise of the mass-tort class action. Much of this commentary, however, also proceeds from the assumption that MDL was intended to be used rarely and that its aims were modest. It is only the vacuum created by the class action that has spawned its expanded use and judges' expansive ideas of their power in MDL cases. This characterization of the statute raises the question: what did its creators intend in the early 1960s, before the class action boom? How did this statute come to be? And how, given how controversial it has become, did it manage to pass the House and the Senate on the consent calendar, without even a roll call vote? I turn to that story now, beginning in the 1920s.

## II. THE ROOTS OF THE MDL STATUTE

### A. An Integrated Federal Judiciary and the Ascendance of Pretrial Procedure

The roots of the MDL statute can be found decades before its passage, with the creation of the Judicial Conference in 1922 and the activities of its Pretrial Committee in the 1940s and 1950s. The creation of the Conference and its emergence as a policymaking force in Congress were a distinct break from the past.

Since they were created in the Judiciary Act of 1789, the federal district courts have traditionally been decentralized, autonomous, and with largely immobile judges. The first Congress, drawing on suggestions in the Federalist Papers,<sup>68</sup> divided the country into geographically drawn judicial districts, all of which were located within the borders of a state.<sup>69</sup> This

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<sup>66</sup> Cf. Stephen B. Burbank & Stephen N. Subrin, *Litigation & Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 408 (2011) (describing the Supreme Court's decisions in *Twombly* and *Iqbal* as acts of lawlessness that spawned lower-court ignorance of those rulings—"lawlessness cubed").

<sup>67</sup> Thomas, *supra* note 5, at 1350 (noting that "MDL remains one of the least studied types of federal litigation"). For exceptions to Professor Thomas's observation, see, e.g., articles referenced *supra* in note 1.

<sup>68</sup> Federalist Papers No. 81 ("it will be found highly expedient and useful to divide the United States into four or five or half a dozen districts").

<sup>69</sup> Ronald J. Krotoszynski, Jr., *The Unitary Executive and the Plural Judiciary: On the*

geographic decentralization was intentional because it provided local figures throughout the country to represent the federal government to a dispersed population.<sup>70</sup> As Alison LaCroix has written, “the inferior federal courts—not Congress—were the most important symbolic and institutional nodes by which the people of the nation would encounter the authority of the federal government.”<sup>71</sup> Despite being the local face of the federal government, though, the federal district courts were essentially autonomous and disconnected entities.<sup>72</sup> Through the nineteenth century, the district courts operated with almost no centralized oversight and possessed relatively limited jurisdiction.<sup>73</sup>

In the 1920s, however, Chief Justice William Howard Taft sought to unify both federal courts and federal judges.<sup>74</sup> The fractured nature of the federal courts and the absence of a voice in Congress prevented the judiciary from formulating and effectively backing reforms to remedy numerous problems facing it.<sup>75</sup> Among the most glaring problems, Taft believed, was backlog in crowded urban federal courts that negatively affected both the quality of justice courts delivered and their legitimacy.<sup>76</sup> To solve this problem, Taft supported creation of a nationally unified and mobile—that is, not geographically constrained—corps of judges belonging

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*Potential Virtues of Decentralized Judicial Decision Making*, 89 NOTRE DAME L. REV. 1021, 1041 (2014) (“Congress designed the lower federal courts to be local institutions within the states”).

<sup>70</sup> *Id.* at 1045 (“A more streamlined model for the federal courts could have been adopted—for example locating the federal judiciary in the national capital, with Congress and the President—but this approach was not taken.”); Alison L. LaCroix, *Federalists, Federalism, and Federal Jurisdiction*, 30 L. & HIST. REV. 205, 206 (2012) (“the federal courts were thought to be the principal physical embodiment of the national government, reaching into the otherwise highly localized spaces of the cities, towns, and countryside”).

<sup>71</sup> LaCroix, *supra* note 70, at 207; PETER GRAHAM FISH *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 17-18 (1973) 12.

<sup>72</sup> FISH, *supra* note 71, at 18.

<sup>73</sup> FISH, *supra* note 71, at 17-18 (1973) (noting that “decentralizing features of the Act of 1789 were everywhere in evidence”); Judith Resnik, *Constricting Rights, Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 273 (2003).

<sup>74</sup> Carl Baar, *Federal Judicial Administration: Political Strategies and Organizational Change*, in RUSSELL R. WHEELER & HOWARD R. WHITCOMB, EDS., *JUDICIAL ADMINISTRATION: TEXT AND READINGS* 97 (1977) (calling Taft’s efforts the “most important change in the judicial branch of the federal government during the past half-century”). In this regard one should also consider Chief Justice Taft’s support of the merger of law and equity. See Burbank, *supra* note 34, at 1069-1070.

<sup>75</sup> FISH, *supra* note 71, at 24 (citing Taft’s desire for “administrative integration of the judiciary”).

<sup>76</sup> *Id.* at 19; JUSTIN CROWE, *BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT* 198-212 (2012) (summarizing both Taft’s goals and political savvy in achieving many of them).

to “a system by which the whole judicial force of circuit and district judges could be distributed to dispose of the entire mass of business promptly.”<sup>77</sup> At the center of Taft’s plan was to convince Congress to authorize the Chief Justice to appoint a force of “at-large” judges who could travel as needed to different districts to combat overwhelmed dockets and delay.<sup>78</sup> But Taft’s attempt to create such a “flying squadron” of judges never really got off the ground. Congress considered such a break from tradition too stark and such power in the hands of the Chief Justice too great (particularly when such a power threatened the traditional patronage opportunity federal judgeships presented).<sup>79</sup> Local lawyers, too, bristled at the idea of appearing before judges whose predilections were unknown.<sup>80</sup>

Although his attempts to achieve a flexible and mobile judiciary failed, Taft succeeded in convincing Congress to authorize creation of a multi-judge body responsible for proposing legislation in the judiciary’s interest and capable of enhancing communication among federal judges.<sup>81</sup> So, in 1922, Congress passed legislation creating the Conference of Senior Circuit Judges, the predecessor to the modern Judicial Conference.<sup>82</sup> According to judicial-administration scholar Peter Graham Fish, the Conference “created

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<sup>77</sup> “Address of President,” *Report of the 37th Annual Meeting of the American Bar Association* (1914); see also William Howard Taft, *The Attacks on the Courts and Legal Procedure*, 5 KY. L.J. 3, 16 (1916) (describing his recommendations for “adjustment of the judicial force to the disposition of increasing business”).

<sup>78</sup> Judith Resnik & Lane Dilg, *Responding to A Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, 1617 (2006) (describing this attempt to “detach the appointment of judges from a position on a particular court”).

<sup>79</sup> FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 235-236 (1927) (describing the failure of Taft’s proposal to get out of committee: “[r]egard for local representation is one of the most obstinate characteristics of American politics”); Peter G. Fish, *William Howard Taft and Charles Evans Hughes: Conservative Politicians as Chief Judicial Reformers*, 1975 SUP. CT. REV. 123, 136 (“such a departure from historic principles of localism fell before heated Congressional opposition”); Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 J. CONST. L. 341, 356 (2004) (Taft’s plan “encountered heated opposition from the traditional conception of geographic fixity”); David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 111 (1981) (“Congressmen, reflecting their local biases, could not accept the idea of ‘outside’ judges whose judicial philosophy was unknown and whose decisions might reflect values prevalent in other parts of the country.”).

<sup>80</sup> FISH, *supra* note 71, at 61.

<sup>81</sup> Jeremy Buchman, *Judicial Lobbying and Politics of Judicial Structure: An Examination of the Judiciary Act of 1925*, 24 JUST. SYS. J. 1, 4-5 (2003) (Taft “launched a comprehensive lobbying campaign on behalf of legislation that would enhance the Court’s policymaking capacity”); Fish, *supra* note 79, at 136.

<sup>82</sup> 42 Stat. 837.

an institutional framework with administrative leadership and informal responsibility lodged in the Chief Justice and the presiding officers of the intermediate appellate courts.”<sup>83</sup> The Conference received additional assistance and resources in 1939, when Congress created the Administrative Office of the Federal Courts, which serves as an institutional liaison between the Congress and federal judges.<sup>84</sup> Over the years, Taft’s creation has been wildly successful in becoming, as Judith Resnik describes it, “the corporate policymaking voice of the federal judiciary.”<sup>85</sup>

The central means through which the Conference develops policy proposals is through committees of judges appointed by the Chief Justice. Among these committees are those that develop the various federal rules of practice and procedure and others that develop legislation to present to the Conference as a whole, and, with the Conference’s approval, then to Congress.<sup>86</sup> One of the most influential of these committees has been the Committee on Pretrial Procedure, established in 1943. To that point, the prevailing norm among federal judges had been mostly to remain passive in cases until the trial, leaving it to the parties to manage litigation at their own pace unless they called upon the judge to decide a motion. Even though the original 1938 Federal Rules of Civil Procedure included a provision for pretrial conferences, judges rarely used it.<sup>87</sup> The Pretrial Committee sought to change that, engaging in a major educational and promotional campaign to convince judges of the benefits of pretrial case management, including active control of discovery and repeated pretrial conferences. The Committee’s chairman, Chief Judge Alfred Murrah of the Tenth Circuit (who, when he was appointed to the district court by Franklin Roosevelt at age 32, was one of the youngest federal judges ever), traveled the country proselytizing experienced judges and training new ones about the virtues of active management of cases to sharpen the issues for trial, reduce costs and delays, and facilitate settlement when appropriate.<sup>88</sup>

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<sup>83</sup> FISH, *supra* note 71, at 39.

<sup>84</sup> See John W. Winkle, *Interbranch Politics: The Administrative Office of the U.S. Courts as Liaison*, 24 JUST. SYS. J. 43, 45 (2003) (describing the AO as the “chief administrative policymaker of the federal courts”).

<sup>85</sup> Judith Resnik, *Building the Federal Judiciary (Literally and Legally): The Monuments of Chief Justices Taft, Warren, and Rehnquist*, 87 IND. L.J. 823, 863 (2012).

<sup>86</sup> Fish, *supra* note 73, at 271.

<sup>87</sup> Burbank, *supra* note 36, at 506 (“federal judges, accustomed to a relatively passive role in common law cases, were loath to use the tools that *were* given to them in 1938”).

<sup>88</sup> Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 174-175 (1997) (“One of the agendas of this educational effort was to teach judges about ‘effective judicial supervision of litigation from cradle to grave’ and another was to educate lawyers about new procedures. The proponents were self-described ‘proselytizers.’”). See, e.g., William J. Brennan, *Remarks on Pretrial Procedure in Protracted Civil and Criminal*

By the 1950s, the Pretrial Committee's efforts were gaining traction, particularly as the federal courts began to be confronted regularly with more complicated, large-scale, multi-party cases.<sup>89</sup> Murrah argued, "the judicial process was literally breaking down under the weight of these cases."<sup>90</sup> In particular, due to the increase in complex antitrust actions in the '40s, brought both by the government and private plaintiffs, Chief Justice Vinson appointed in 1949 a subcommittee of ten federal judges to study the problem of large-scale, "protracted" litigation—so-called "big cases."<sup>91</sup> As part of this subcommittee, Murrah continued to circulate around the country, speaking often to judicial meetings to expound on the importance of pretrial conferences and control of discovery in complex cases.<sup>92</sup>

In 1951, the subcommittee issued the "Prettyman Report," named for E. Barrett Prettyman, Chief Judge of the D.C. Circuit, who chaired.<sup>93</sup> The Prettyman Report described the growth of complex cases as an "acute, major problem in the current administration of justice," both because of the complexity of those cases—in which the litigation was "less certain and less accurate"—but also the effect of those cases on the congestion of the district courts.<sup>94</sup> The Prettyman Report refrained from proposing new legislation or rules to respond to the "big case," but instead offered suggestions based on the experiences of judges and lawyers in litigating these cases.<sup>95</sup> Foremost among these suggestions was increased pretrial procedure and "rigid control" by the trial judge at the outset of the litigation.<sup>96</sup>

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*Litigation*, 23 F.R.D. 319, 380 (1958) (effective pretrial management "puts people in a frame of mind to settle").

<sup>89</sup> David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1983 (1989) ("Judges began to see themselves less as neutral adjudicators—deciding what the parties brought to them for decision and proceeding as a pace to be determined by the parties—and more as managers of a costly and complicated process.").

<sup>90</sup> Alfred P. Murrah, *Seminar on Protracted Cases for United States Judges* 23 F.R.D. 319, 386 (1958); Alfred P. Murrah, *Seminar on Procedures Prior to Trial*, 20 F.R.D. 485, 491 (1957) ("A judge must be willing to assume his role as the governor of a lawsuit. He can't be just an umpire.").

<sup>91</sup> See, e.g., Breck P. McAllister, *The Judicial Conference Report on the Big Case: Procedural Problems of Protracted Litigation*, 38 A.B.A. J. 289 (1952); E. Barrett Prettyman, *Needed: New Trial Technique: Suggestions for the Trial of Complicated Cases*, 34 A.B.A. J. 766 (1948).

<sup>92</sup> See Earl Warren, *The Problem of Delay: A Task for Bench and Bar Alike*, 44 A.B.A. J. 1043, 1043 (1958) (noting Murrah's efforts).

<sup>93</sup> Procedure in Antitrust and Other Protracted Cases—A Report Adopted by the Judicial Conference of the United States, 13 F.R.D. 62 (1951).

<sup>94</sup> *Id.* at 63.

<sup>95</sup> *Id.* at 64.

<sup>96</sup> *Id.* at 66.

The Prettyman Report was met with widespread praise.<sup>97</sup> So, in 1955, still troubled by the problem of delay in federal litigation, Chief Justice Warren formed a new subcommittee (with several of the same members as the 1949 subcommittee, including Murrah, who chaired) to translate the Prettyman Report into courtroom action. Warren actively promoted the project, lauding Murrah personally in the keynote speech at the Annual Meeting of the American Bar Association in 1958.<sup>98</sup> In that speech, Warren decried that “interminable and unjustifiable delay in our courts are today compromising the basic legal rights of countless thousands of Americans and, imperceptibly, corroding the very foundations of constitutional government in the United States.”<sup>99</sup> Among the solutions to this problem, Warren claimed, was the kind of pretrial procedure that “Judge Murrah has tried for ten years to demonstrate to our federal judges.”<sup>100</sup>

The result of these discussions and “three years of intensive investigation” by the committee was eventually the Handbook of Recommended Procedures for the Trial of Protracted Cases, adopted by the Judicial Conference of the United States in March 1960.<sup>101</sup> In an introductory note, Judge Prettyman noted that the Handbook primarily would respond to “lack of central control” of cases by trial judges.<sup>102</sup> The Handbook recommended (1) early identification of protracted litigation, (2) assignment of the case to a single judge, (3) definition of the contested issues through use of pretrial conferences, confined discovery to prevent fishing expeditions, and (5) careful planning of trial procedure.<sup>103</sup> In short, the Handbook endorses all of the tenets of what we would now consider typical case management.<sup>104</sup>

The ink was barely dry on the Handbook when the federal courts would be confronted with the biggest “big case” in their history. The tenets of rigid control would soon be put to an extreme test.

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<sup>97</sup> See, e.g., REPORT BY THE COMMITTEE ON PRACTICE AND PROCEDURE IN THE TRIAL OF ANTITRUST CASES OF THE SECTION OF ANTITRUST LAW OF THE AMERICAN BAR ASSOCIATION (1954); Leon Yankwich, *Short Cuts in Long Cases*, 13 F.R.D. 41 (1953).

<sup>98</sup> Earl Warren, *The Problem of Delay: A Task for Bench and Bar Alike*, 44 A.B.A. J. 1043, 1043 (1958).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 1045.

<sup>101</sup> ALFRED P. MURRAH, FOREWORD, HANDBOOK OF RECOMMENDED PROCEDURES FOR THE TRIAL OF PROTRACTED CASES 5 (1960).

<sup>102</sup> E. BARRETT PRETTYMAN, PREFACE, HANDBOOK OF RECOMMENDED PROCEDURES FOR THE TRIAL OF PROTRACTED CASES 10 (1960).

<sup>103</sup> HANDBOOK OF RECOMMENDED PROCEDURES FOR THE TRIAL OF PROTRACTED CASES 23-24 (1960).

<sup>104</sup> See, e.g., Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027 (2013); Steven Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669 (2010).

## B. The Electrical-Equipment Antitrust Litigation

In 1961, an unprecedented challenge arose: massive antitrust litigation involving the electrical-equipment industry that threatened to overwhelm the federal courts.<sup>105</sup> Before the electrical-equipment cases began, civil antitrust actions amounted to a significant amount of business in the federal courts, and indeed they motivated much of the original investigation into adapting procedure to the “big case,” but their impact was manageable.<sup>106</sup> In 1959, for instance, 315 antitrust cases were filed in the federal courts, around one per district judge.<sup>107</sup>

In 1960, though, virtually every significant American manufacturer of electrical equipment, from General Electric and Westinghouse on down, was indicted under the Sherman Act.<sup>108</sup> The indictments alleged conspiracies to divide business and fix prices in twenty product lines of electrical equipment, implicating \$6-7 billion in sales.<sup>109</sup> The Chief Judge of the Eastern District of Pennsylvania, where the indictments issued, called the conspiracies “a shocking indictment of a vast section of our economy.”<sup>110</sup> Ultimately, the criminal cases were resolved through a series of guilty and *nolo contendere* pleas in February 1961, resulting in nearly \$2 million in fines, some short jail sentences for relatively low-level defendant employees, and consent decrees entered in September 1962.<sup>111</sup> Congressional hearings held by Senator Estes Kefauver followed.<sup>112</sup>

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<sup>105</sup> Burbank, *supra* note 36, at 515 (“The crisis emerging from the electrical equipment antitrust cases . . . was in part a crisis for federal judges.”).

<sup>106</sup> Warren Olney III, *Impact of Antitrust Litigation in U.S. District Courts*, 1960 CCH Antitrust Law Symposium 4 (noting that “antitrust litigation does have a heavy impact on the business of the federal courts,” but “numerically, antitrust cases account for a small percentage of the total caseload”).

<sup>107</sup> *Id.*

<sup>108</sup> Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621 (1964). For a comprehensive description of the activities that led to the indictments, see JOHN HERLING, *THE GREAT PRICE CONSPIRACY: THE STORY OF THE ANTITRUST VIOLATIONS IN THE ELECTRICAL INDUSTRY* (1962).

<sup>109</sup> CHARLES A. BANE, *THE ELECTRICAL EQUIPMENT CONSPIRACIES: THE TREBLE DAMAGE ACTIONS* 83 (“in light of the total sales that seemed to have been involved in the claims, . . . it is clear that the claims for damages, after trebling, were in the hundreds of millions of dollars.”).

<sup>110</sup> *Id.* at 14. (quoting Chief Judge James Cullen Ganey).

<sup>111</sup> *Id.* at 20. The penalties were, at the time, “among the strongest ever levied for violations of the Sherman Antitrust Act”). Wayne E. Baker & Robert R. Faulkner, *The Social Organization of Conspiracy: Illegal Networks in the Heavy Electrical Equipment Industry*, 58 AM. SOC. REV. 837, 839 (1993).

<sup>112</sup> *Price Fixing and Bid Rigging in the Electrical Manufacturing Industry: Hearing Before the S. Comm. On the Judiciary*, 87th Cong. (1961).

Although the criminal cases were over by fall 1962, the civil litigation was just beginning. As Charles Bane, the lawyer who represented plaintiff Commonwealth Edison, noted, “it was clear to purchasers, which would include among others practically every investor-owned public utility in the United States, and to their counsel, that the convictions in themselves, together with the information (meager though it was) developed at the Kefauver hearings, established that there had been unlawful conspiracies to fix prices and allocate markets.”<sup>113</sup> These investor-owned utilities were purchasers of all of the equipment involved in the indictments and they organized among themselves a group of attorneys to study the extent of the damages they had suffered during the scope of the conspiracies, which had allegedly stretched back to the 1940s.<sup>114</sup> Having concluded that the overcharges had amounted to up to 25% for some products, such as turbine generators, plaintiffs filed treble-damage actions nationwide against the manufacturers, mostly in the plaintiffs’ home districts.<sup>115</sup> As Bane puts it, “toward the end of 1961, the filings for treble damages had swollen to a torrent.”<sup>116</sup> Over 1900 cases were filed in 35 federal districts.<sup>117</sup> As Chief Judge Thomas Clary of the Eastern District of Pennsylvania noted, “in these cases, there were as many as 40 plaintiffs. There were actually 25,632 claims, in other words, individual cases involved in these 1912 cases.”<sup>118</sup> Although the cases were scattered throughout the country (as plaintiffs tended to file at home), the courts with the most individual filings were in major cities, with New York, Chicago, Philadelphia, and Seattle leading the way.<sup>119</sup>

This opening of the floodgates caught the attention of the Judicial Conference, and in February 1962, Chief Justice Warren formed a subcommittee of the Committee on Pretrial Procedure “for the purpose of considering the problems arising from discovery procedures in multiple litigation filed in different judicial districts but with common witnesses and exhibits,” such as “major air crashes and antitrust conspiracies.”<sup>120</sup> As

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<sup>113</sup> BANE, *supra* note 109, at 50.

<sup>114</sup> *Id.*

<sup>115</sup> BANE, *supra* note 109, at 75.

<sup>116</sup> *Id.* at 81.

<sup>117</sup> Neal & Goldberg, *supra* note 108, at 622. (referring to the filings as an “avalanche”).

<sup>118</sup> Proceedings of the Twenty-Eighth Judicial Conference of the Third Judicial Circuit of the United States, *The Impact of the Electrical Anti-Trust Cases Upon Federal Civil Procedure*, 39 F.R.D. 375, 497 (1965) (statement of Chief Judge Thomas J. Clary, E.D. Pa.); *see also* BANE, *supra* note 109, at 82.

<sup>119</sup> The numbers of cases filed were: S.D.N.Y. (427), N.D. Ill. (226), E.D. Pa. (182), W.D. Wash. (141). *See* Neal & Goldberg, *supra* note 108, at 622.

<sup>120</sup> Press Release, Administrative Office of the United States Courts, February 7, 1962.

Warren noted, “[a] proper solution of these problems . . . is essential to the proper administration of our court system.”<sup>121</sup> The new committee, christened the Co-Ordinating Committee on Multiple Litigation included seven judges: Murrah (10th Cir.), George H. Boldt (W.D. Wash.), Thomas J. Clary (E.D. Pa.), Joe E. Estes (N.D. Tex.), Edwin A. Robson (N.D. Ill.), Sylvester J. Ryan (S.D.N.Y.), and Roszel Thomsen (D. Md.). Judge William H. Becker (W.D. Mo.) was added in 1962. Murrah, appointed to the bench by Franklin Roosevelt, was the first chairman. In 1964, Robson, appointed in 1951 by President Eisenhower, succeeded him, and in 1966, Becker, a 1961 Kennedy appointment, succeeded Robson. These three judges would ultimately become the driving force behind the MDL statute.

The Committee met in New York on February 21, 1962, and reported to the Judicial Conference in early March that it would seek to coordinate the progress of the litigation “in the hands of as few judges as possible, who should carefully supervise and regulate all discovery procedures.”<sup>122</sup> In so doing, the Committee agreed that the principles enumerated in the [Handbook] are applicable and should be applied to these cases.”<sup>123</sup> The Judicial Conference endorsed these plans, and the Committee was off and running.<sup>124</sup> The Committee’s operations were centered in Chicago, in an office adjoining Judge Robson’s chambers. Dean Phil C. Neal of the nearby University of Chicago Law School was named Executive Secretary, and he hired Perry Goldberg, a 1960 graduate of the school, as his clerk.<sup>125</sup>

The Committee had no power to enter any orders or to require any judge assigned to any of the cases to do anything—its efforts depended entirely on the voluntary cooperation of the district judges involved, and the degree of cooperation was remarkable.<sup>126</sup> The first major innovation of the

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<sup>121</sup> *Id.* See also Edward Ranzal, *Warren to Study Utility-Suit Jam*, N.Y. TIMES, Feb. 7, 1962, at A1.

<sup>122</sup> Report of the Subcommittee on Pretrial Procedure for Considering Discovery Problems Arising in Multiple Litigation With Common Witnesses and Exhibits to the Judicial Conference of the United States, March 2, 1962, Becker Papers, Box 6, Folder 15, at 4-5. See also BANE, *supra* note 109, at 19.

<sup>123</sup> *Id.*

<sup>124</sup> Report of the Proceedings of the Judicial Conference of the United States, March 8-9, 1962, at 25-26 (“the Conference desires to express its encouragement of the forthcoming meetings of judges aimed to effect voluntary coordinating procedures in the civil antitrust cases in the electrical equipment industry”).

<sup>125</sup> Neal & Goldberg, *supra* note 108, at 624-25.

<sup>126</sup> See, e.g., Proceedings of the Twenty-Eighth Annual Judicial Conference of the Third Judicial Circuit of the United States, *The Impact of the Electrical Anti-Trust Cases Upon Federal Civil Procedure*, 39 F.R.D. 375, 515 (1965) (statement of Benjamin Kaplan) (“Now bear in mind that the Coordinating Committee can do nothing except by voluntary cooperation. . . . Unless the judges act with unanimity on these Orders, the plan would break down.”); Phil C. Neal, *Multi-district Coordination—The Antecedents of Sec. 1407*,

coordination program was a series of uniform pretrial orders, the first set of which were borrowed from the orders Chief Judge Sylvester Ryan (a Committee member) had issued in the cases already pending before him in the Southern District of New York. The orders were developed at national meetings—first by the Committee, then with all of the judges assigned to these cases, and then after hearings open to all attorneys. Following these hearings, the local judges entered the proposed pretrial orders in their own cases after “local” hearings, at which the parties could be heard, though the orders were rarely altered.<sup>127</sup> Although it was not unanimous, the level of cooperation by district judges was remarkable.<sup>128</sup>

The pretrial orders followed the guidance of the *Handbook* by placing control of discovery within the hands of the judge. Moreover, these orders stayed already-issued discovery requests or scheduled depositions in order to coordinate discovery on a national level, including uniform sets of interrogatories issued to the defendants in cases involving major product lines. Other cases, involving products lines with less sales, were, by consent of the parties, placed on “back burner” status, so that national discovery could proceed on the largest sets of claims. In order to manage the nationwide depositions of defense witnesses, the plaintiffs’ lawyers met in Chicago to appoint a “steering committee.” The committee would decide in what order the witnesses would be deposed and divide up the workload.<sup>129</sup> The next major steps included establishing, at defendants’ expense, a national document depository in Chicago, at which all discovery of defendants’ materials would be housed and available to the lawyers. Later a similar depository funded by plaintiffs was established in New York for plaintiffs’ documents.<sup>130</sup>

The Committee also created a schedule of national depositions—first by plaintiffs, then by defendants—presided over by a judge who would make legal rulings, and held around the country, so that common witnesses would

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14 ANTITRUST BULL. 99, 101 (1969) (“The Committee was of course operating without statutory authority or other formal authority. The success of its effort depended entirely on the willingness of all the judges responsible for the cases to follow the lead of the Committee.”).

<sup>127</sup> Neal & Goldberg, *supra* note 108, at 624.

<sup>128</sup> Some judges bristled at the heavy-handedness of the Coordinating Committee. For example, Judge Sherrill Halbert of the Northern District of California ceased cooperating with the national program on the ground that “I have a strong feeling that a Court ought to be able to run its own affairs . . . I may be wrong, but I will tell you very candidly that I think these cases would have all been done and disposed of long ago had it not been for the intervention of this super-doooper Court.” Transcript of Hearing on Motion to Bring in Additional Parties; Motion to Enter National Pre-trial Orders, Sacramento Mun. Util Dist. v. Gen Elec. Co., No. 8380 (N.D. Cal. Aug. 12, 1963).

<sup>129</sup> BANE, *supra* note 109, at 131-132.

<sup>130</sup> *Id.* at 626-627.

only have to be deposed once.<sup>131</sup> Plaintiffs and defendants agreed among themselves who would conduct the depositions, but the deposition would remain “open” for forty days after oral testimony concluded so any lawyers could ask additional questions. Eventually, over 300 depositions were conducted.<sup>132</sup>

Although discovery was moving full-steam ahead, the judges had been requesting that the parties consider settlement since December 1962.<sup>133</sup> In response, the plaintiffs’ steering committee began developing damage models and lump-sum proposals to the defendants.<sup>134</sup> Settlement talks did not heat up, however, until the government settled its claims against the defendants in spring 1963,<sup>135</sup> and General Electric, the largest defendant, came to the table with the civil plaintiffs.<sup>136</sup> From the beginning, the judges played an active role in negotiations between General Electric and the plaintiffs, including private conferences conducted by Judges Robson, Ryan, and Wilfred Feinberg of the Southern District of New York.<sup>137</sup> At the conferences, the judges frankly assessed the strengths and weaknesses of the parties’ cases—and the acceptability of their settlement positions. Upon hearing one of the plaintiffs’ early settlement offers, Judge Ryan made clear that he considered it a non-starter on the ground that “what the utilities are asking for would break GE and put it out of business.”<sup>138</sup>

Eventually, General Electric came to an agreement with the plaintiffs, settling all claims against it for around \$300 million by the end of 1964.<sup>139</sup> Although they were not required to do so, the judges nevertheless held hearings to approve the fairness of the settlements.<sup>140</sup> The plaintiffs’

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<sup>131</sup> *Id.* at 625-26.

<sup>132</sup> Clary, 39 F.R.D. at 498 (noting that 180 lawyers attended the early depositions in the case).

<sup>133</sup> BANE, *supra* note 109, at 215 (noting that Judge Clary “requested that the parties open settlement negotiations”).

<sup>134</sup> *Id.* at 220.

<sup>135</sup> *Id.* at 225 (Upon settling the criminal charges, Attorney General Robert F. Kennedy noted the government’s responsibility to “clean up the congestion” created by the litigation.)

<sup>136</sup> *Id.* at 232 (“As the parties came into the latter part of 1963, it was obvious that the key to settlement lay with the larger manufacturers and, above all, GE.”).

<sup>137</sup> *Id.* at 238.

<sup>138</sup> *Id.* at 239, 244 (noting the series of public and private settlement negotiations with GE).

<sup>139</sup> BANE, *supra* note 109, at 250.

<sup>140</sup> *Id.* at 259-261. Apparently, another reason the parties sought judicial approval of the settlements as fair and reasonable was so they could be justified to their officers and directors. Moreover, approval of the settlements as “price adjustments” rather than treble damages carried important tax consequences for both the plaintiffs and the defendants. The judges’ acquiescence in the parties’ preferred classification for tax purposes is a further illustration of the scope of judicial involvement in the settlements. *Id.*

actively acknowledged the judges' involvement in the entire settlement process; for instance, at the fairness hearing approving Commonwealth Edison's settlement with Westinghouse, its lawyer remarked: "we believe we can honestly attribute [the agreement] to your Honor and your Honor's efforts, and we thank you for it."<sup>141</sup>

Although by mid-1965 the cases involving the major product lines had begun settling in droves, some cases involving smaller product lines, which had been placed on the "back burner," had not yet settled. The judges' plan was to transfer these remaining cases for trial to one district court per product line.<sup>142</sup> One sticking point in this plan was the defendant I-T-E Circuit Breaker, primarily represented by the Philadelphia law firm, Dechert, Price & Rhoads. By the end of 1965, I-T-E was the defendant with the largest number of cases still pending against it, some 365, and the Committee determined that Judge Robson should try those cases in the Northern District of Illinois. I-T-E objected to its cases being sent to Chicago, but the judges, including Judge Becker, overrode their objections and transferred the cases anyway, sometimes on their own motion.<sup>143</sup> I-T-E went so far as to seek mandamus against Becker in the Eighth Circuit, but its gambit was unsuccessful. The Eighth Circuit rejected its position, both lauding the success of the national program and noting that I-T-E "has not formulated any program, and indeed that it is without even a suggestion of any plan, for effecting termination of the litigation thus pending against it, either by way of desire to engage in trials, of intention to attempt settlements, or of basis to seek dismissals."<sup>144</sup> The court added that what I-T-E "seemingly wants done is simply to have all of the suits against it left alone."<sup>145</sup>

As a result of the Eighth Circuit's decision, the I-T-E cases were transferred to Chicago, where the parties eventually settled on the first day of trial.<sup>146</sup> Once I-T-E settled, settlements of the rest of the cases followed quickly without trial, and by the end of 1966 the litigation was over.<sup>147</sup> No

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<sup>141</sup> *Id.* at 260.

<sup>142</sup> *Atlantic City Elec. Co. v. I-T-E Circuit Breaker Co.*, 247 F. Supp. 950, 953 (S.D.N.Y. 1965).

<sup>143</sup> *Kansas City Power & Light Co. v. I-T-E Circuit Breaker Co.*, 240 F. Supp. 121 (W.D. Mo. 1965) (Becker's initial plan was to transfer the cases to Philadelphia, before Chicago was settled on as the best district for trial).

<sup>144</sup> *I-T-E Circuit Breaker Co. v. Becker*, 343 F.2d 361, 362 (8th Cir. 1965) (per curiam).

<sup>145</sup> *Id.*

<sup>146</sup> BANE, *supra* note 109, at 378 (describing the deal as "a true courthouse settlement").

<sup>147</sup> *Id.* at 379; Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 COLUM. L. REV. 1, 9 (1971) ("although a total of 1,912 cases had been filed, only nine trials were required.").

less important a figure than Chief Justice Warren himself lauded the Committee's achievement in a speech at the American Law Institute: "If it had not been for the monumental effort of the nine judges on this Committee of the Judicial Conference and the remarkable cooperation of the 35 district judges before whom these cases were pending, the district court calendars throughout the country could well have broken down."<sup>148</sup>

But the reaction to the mass settlements was not universal praise. As the lead lawyers for the plaintiff, Bane, put it, the pace of the national discovery program played a role in resolving the cases: "doubtless the pressure of the national discovery program contributed greatly to the defendants' desire to be relieved of the burden of the electrical equipment cases."<sup>149</sup> Defense counsel roundly criticized the speed with which discovery proceeded, the judges' lack of regard for their arguments, and their impression that the hearings were for show, the Committee having decided on pretrial orders in advance of argument.<sup>150</sup> They also complained that "it became clear that the national program of the Committee would move forward and 'nothing' would interfere with its progress," particularly pleas for relief from the pace of discovery by the defendants.<sup>151</sup> In a speech at the American Bar Association national meeting, defense lawyer John Logan O'Donnell complained that the coordination of proceedings inured to the exclusive benefit of the plaintiffs by eliminating defendants' best institutional advantage: their "advantage of numbers, which we all know has significance in any litigation such as antitrust which can be so time-consuming and complex as to tax the energy and perseverance of the best of

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<sup>148</sup> Earl Warren, Address to the Annual Meeting of the American Law Institute, May 16, 1967, *quoted in* MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION, at 6 (1969). *See also, e.g.*, S. Rep. No. 90-454, at 4 (observing that the Committee's "procedures worked exceptionally well"); Resnik, *supra* note 2, at 32 ("Much legal commentary describes the work of the Committee as successful.").

<sup>149</sup> BANE, *supra* note 109, at 266.

<sup>150</sup> *See, e.g.*, John L. O'Donnell, *Pretrial Discovery in Multiple Litigation from the Defendants' Standpoint*, 32 ANTITRUST L.J. 133, 137 (1966). Typical of the allegations of a power grab by the judges are comments by Breck McAllister, of the Donovan Leisure firm, at the 1966 New York State Bar Association Antitrust Law Symposium:

The extraordinary point to be made about this Co-Ordinating Committee at the outset is this: without any mandate from statute or any other source, it was able to embark upon and carry out a program of action in discovery and pretrial in this mass of cases that was largely accepted, often only after vigorous argument and protest by the parties, and that was almost invariably carried out in many district courts in which these cases had been filed. This was surely an extraordinary exercise in the use of judicial prestige and persuasion.

Breck P. McAllister, *Judicial Administration of Multiple-District Treble Damage Administration*, 1966 New York State Bar Association Antitrust Law Symposium, 55, 58.

<sup>151</sup> McAllister, *supra* note 150, at 60.

lawyers.”<sup>152</sup> O’Donnell added, in a passage that wins high marks for frankness:

In multiple litigation, however, the differential is eliminated in large part. Plaintiffs pool their resources and generally designate their most experienced lawyers and skilled cross-examiners as lead counsel to conduct depositions and supervise and coordinate all phases of plaintiffs’ pretrial discovery. First, costs are lessened and in fact, there may be virtually no cost to a particular individual plaintiff. Like it or not, from the defendants’ standpoint, the potential cost to be incurred by plaintiffs in prosecuting a triple damage case is a factor which may lead to a favorable, reasonable, and satisfactory settlement, under ordinary circumstances. Second, and more important, each plaintiff is handed a ready-made case to the extent that expert lead counsel can establish it, and, in any event a far better case than most plaintiffs’ counsel could ever establish without the coordinated program.<sup>153</sup>

Defendants also decried the pressure they felt to settle due to the pace of discovery. As William M. Sayre, Vice Chairman of the New York State Bar Section on Antitrust, noted in a meeting of his group in 1966,

The defendants litigated, but it was all uphill. The courts had little sympathy for their plight, and it must have been obvious to the courts that their burden would be relieved if enough pressure were put upon the defendants to force them to settle. And pressure there was. The judges put into the game a series of new and unprecedented rules . . . and greatly accelerated the discovery and trial timetables. . . . Settlements came in most of the cases, and they were expensive.<sup>154</sup>

For their part, plaintiffs, perhaps recognizing the benefits of coordination and speed, were generally in favor of coordinated proceedings.<sup>155</sup>

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<sup>152</sup> O’Donnell, *supra* note 150, at 138-139.

<sup>153</sup> *Id.* at 138-139.

<sup>154</sup> William M. Sayre, Developments in Multiple Treble Damage Act Litigation, 1966 CCH New York State Bar Association Antitrust Law Symposium, 51-52.

<sup>155</sup> BANE, *supra* note 109, at 131. *See also* Charles A. Bane, *Pretrial Discovery in Multiple Litigation from the Plaintiffs’ Standpoint*, 32 ANTITRUST L.J. 116, 129 (1966).

Despite the voices of complaint on the defense side, most commenters considered the settlement of the electrical-equipment litigation a resounding success. In fact, district judges were so impressed by the work of the Committee that as new multidistrict cases arose in the 1960s, they repeatedly sought out the Committee's help. By the middle of the 1960s, the Committee was coordinating cases pending around the country dealing with subjects as diverse as patent and airplane crashes, as well as in large-scale antitrust cases involving the Concrete Pipe, Children's Schoolbooks, and Rock Salt industries. The Committee coordinated this litigation as the request of other judges despite having no permanent staff, source of funding, or any statutory authority to act.<sup>156</sup> By the mid-1960s the Committee—whose members had been proponents of strong pretrial management even before their success in the electrical-equipment litigation—was riding high, and they next turned to making their activities a permanent fixture of the federal litigation system.

### III. DRAFTING THE MDL STATUTE

#### A. Inventing Pretrial Transfer

It was not long after the inception of the Coordinating Committee that its members began to consider more permanent mechanisms for the type of coordination that it had begun in the electrical-equipment cases. As early as September 1962, the Judicial Conference endorsed the development by the Committee of “general principles applicable to the handling of discovery problems in multiple litigation . . . in the light of the methods developed in processing the cases presently under consideration.”<sup>157</sup> This early move toward a broader application of the case-management techniques the Committee was pioneering is unsurprising because of the enthusiasm of both Chief Justice Warren and the Committee's members for the innovations of the *Handbook*, especially strong judicial control over discovery and early definition of issues for settlement or trial. Moreover, the members of the committee were pleased with how the electrical-equipment consolidation had gone in its first year. Discovery was proceeding rapidly, settlement talks were already underway, and judges were cooperating with the national program. Buoyed by their success, the Committee began to formulate ideas for a new statute or rule of civil procedure to make coordination of litigation pending in multiple districts a codified part of the

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<sup>156</sup> Neal, *supra* note 126, at 99 (noting that “the Committee had taken under its wing several other sets of cases and was keeping itself closely informed of developments in a variety of others.”).

<sup>157</sup> Report of the Judicial Conference of the United States, Sept. 19-20, 1962, at 44-45.

federal judicial machinery. In support of this effort, the Committee began studying various consolidation mechanisms in federal courts around the country, including the early experimentation with rules assigning related cases filed in a single district to one judge.<sup>158</sup> The Committee's efforts gained further momentum in the spring of 1963, thanks to Chief Justice Warren's endorsement at the annual meeting of the American Law Institute.<sup>159</sup>

Dean Neal, the executive secretary of the Committee, floated his inchoate ideas for a permanent response to multidistrict litigation during a speech to the Seventh Circuit Judicial Conference in Chicago on May 14, 1963. Echoing sentiments raised by Committee members, Neal both predicted that "similar batches of related litigation will continue to be part of the business of the federal courts" and suggested that in such circumstances it would be "desirable to recognize a class of cases in which much greater flexibility in the transfer of cases would be permitted, so that cases could be brought within the control of a single district judge simply to obtain the advantages of consolidation or partial consolidation which would be available if the cases had all been brought in a single district."<sup>160</sup> In language that would have made Chief Justice Taft smile, Neal argued: "Surely at least a part of the answer lies in making a fuller use of the potential unity of the federal judicial system, and allowing ourselves of some of the advantages which would be available if the federal district courts were parts of one court rather than many courts."<sup>161</sup>

Emphasizing "the interest of the public in the efficient administration of justice, and the interest of all the other litigants in clearing the docket of the courts," Neal concluded that "what is needed is some supervisory mechanism in the federal judicial system for identifying related cases filed in different districts as soon as they are filed, reviewing such cases to determine whether justice requires that they be brought together, and directing transfer to the proper district."<sup>162</sup> Candidly, however, Neal conceded: "This is perhaps a radical proposal, and I am unable to suggest any close analogy for such a power."<sup>163</sup>

By summer, however, Neal, Judges Becker and Robson, and the Committee's law clerk, Perry Goldberg, began laying out options for

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<sup>158</sup> Report of the Co-Ordinating Committee for Multiple Litigation of the United States District Courts, March 7, 1963, Becker Papers, Box 23, Folder 51.

<sup>159</sup> Earl Warren, Address to the Annual Meeting of the American Law Institute, May 22, 1963.

<sup>160</sup> Philip C. Neal, Speech to Seventh Circuit Judicial Conference, Chicago, IL, May 14, 1963, Becker Papers Box 17, Folder 39.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

possible legislative or rule-based reform along these lines. Reflecting the difficult communication capabilities of the period, their primary initial concern was the problem of identifying litigation involving the same subject matter pending in multiple districts. Although “the immensity and resultant publicity” of the electrical-equipment litigation made the need for action apparent in those cases, typically, litigation involving common questions would be pending in multiple districts without the assigned judges being aware. As a result, they understood the need for some federal mechanism for identifying multidistrict cases for special treatment.<sup>164</sup>

But the drafters also understood that “identification is clearly only a first step, and quite possibly not of itself very meaningful . . . leaving for judicial determination the basic question of whether coordination, consolidation, or some combination technique would have net utility.”<sup>165</sup> So, the drafters therefore also cited the necessity of asserting centralized judicial control early in the litigation, a concept consistent with the Handbook, but “clearly in conflict with the basis of the Federal Discovery Rules where party governed pre-trial is an overriding object.”<sup>166</sup> As a result, according to an early memo, Neal, Becker, and Robson recognized the need for a “new rule or new rules to permit *unified* judicially controlled discovery in situations of multiple litigation,” but they expressed concern about complete transfer of all related cases nationwide in a single district because it “might present problems with due process overtones.”<sup>167</sup> Nevertheless, the drafters emphasized the need for “centralization of the power to make decisions.”<sup>168</sup> By fall, however, the drafters believed they had hypothesized a solution: “consolidation before a panel of Judges” who would facilitate “assignment of cases to one judge and consolidation for pre-trial purposes” combined with “stay of proceedings in all districts involved other than the one selected to proceed with pre-trial procedures.”<sup>169</sup>

As the team began developing these ideas, Judge Robson thought it important to coordinate its activities with the Civil Rules Advisory Committee (the “Rules Committee”), which was by then fully engaged in its work on a revised federal Rule 23 on class actions.<sup>170</sup> Early that summer, Neal reached out to the Rules Committee’s Reporters, Professors Benjamin

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<sup>164</sup> “Discovering Instances of Multiple Litigation – A Clue to the Need for Manually Operated Rules,” June 7, 1963, Becker Papers, Box 17, Folder 39.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* (emphasis in original).

<sup>169</sup> “Outline of Suggested Topics for Discussion on Problems Related to Multiple Litigation,” October 16, 1963, Becker Papers, Box 17, Folder 39.

<sup>170</sup> Letter from Edwin Robson to the Co-Ordinating Committee on Multiple Litigation, November 4, 1963, Becker Papers, Box 18, Folder 19.

Kaplan and Albert Sacks of Harvard Law School.<sup>171</sup> Kaplan responded with interest and he and Sacks agreed to attend the Co-Ordinating Committee's next meeting in November 1963 in New York to collaborate.<sup>172</sup>

As has been well documented elsewhere, the Rules Committee significantly reworked Rule 23 in ways that brought on the class-action revolution,<sup>173</sup> but they explicitly did not intend so-called “mass accidents” to be typical grist for the class-action mill.<sup>174</sup> In other words, the Rules Committee did not believe it was acting to reshape the law to facilitate class treatment of claims in which individual litigation was justified by the amount of damages at stake; to the contrary, the Rules Committee believed it was basically clarifying an outmoded and vague rule to better reflect current practice, and if it had any ideological valence, it was to better facilitate civil-rights class actions.<sup>175</sup>

Indeed, Rules Committee member John Frank sought to delete proposed Rule 23(b)(3) entirely, on the ground that a rule facilitating such “mass accident” class actions would open the door to serious due-process abuses for absent plaintiffs represented by unscrupulous lawyers.<sup>176</sup> Although Kaplan was committed to retaining Rule 23(b)(3), despite its somewhat “adventuresome” quality, he essentially agreed that 23(b)(3) should be used sparingly in cases where the damages to individual plaintiffs justified

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<sup>171</sup> Letter from Benjamin Kaplan to Philip Neal, May 28, 1963, Neal Papers, Box 4, Folder XYZ.

<sup>172</sup> Letter from Benjamin Kaplan to Philip Neal, November 6, 1963, Neal Papers, Box 4, Folder XYZ. Judge Roszel Thomsen, of the District of Maryland, was a member of both the Coordinating Committee and the Civil Rules Advisory Committee. Thomsen was a major proponent of the two committees' exchanging ideas. See Letter from Benjamin Kaplan to Dean Acheson, December 4, 1963 in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-7003 (Cong. Info Serv.).

<sup>173</sup> Stephen B. Burbank, *The Class Action Fairness Act in Historical Perspective: A Preliminary View*, 156 U. PA. L. REV. 1439, 1487 (2008) (noting that the rulemakers “were aware that they were breaking new ground and that those effects might be substantial”).

<sup>174</sup> See, e.g., Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 393 (1967). One focus of the amendments was the facilitation of civil-rights suits seeking injunctions under Ruler 23(b)(2). See R. Marcus, *supra* note 50, at 500; D. Marcus, *supra* note 29, at 605-606.

<sup>175</sup> D. Marcus, *supra* note 29, at 604 (contending that the rulemakers' primary “job was to craft a cleaner, more flexible rule that better reflected how some courts had begun to use the class action device”); David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 702-707 (2011) (describing centrality of desegregation cases to amended Rule 23).

<sup>176</sup> See Resnik, *supra* note 1, at 9-15 (describing the Frank-Kaplan debate); see also John P. Frank, *Response to 1996 Circulation of Proposed Rule 23 on Class Actions*, in 2 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, December 20, 1996, at 262.

separate litigation.<sup>177</sup>

In any event, the debate over Rule 23(b)(3) was in full swing within the Rules Committee when Kaplan met with the Coordinating Committee in November 1963 in New York. Consistent with the Rules Committee's view that class actions were not generally appropriate for mass torts, all assembled agreed that the class-action rule amendments did not obviate the need for a more permanent mechanism to consolidate litigation pending in multiple districts.<sup>178</sup> According to the Coordinating Committee's minutes, after review of the suggested Rule 23 amendments the "consensus was that the proposed Rule 23 changes would be most beneficial for resolving certain existing ambiguities of class actions, but that a general solution of the problems of multiple litigation will require more comprehensive treatment."<sup>179</sup> Judge Becker added that the "primary problem in the electrical suits is one of *management*," adding that "the problem cannot be handled under the rule making power . . . who's going to say where the cases should go?"<sup>180</sup> Becker and the Committee concluded that it was necessary to "[c]reate a new package for multiple litigation."<sup>181</sup>

Kaplan and Sacks' reflections of the meeting, memorialized in a December 2, 1963 memorandum to the Rules Committee, are consistent with those of the Coordinating Committee. Regarding the meeting, the memo notes the Coordinating Committee's conviction that "multiple litigation—perhaps not often of the scale of these antitrust cases, but nevertheless of a sizable character—will henceforth be a staple item appearing with increasing frequency on Federal court calendars."<sup>182</sup> The memo also describes the attendees' consensus that district judges must have significant flexibility in handling large litigations, stating, "it would be unwise to introduce stiff rules excluding judicial discretion. On the contrary, a good deal of play in the joints is required."<sup>183</sup>

More generally, the memo states: "The judges were quite aware of the problem that has given us concern, namely, that of allowing the individual

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<sup>177</sup> Benjamin Kaplan, *A Prefatory Note, The Class Action—A Symposium*, 10 B.C. INDUS. & COMM. L. REV. 497 (1969);

<sup>178</sup> Co-Ordinating Committee for Multiple Litigation Bulletin No. 20, November 27, 1963, Becker Papers, Box 8, Folder 19.

<sup>179</sup> *Id.*

<sup>180</sup> Minutes of Meeting of Co-Ordinating Committee Held on Sunday, November 17, 1963, at 3:00 p.m., Becker Papers, Box 10, Folder 23 (emphasis in original). The notes also reflect that the Committee's work went beyond antitrust and included "Disaster (cases), Products Liability" cases as well.

<sup>181</sup> *Id.*

<sup>182</sup> Memorandum to the Chairman and Members of the Advisory Committee on Civil Rules, December 2, 1963, at 4, in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-7104 (Cong. Info Serv.).

<sup>183</sup> *Id.*

litigants a fair amount of freedom while at the same time not undercutting the values (which in part accrue to individuals) of efficient unitary adjudication.”<sup>184</sup> Along those lines, when consulted about the Rules Committee’s debate over whether to allow individuals to opt out of a class action, the Coordinating Committee judges expressed that opt-out “should not be allowed simply on the say-so of the individual member of the class. The interest of the individual in litigating as he pleased may be strong, but it should not be considered absolute.”<sup>185</sup>

The following day, November 18, 1963, the Coordinating Committee met with all of the judges before whom electrical-equipment cases were pending, with Kaplan again in attendance.<sup>186</sup> At the meeting, Judge George Boldt of Seattle, a Committee member, expressed the urgent need to create permanent legislation to handle multidistrict cases due to the growing resistance of defense lawyers and judges to the Committee’s actions in the electrical cases. Boldt emphasized, and the attending judges agreed, that “[c]ooperation in the future cannot be expected,” and that such coordination “[c]an’t be left to voluntary good will.”<sup>187</sup> As the memos of both the Coordinating Committee and Kaplan and Sacks demonstrate, all parties left the November 1963 meetings in agreement that the class-action amendments were not intended for mass-tort litigation, and that a multidistrict-litigation statute would be necessary to provide for centralized management of widespread tort cases. Indeed, it was this meeting with the Coordinating Committee that prompted Kaplan to add the “superiority” requirement to Rule 23(b)(3), on the ground that in most mass-tort cases, MDL should be considered as an alternative to the class action, a view also eventually expressed in the Rule 23 advisory committee notes.<sup>188</sup>

By March 1964, with the electrical-equipment cases proceeding apace, the Judicial Conference again affirmed its support for the Coordinating Committee’s efforts at reform.<sup>189</sup> So Neal, Goldberg, and Judge Becker

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 6.

<sup>186</sup> Co-Ordinating Committee for Multiple Litigation Bulletin No. 20, *supra*.

<sup>187</sup> Minutes of Meeting of Co-Ordinating Committee Held on Monday, November 18, 1963, at 9:30 a.m., New York, NY, Becker Papers, Box 17, Folder 39.

<sup>188</sup> FED. R. CIV. P. 23 advisory committee notes. Of the superiority requirement, Kaplan noted: “The discussion with the judges showed the wisdom of stressing the need for considering alternative procedures, and in this connection it will be advisable to refer in the Note to the increasing and developing experience with devices other than the class action for managing multiple litigation.” See Memorandum to the Chairman and Members of the Advisory Committee on Civil Rules, December 2, 1963, at 6, in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-7104 (Cong. Info Serv.).

<sup>189</sup> Report of the Judicial Conference, March 16-17, 1964 (resolving that the Committee “develop . . . general principles and guidelines for use in other multiple litigation, including any recommendations for statutory change; and . . . any desirable rules

picked up where the November 1963 meeting left off, beginning in earnest to develop a proposal intended to apply broadly to all litigation pending in multiple districts, including “contract, fraud, negligence, antitrust, and civil rights. Products liability cases with absolute liability may be another category.”<sup>190</sup>

In June, Becker presented the group’s progress to the Coordinating Committee in New York, explaining that creating a panel to order partial transfer for pretrial proceedings was the “maximum practical objective that is attainable.”<sup>191</sup> More aggressive consolidation alternatives, such as complete transfer through trial would attract resistance from many lawyers due to the “proprietary notion of their cases.”<sup>192</sup> Becker, emphasized however, that although transfer would be limited to pretrial proceedings, “the procedure should invest the transferee Judge, Judges, or Court with plenary pre-trial powers, including among other things powers to render summary judgments, to invoke sanctions for violation of pre-trial orders and other pre-trial powers ordinarily reposed in the District Court.”<sup>193</sup>

Becker also added that he believed that even though he thought “a substantial case could be made for the rule making authority on the theory that venue is procedural,” he believed the reform must be accomplished through legislation in order to “remove all legal doubts” under the Rules Enabling Act.<sup>194</sup> Because venue had typically been a subject of legislation

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of procedure for multiple litigation.”).

<sup>190</sup> Memorandum, “Outline of Alternatives for Processing Multiple Litigation,” May 19, 1964, Becker Papers, Box 17, Folder 39. Among the alternatives they considered was complete transfer and consolidation under 28 U.S.C. § 1404(a), limited transfer for discovery and “other aspects of pre-trial,” voluntary coordination of judges involved in multiple litigation, and expanded use of class actions.

<sup>191</sup> Proposal for Legislation and Rules for Multiple Litigation, June 3, 1964, Becker Papers, Box 1, Folder 1.

<sup>192</sup> Minutes of the Co-Ordinating Committee in the United States Courthouse in New York City, June 5, 1964, Becker Papers, Chronological Files, Box 1, Folder 1, at 8. Although the text of the minutes uses the word “propriety,” I believe this is a typo and the intended language is “proprietary.” Aside from the observation that “propriety” makes no sense here, use of the word “proprietary” would be consistent with reservations about the transfer proposal expressed at the November 18, 1963 New York meeting of the judges involved in the electrical-equipment cases with the Co-Ordinating Committee and Professors Kaplan and Sacks. In discussing the possibility of formalizing change of venue in multiple litigation, Chief Judge Roy W. Harper of the Eastern District of Missouri expressed the concern that local bars would oppose any such reform for fear of losing control over their cases in a national litigation. *See* Minutes of Meeting of Co-Ordinating Committee Held on Monday, November 18, 1963, at 9:30 a.m., Becker Papers, Box 17, Folder 39 (“Venue will be fought by the practicing Bar.”).

<sup>193</sup> Proposal for Legislation and Rules for Multiple Litigation, June 3, 1964, Becker Papers, Box 1, Folder 1.

<sup>194</sup> *Id.* at 2.

“no chance should be taken here if it can be avoided.”<sup>195</sup> Nevertheless, Becker recognized the challenge of obtaining Congressional approval, so he suggested that “a minimum amount of legislation be sought, and that rule making power be employed to the maximum” in order to “allow greater flexibility for amendment and supplement of the procedures.”<sup>196</sup> In sum, Becker argued that Congress must authorize pretrial transfer, but he intended that the Rules Committee would be in charge of drafting rules to provide standards for when such transfer would be appropriate and procedures for conducting the litigation following the transfer.<sup>197</sup>

The Committee was receptive to Becker’s suggestions and agreed to a set of “general objectives,” including creating a “panel to manage and transfer multiple litigation” named by the Chief Justice, and that “the proposal should require a minimum of legislation and employ the rule making power to the maximum.”<sup>198</sup> Judge Murrah was enthusiastic, even though he recognized the political limitations on the statute’s aims, noting that the Committee “felt that it was desirable from a practical standpoint to return the cases to the jurisdiction in which they arose for local discovery and for trial. One reason for this is to allay massive resistance to the new legislation and new rules.”<sup>199</sup>

## B. Drafting the New Statute

With the Committee’s endorsement of the pretrial-transfer concept in hand, Judges Becker and Robson, Dean Neal, and Perry Goldberg met in Chicago to begin drafting the new statute on June 24, 1964. All four concurred with the Committee’s view that the authorization of pretrial transfer must be accomplished by statute rather than amendment of the Federal Rules.<sup>200</sup> The first draft of the statute reflects the outline agreed to in New York, including the plan to provide for most details through subsequent rulemaking. Indeed, the initial draft delegates to the Supreme Court the “power to prescribe general rules” through the process created by

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 2.

<sup>197</sup> *Id.* at 3-4.

<sup>198</sup> Minutes of the Co-Ordinating Committee, New York, June 5, 1964, Becker Papers, Chronological Files, Box 1, Folder 1, at 9-10.

<sup>199</sup> Letter from Judge Alfred P. Murrah to Judge Albert Maris, June 15, 1964, Becker Papers, Box 16, Folder 14.

<sup>200</sup> Letter from Judge William H. Becker to Judge Alfred P. Murrah, June 26, 1964, Becker Papers, Box 16, Folder 4 (“All of us agreed that adequate procedures for the identification of multiple litigation, and the management of pre-trial procedures therein, could not be provided by amendment of the Rules of Civil Procedure under existing rule-making powers.”).

the Rules Enabling Act regarding “the method and criteria by which the determination to transfer shall be made, the district to which the actions shall be transferred, the District Judges who shall conduct pre-trial proceedings, the places where pre-trial proceedings shall be conducted, and the practice and procedure in such actions following transfer.”<sup>201</sup>

Becker, Neal, and Goldberg continually revised the proposal throughout the summer of 1964. Many of the specifics of the statute we are now familiar with began to take shape during this period; for instance, a draft of a proposed rule to be promulgated under the statute includes a provision for a “standing Panel on Multi-District Litigation” appointed by the Chief Justice, and transfer for consolidated pre-trial proceedings in any district when “common elements may be present in the action.”<sup>202</sup>

### C. Obtaining Judicial Conference Approval

Judges Robson, Becker, Boldt, Estes, and Murrah met to consider the proposed draft in Chicago on July 28, 1964, with an eye toward presenting the proposal to the Judicial Conference at its upcoming September meeting.<sup>203</sup> All of the judges recognized the importance of Judicial Conference approval. By the 1960s, Chief Justice Warren had furthered Taft’s vision of using the Conference as a major driver of the courts’ Congressional agenda.<sup>204</sup> With approval from the Judicial Conference, the Committee could set their sights on the Congress. But without such approval there would be virtually no hope of getting Congress’s attention, because the legislation would be seen as a pet project of a few judges rather than the position of the judiciary as a whole.<sup>205</sup> Approval by the Conference would mark the bill as representing the considered expertise of all federal judges and would also warrant the assistance of the legislative liaisons at

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<sup>201</sup> Draft of § 1404(e). Change of Venue, June 24, 1964, Becker Papers, Box 16, Folder 1.

<sup>202</sup> See, e.g., “Draft Rule on Multi-District Litigation,” July 16, 1964, Neal Papers, Box 7, Folder on C.O.C. Documents.

<sup>203</sup> Meeting of Co-Ordinating Committee Judges in Chicago, July 28, 1964, Becker Papers, Box 8, Folder 19, at 3. Although Murrah noted the “difficulties and delay involved with securing legislative passage,” the judges again agreed “such a provision must take the form of legislation. Historically, venue is a statutory field.” Becker’s notes provide additional color. Murrah remarked about “difficulties because of opposition” to the legislation. But Becker is noted as saying “venue is a substantial right – not for the rules.” Notes of Co-Ordinating Committee Meeting, July 28, 1964, Becker Papers, Box 8, Folder 19.

<sup>204</sup> FISH, *supra* note 71, at 301; see also Judith Resnik, *Judicial Independence and Article III: Too Little and Too Much*, 72 S. CAL. L. REV. 657, 666 (1999).

<sup>205</sup> *Id.* at 304 (describing importance of Conference approval).

the Administrative Office.<sup>206</sup>

The judges wanted to proceed as quickly as possible, in part because, as noted above,<sup>207</sup> the Committee had begun accepting requests by other judges to coordinate litigations other than the electrical cases, but had no explicit authorization—or resources allocated—to do so. The judges also understood that due to the negative reaction to their activities by defense counsel in the electrical cases and the increasingly skeptical reaction of some recalcitrant district judges, voluntary coordination would likely not be feasible in future multidistrict litigations.<sup>208</sup> As a result, it was important to Judge Becker that the group sidestep the lengthy process of presenting its draft for revisions by the Civil Rules committee, which could take years and which would also leave their statute vulnerable to revision by other judges.<sup>209</sup> But this presented a problem. Such a proposal *would* typically be considered the Rules Committee’s bailiwick, and an attempt to circumvent its consideration might risk its members’ support. Lack of support from such a crucial committee might doom the proposal in the Judicial Conference as a whole.<sup>210</sup>

Murrah, the Judicial Conference stalwart since the early 1940s, had the answer. Rather than seek approval by the entire Rules Committee, Murrah would “attempt to take the proposal straight to the top” by lobbying the Rules Committee’s chairman, Dean Acheson, its Reporter, Benjamin Kaplan, and the chairman of both the Standing Committee on Practice and Procedure and the Committee on Revision of the Laws, Chief Judge Albert Maris of the Third Circuit.<sup>211</sup> The Committee “felt that with the endorsement of these three people the provision would stand a good chance of winning widespread support.”<sup>212</sup>

At the July meeting, the Coordinating Committee also considered “the problems that are likely to be encountered in seeking passage of this legislation” in Congress.<sup>213</sup> The major problem they predicted—also noted by Judge Becker at the June meeting—was “that great opposition would

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<sup>206</sup> *Id.* at 304-306.

<sup>207</sup> *Supra*, Part II.B.

<sup>208</sup> Notes of Co-Ordinating Committee Meeting, July 28, 1964, Becker Papers, Box 8, Folder 19 (detailing Becker’s view that the judges would “never be able to do this again as in antitrust cases”).

<sup>209</sup> *Id.* (noting Becker’s desire that the group not “have proposal rise through rules committee”).

<sup>210</sup> Fish, *supra* note 71, at 265 (describing the importance of approval of legislative proposals by the relevant committees).

<sup>211</sup> Notes of Co-Ordinating Committee Meeting, July 28, 1964, Becker Papers, Box 8, Folder 19 (noting that Murrah should “attempt to enlist the support of Judge Maris, Professor Kaplan, and Dean Acheson [sic]”).

<sup>212</sup> *Id.* at 4.

<sup>213</sup> *Id.* at 6.

arise from local lawyers fearful that all their business is about to be seized by the city attorneys.”<sup>214</sup> The judges’ proposed solution was to mollify lawyers by emphasizing the statute’s modesty in a “note drafted to accompany the proposal” that would “stress that transfer is only for pre-trial purposes.”<sup>215</sup> The judges also noted other potential “strategic weapons,” including “some sympathetic members of the bar” and “some recorded testimony by members of the Bar praising the work done in the electrical equipment cases.”<sup>216</sup>

Murrah presented the draft to the Pretrial Committee as a whole at its August 1964 meeting on Cape Cod, where it was approved in principle for presentation to the Judicial Conference. Judge Maris was in attendance at this meeting and offered his tentative support, agreeing to meet with Murrah to discuss the matter further later in the year.<sup>217</sup>

On behalf of the Pretrial Committee, Judge Murrah then presented the proposed statute to the Judicial Conference at its September 1964 meeting. Accompanying the statute was the explanatory commentary drafted by Judge Becker and Dean Neal. The language of the commentary is consistent with the strategy devised by the judges in Chicago. At numerous points, it emphasizes the statute’s purportedly modest aims—in particular that the transfer would be for pretrial proceedings and not trial, and that the statute would *not* be self-executing, that is, it “would not require that any case be transferred for pre-trial purposes unless the Supreme Court exercises the power to prescribe general rules for such transfers.”<sup>218</sup> Despite its supposed modesty, the comment is not shy about its “major innovation,” “the technique of transferring cases to a single district solely for pre-trial purposes.” Indeed, the note explains that such a provision is necessary because the general transfer provisions, Sections 1404(a) and 1406(a) provided only for transfer to a district where the case might otherwise have been brought—significantly limiting the possibility of transfer of all related cases to a single district (if jurisdiction or venue would not lie against the defendant in that district). Having achieved the tentative support of Judge Maris in Cape Cod, Murrah successfully convinced the Judicial Conference to “authorize[] the subcommittee to work toward the development of this proposal” but not yet submission to Congress.<sup>219</sup>

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<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> Report to the Judicial Conference of the Sub Committee on Coordinated Multiple Litigation, September 1964.

<sup>218</sup> *Id.* at 23.

<sup>219</sup> Report of the Judicial Conference, September 23-24, 1964; Minutes of Meeting of all the Judges Before whom Electrical Equipment Antitrust Cases are Pending, October 2, 1964, Becker Papers, Box 9, Folder 22 (noting that “Chief Judge Murrah will work with

#### D. Rebuffing the Defense Bar

Following the Judicial Conference's partial approval, the draft was circulated to all district judges handling the electrical-equipment litigation in Chicago on October 2, where "[t]here was unanimous consent that the Coordinating Committee continue its work on the legislative proposal along the form outlined."<sup>220</sup> At this meeting, Judge Alfonso Zirpoli of the Northern District of California reaffirmed that "the feature of return of the cases for trial where filed is important in getting support from the Bar."<sup>221</sup>

The following day, the judges held a hearing with lawyers in the electrical-equipment cases, to whom they presented the draft statute and from whom the judges sought input. At that hearing, Becker asked that the plaintiffs and defendants name representatives to survey lawyers on their respective sides for their views on the proposal.<sup>222</sup> Charles Bane, the lawyer representing Commonwealth Edison in the Northern District of Illinois, responded, explaining that he, William Ferguson of Seattle, and Harold Kohn of Philadelphia would represent the plaintiffs.<sup>223</sup> Steven E. Keane of Foley, Sammond & Lardner in Milwaukee responded on behalf of the defendants, noting that he, Ralph L. McAfee of Cravath, Swaine & Moore in New York, and Edward L. Mullinix of Schnader, Harrison, Segal & Lewis in Philadelphia, would represent the defendants.

On behalf of defense counsel, Keane refused to provide any comment on the proposal, explaining that "[t]here is substantial unanimity of opinion that it may well be regarded as inappropriate for a committee composed only of counsel actively engaged in the pending litigation to serve the purposes you have in mind."<sup>224</sup> He added, "since the scope of the proposed legislation extends far beyond the area encompassed by the electrical equipment cases and is of such great importance to the overall administration of justice, it seems to us that your Committee of Judges would want to obtain the views of the Bar in general."<sup>225</sup> Keane also offered: "Many of the lawyers who have been actively engaged in the electrical equipment litigation are giving thoughtful consideration to the

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Chief Judge Maris on the form of the legislation and on having it sponsored in Congress.").

<sup>220</sup> Minutes of Meeting of all the Judges Before whom Electrical Equipment Antitrust Cases are Pending, October 2, 1964, Becker Papers, Box 9, Folder 22.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> Letter from Charles Bane to Judge Edwin A. Robson, October 9, 1964, Becker Papers, Box 16, Folder 4.

<sup>224</sup> Letter from Steven E. Keane to Judge Edwin A. Robson, October 19, 1964, Becker Papers, Box 16, Folder 4.

<sup>225</sup> *Id.*

proposed legislation, and we are certain that they will be prepared to present their individual views to any appropriate committee of the Bar.”<sup>226</sup>

Judges Robson and Becker did not take kindly to this suggestion. In their view, the defendants sought only to delay and eventually thwart the legislation, and the last thing the judges wanted was for the electrical-equipment defense lawyers, who by then had expressed that they felt bullied by the national program, to present their proposal to the bar at large. In a letter to Becker, Robson stated, plainly, “It is apparent that defendants want to kick the ball around.” He added, “In my opinion certainly some of the defendants, if not a substantial number of them, are trying to do all they can to block this amendment.”<sup>227</sup>

Judge Becker responded, expressing his own skepticism about the defendants’ motives:

Underlying the action of some of the defendants’ counsel throughout this litigation must have been the hope that this electrical equipment antitrust litigation would overwhelm the Courts and demonstrate the unworkability of the antitrust laws allowing treble damage recoveries in civil suits. Every measure proposed which would make multiple civil antitrust litigation manageable impairs that hope. Yet we must deal with the defendants’ counsel who are inspired by this hope.<sup>228</sup>

Soon thereafter, Robson reaffirmed his concerns that the defendants would act to block the bill in a letter to Murrah. Referring to the “committee” of lawyers invited to comment, he noted that “We, of course, have to keep in mind the problem presented primarily by the defendants in that they are not overly enthusiastic about this proposed legislation. . . . I think a meeting should be held with the respective members of the committee to ascertain their attitude, and determine then whether to enlarge the committee, place others in it, or thank them and just forget about their assistance.”<sup>229</sup>

Such a meeting was scheduled and the attorneys for each side submitted memoranda in advance containing comments on the proposed statute. The plaintiffs expressed “general, if not unanimous support.”<sup>230</sup> The defendants,

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<sup>226</sup> *Id.*

<sup>227</sup> Letter from Judge Edwin A. Robson to Judge William H. Becker, October 21, 1964, Becker Papers, Box 16, Folder 4.

<sup>228</sup> Letter from Judge William H. Becker to Judge Edwin A. Robson, October 26, 1964, Becker Papers, Box 16, Folder 4.

<sup>229</sup> Letter from Judge Edwin A. Robson to Judge Alfred P. Murrah, October 28, 1964, Becker Papers, Box 7, Folder 18.

<sup>230</sup> Letter from Charles Bane, William Ferguson, and Harold Kohn to Judge Edwin A.

on the other hand, did not offer comments. Rather, they reaffirmed their view that the legislation should be presented to the American Bar Association for reactions of lawyers across a wide range of fields.<sup>231</sup> On November 13, Becker and Robson met with these lawyers in Washington. At the outset, however, the judges explained that “the purpose of this meeting was not to obtain [counsel’s] endorsement for the proposal, but to receive and discuss their suggestions and criticisms of the draft.”<sup>232</sup> The defense lawyers again urged submission of the proposed statute to concerned bar associations.<sup>233</sup> Becker made clear that this would not be in the offing because “the length of time required for meaningful study by an outside group, reference to a Bar committee would be inappropriate and would unduly delay implementation.”<sup>234</sup> For their part, perhaps accurately perceiving the direction of the wind, the plaintiffs expressed strong support for the proposed statute. The main concern they expressed was the question of whether in diversity cases the choice-of-law rules of the transferor forum would apply to cases once transferred into the MDL court, a concern the judges assuaged by their assurance that they would under the rule from the recently decided *Van Dusen v. Barrack*.<sup>235</sup>

In any event, the next day, Judges Robson, Becker, and Boldt, and Dean Neal, held their planned meeting with Judge Maris to seek his crucial support. At that meeting, Becker expressed that there was an “extreme need for central management” in multidistrict cases, and that the proposed statute was an “alternative to [a] radical *forum non conveniens* statute” providing for complete transfer.<sup>236</sup> Maris expressed skepticism as to whether the statute was necessary in light of the successful cooperation achieved in the electrical cases.<sup>237</sup> Becker responded: voluntary cooperation would not be effective because “litigants would run cases,” in direct opposition to the kind of centralized judicial control that was necessary. Becker added his view that the transferee judge must have the power to grant summary judgment and award sanctions in order for the statute to work effectively.<sup>238</sup>

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Robson, November 11, 1964, Becker Papers, Box 16, Folder 3.

<sup>231</sup> Letter from Steven Keane to Judge Edwin Robson, November 6, 1964, Becker Papers, Box 16, Folder 3.

<sup>232</sup> Summary of Meetings Held in Washington, D.C., November 13 and 14, 1964, Neal Papers, Box 7, Folder on C.O.C. Documents.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* (discussing 376 U.S. 612 (1964)).

<sup>235</sup> *Id.* For discussion of the myriad choice-of-law problems created by MDL, see Bradt, *supra* note 10; Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 682 (1983).

<sup>236</sup> Notes on Meeting of November 14, 1964, Washington, DC, Becker Papers, Box 17, Folder 39.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

Maris expressed tentative support for the concept of pretrial transfer, but all involved agreed to meet again.<sup>239</sup>

Maris's support, however, cooled the following month, apparently due to comments by defense counsel in the electrical-equipment cases. After the November meeting in Washington, defense lawyer John Collins sent the judges a memorandum criticizing the statute.<sup>240</sup> Having abandoned the strategy of refusing to comment, in this memo the defendants now issued a series of objections. In essence, they argued that litigation on the same scale as the electrical-equipment cases would be a "rare occurrence," and that adoption of a statute based on experience in the electrical cases would be hasty.<sup>241</sup> The defendants also claimed that the success of the cooperation of judges in the electrical cases demonstrated that a transfer statute was unnecessary.<sup>242</sup> Beyond these general objections, the defendants noted numerous other concerns mostly revolving around the vagueness of the concepts of pretrial proceedings and related litigation.<sup>243</sup>

Maris apparently found the critique persuasive. In a letter to Murrah, dated December 15, 1964, he noted that he was "much impressed by the points made in the memoranda" and endorsed the wait-and-see approach of the defendants.<sup>244</sup> Maris added his view that transfer authority was unnecessary, and that "[f]urther experience along these lines may give us much more light on the shape permanent procedural provisions should take."<sup>245</sup>

Murrah reacted with apparent alarm. Noting that he thought Maris had agreed with the need for legislation in November, Murrah now worried that Maris "would not favor any statutory authority to prescribe by general rules the method and criteria for transferring multiple litigation for the sole purpose of pretrial."<sup>246</sup> Murrah added: "If this is your view, I would beg you

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<sup>239</sup> Summary of Meetings Held in Washington, D.C., November 13 and 14, 1964, re: Proposed Amendment to 28 U.S.C. § 1404, Neal Papers, Box 7, Folder on C.O.C. Documents.

<sup>240</sup> Letter from John R. Collins to Judge Albert Maris, December 7, 1964, Neal Papers, Box 4, Folder XYZ. Collins apparently took over for Steven Keane after Keane "became seriously ill and was hospitalized with a hemorrhaging ulcer."

<sup>241</sup> *Id.* (adding that "[t]here may be an advantage in adopting *ad hoc* procedures for each of the few times when national discovery and pretrial procedures are called for, rather than trying to anticipate all of the problems that might arise and cover them by so-called general rules").

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> Letter from Judge Albert Maris to Chief Judge Alfred Murrah, December 15, 1964, Neal Papers, Box 4, Folder XYZ.

<sup>245</sup> *Id.*

<sup>246</sup> Letter from Judge Alfred Murrah to Judge Albert Maris, December 24, 1964, Neal Papers, Box 4, Folder XYZ.

to grant us a rehearing.”<sup>247</sup> Murrah also cast aspersions on the motivations of defense counsel, in line with the observations of Robson and Becker earlier in the summer, claiming that “[t]he memorandum submitted by certain lawyers in the so-called electrical equipment cases is admittedly colored by their experience in these cases which, as we know, has not been to their liking. They frankly admit their inability to be entirely objective in their approach to this problem.”<sup>248</sup> Murrah continued: “the judges who have had the responsibility of these cases are in a position to be objective. They want nothing more than a codification of the procedures that have been followed in the cases.”<sup>249</sup>

Maris responded with skepticism, adhering to the view that specific rules promulgated by the Rules Committee for multiple litigation would be too rigid, preferring ad hoc consideration by the Judicial Conference to cases as they arose, but he promised that he was “keeping his mind completely open on the subject of the legislation,” and that “I shall await a copy of the redraft with interest.”<sup>250</sup>

Returning to the drawing board in December 1964, Becker and Neal developed an ironic solution to Maris’s opposition: they eliminated the provision for implementing rules governing procedure in multidistrict litigation enacted through the Enabling Act process altogether. They excised the part of the statute providing for any such rules to be drafted by the Rules Committee and approved by the Supreme Court. By that point, there had developed among the drafters “considerable sentiment for eliminating or short-cutting these steps where possible” due to the “undesired or probable result that lengthy steps will be required before the Court will approve any procedural changes.”<sup>251</sup> As the judges noted, such rulemaking would require “lengthy consideration and review by the standing Committee on Federal Rules of Procedure and its Sub-Committee on Federal Rules of Civil Procedure, to be followed subsequently by further consideration and/or review in the Supreme Court and the Congress.”<sup>252</sup> Maris, through his skepticism of implementing rules, had sparked the idea to cut the Rules Committee out of implementation of MDL entirely.

To accomplish this, the drafters thus made three changes in the statute: they (1) added language providing the standard for when cases should be transferred for coordinated for pretrial proceedings, (2) provided for

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<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> Letter from Judge Albert Maris to Judge Alfred Murrah, December 29, 1964, Neal Papers, Box 4, Folder XYZ.

<sup>251</sup> *Id.*

<sup>252</sup> Memorandum, Two Suggestions on the Draft Venue Statute, November 10, 1964, Becker Papers, Box 16, Folder 1.

creation of the Panel and its appointment by the Chief Justice, and (3) eliminated the provision for Supreme Court rulemaking, instead allowing the newly created Panel to promulgate *its own rules* of procedure governing transfer.<sup>253</sup> Not only would these changes “shortcut” the need for follow-on rulemaking for the statute to be implemented, they would assuage Maris’s concerns about rigidly codifying one-size-fits-all procedure in all kinds of multidistrict litigation through rules drafted by the Rules Committee. This assured the drafters both an easier route to Maris’s approval of the statute, and less future interference with its eventual implementation. The new statute would therefore retain maximum future flexibility and ensure control by the new Judicial Panel, to which Warren would presumably appoint Becker and Robson. From this point forward, all drafts eschew the rulemaking provisions and provide only for consolidated pretrial proceedings.<sup>254</sup>

The Co-Ordinating Committee next met in New Orleans in February 1965 to consider this new draft. At the meeting, in response to a request by Judge Roszel Thomsen for clarification of the powers granted to the transferee judge, Judge Becker emphasized that the judge assigned by the panel would have responsibility over “all matters . . . during centralized proceedings.”<sup>255</sup> For the most part, the judges in attendance were in support, although Judge Sylvester Ryan, a member of the Committee and the Chief Judge of the Southern District of New York, expressed reservations for the first time about the statute’s invasion of authority of transferor judges, who would have no say in whether their cases would be transferred.<sup>256</sup> Nevertheless, the drafters presented the draft the following day to Judge Maris, who then expressed his support for the new version, “observing that the draft of the proposed statute was greatly improved.”<sup>257</sup>

The drafters of the statute also agreed that they would meet with Judge Ryan in New York in February to discuss his objections.<sup>258</sup> Only Becker’s handwritten notes of that meeting survive, but Ryan is noted as believing it would “not [be] desirable to set up [a] permanent institution with power to

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<sup>253</sup> Draft of Title 28, U.S.C. § 1404(e), January 8, 1964, Becker Papers, Box 16, Folder 1; Draft of Title 28, U.S.C. § 1404(3), January 11, 1964, Becker Papers, Box 16, Folder 1.

<sup>254</sup> Both strategies are implicit in a draft report for submission to the Judicial Conference highlighting the need for “rapid and flexible procedures”. See Comment on Proposed Title 28, U.S.C. § 1404(e), December 28, 1964, Becker Papers, Box 16, Folder 1.

<sup>255</sup> Minutes of Co-Ordinating Committee, New Orleans, LA, February 7, 1965, Becker Papers, Box 9, Folder 21.

<sup>256</sup> *Id.* Ryan was not in attendance—he expressed his reservations by letter.

<sup>257</sup> Minutes of the Legislative Committee at New Orleans, February 9, 1965, Becker Papers, Box 9, Jacket 21.

<sup>258</sup> *Id.*

invade jurisdiction of district court.”<sup>259</sup> Apparently, as a result of this meeting, new language, later referred to as the “Ryan Amendment” was inserted into the text providing that “no action shall be transferred without consent of the District Court in which it is pending.”<sup>260</sup>

With Judge Ryan temporarily mollified and Judge Maris’s support secured, the Committee submitted this new draft to the Judicial Conference for final approval at its next meeting on March 18, 1965. The report submitted by the Committee (somewhat disingenuously) trumpets its consultation with “judges and various representative counsel who have been involved in the electrical equipment antitrust cases,” and notes its decision to “revise the draft to permit for a largely self-implementing statutory procedure.”<sup>261</sup> The commentary also notes the limited scope of the statute in that it “affects only the pre-trial stages in multi-district litigation.”<sup>262</sup> Indeed, the limited nature of pretrial transfer is considered an “advantage” over use of the class-action device because “each action remains an individual suit with the litigants retaining control over their separate interests.”<sup>263</sup> As a result, “[p]roposed § 1407 would maximize the litigant’s traditional privileges of selecting where, when, and how to enforce his substantive rights or assert his defenses while minimizing possible undue complexity from multi-party jury trials.”<sup>264</sup> With the support of Judge Maris’s committee, and no dissents recorded, the Judicial Conference approved the statute for submission to the Congress.<sup>265</sup>

The Committee had come a long way in two years: Dean Neal’s “radical proposal” had become a draft statute endorsed without dissent by the Judicial Conference. Although the judges may have limited the scope of transfer to preempt potential political difficulties, they had conceived of legislation that for the first time would provide for identification and centralized control of multidistrict litigation in the manner of the electrical-equipment cases. Moreover, they had achieved the critical support of the Judicial Conference without engaging in the lengthy and deliberative process of rulemaking. And thus far the judges had avoided any resistance from the plaintiffs’ bar and rebuffed the skeptical and aggrieved antitrust-defense bar. So, by the summer of 1965, the drafters had reason to be

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<sup>259</sup> Notes of February 18, 1965 N.Y. Meetings, Becker Papers, Box 17, Jacket 39.

<sup>260</sup> Proposed Title 28, U.S.C. §1407, February 10, 1965, Becker Chronological Files, Box 2, Folder 8.

<sup>261</sup> Report of the Co-Ordinating Committee for Multiple Litigation, March 2, 1965, Becker Papers, Box 16, Folder 1, at 13.

<sup>262</sup> *Id.* at 19.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 20

<sup>265</sup> Report of the Judicial Conference of the United States, March 18-19, 1965, at 12, 38.

optimistic as they turned their attention to the Congress. But there were storm clouds on the horizon. The lawyers they had rebuffed were not going to take things lying down.

#### IV. THE BUMPY ROAD TO CONGRESSIONAL PASSAGE

The Judicial Conference formally communicated the proposed statute to the House and Senate Judiciary Committees on April 12, 1965.<sup>266</sup> Congressman Emmanuel Celler, Chairman of the House Judiciary Committee, subsequently introduced the bill, H.R. 8276, in the House on May 9, 1965. All seemed to be going according to plan.<sup>267</sup> At the June 25 meeting of the Coordinating Committee in Denver, Judge Robson optimistically reported that “the proposed legislation has been introduced into the House and that hearings will be conducted before the House Judiciary Committee in July. After passage in the House, the bill will be introduced in the Senate where no problems are anticipated.”<sup>268</sup> This optimism was premature.

##### A. Achieving Department of Justice Support

Any possibility of quick action in the House hit an immediate snag. The Judiciary Committee deferred action on the statute until the Department of Justice could present its views. This was not necessarily cause for worry, as the Congress regularly consulted DOJ on the Judicial Conference’s statutory recommendations, but it did mean that DOJ support would be vital.<sup>269</sup> Judge Robson and Dean Neal set up a meeting with Donald Turner, Assistant Attorney General for Antitrust, on August 4, 1964, to discuss the statute.<sup>270</sup> Turner, though, was non-committal; although he expressed general support for the concept, he believed strongly that actions by the government should be exempt in order to avoid the government’s cases’

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<sup>266</sup> Letter from William E. Foley, Deputy Director, Administrative Office of the United States Courts to John W. McCormack, Speaker, House of Representatives, April 12, 1965, Becker Papers, Box 15, Folder 34; Letter from William E. Foley, Deputy Director, Administrative Office of the United States Courts to Hubert H. Humphrey, President, United States Senate, April 12, 1965, Becker Papers, Box 15, Folder 34.

<sup>267</sup> Letter from Judge Edwin A. Robson to Judges of Co-Ordinating Committee on Multiple Litigation, May 26, 1965, Becker Papers, Box 15, Folder 34. Review of Congressman Celler’s papers did not reveal anything of note regarding MDL.

<sup>268</sup> Minutes of the Co-Ordinating Committee on Multiple Litigation, Denver, CO, June 25, 1965, Becker Papers, Box 9, Folder 21.

<sup>269</sup> Fish, *supra* note 71, at 208.

<sup>270</sup> Letter from Phil C. Neal to Donald F. Turner, August 5, 1965, Becker Papers, Box 15, Folder 34.

becoming enmeshed in private actions. Neal acknowledged Turner's request but hoped the Department would nevertheless "affirmatively support the bill in principle."<sup>271</sup> Turner, however, was unwilling to offer a quick endorsement, citing the need to "take some time" to consider the proposal.<sup>272</sup>

Radio silence from the DOJ persisted throughout fall 1965. Concerned about the Department's ability to derail the legislation, the Committee authorized Murrah to "take all necessary steps to secure action by the Department."<sup>273</sup> Murrah eventually procured a meeting in Washington with Deputy Attorney General Ramsey Clark late in the evening of December 13, at which Murrah agreed to support an amendment exempting any cases brought by the government from the statute's ambit.<sup>274</sup> But Clark also expressed confusion about the Ryan Amendment requiring consent to transfer by the transferor judge. Murrah, who had consented to inclusion of the amendment only to mollify Judge Ryan, made clear to Clark that he would not oppose in Congress a DOJ suggestion that the Ryan Amendment be eliminated from the bill.<sup>275</sup>

Clark apparently took Murrah's hint and sent a letter to the House Judiciary Committee on January 7, 1966, expressing the Department's support for the statute with his two requested amendments.<sup>276</sup> In the letter, Clark referred to the Ryan Amendment as "superfluous" given the need for the panel to approve the transfers, and added that "[r]equiring the consent of the transferor district judge would give a veto power and in essence require voluntary cooperation of all in order to consolidate discovery proceedings," defeating the purpose of the bill.<sup>277</sup> With the amendments, however, Clark

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<sup>271</sup> *Id.*

<sup>272</sup> Letter from Donald F. Turner to Phil C. Neal, Neal Papers, Box 4, Folder XYZ.

<sup>273</sup> Minutes of the Co-Ordinating Committee on Multiple Litigation, Chicago, IL, December 9, 1965, Becker Papers, Box 9, Folder 21 ("Congressional action remains delayed pending the Justice Department's recommendations. Through repeated efforts have been made to determine the Department's position, no report has been received."); *see also* Minutes of the Co-Ordinating Committee on Multiple Litigation, New York, NY, September 29, 1965, Becker Papers, Box 9, Folder 21.

<sup>274</sup> Letter from Alfred Murrah to Ramsey Clark, Deputy Attorney General, December 16, 1965, Neal Papers, Box 4, Folder XYZ ("It was so typically fine and cooperative of you to see me late Monday evening concerning the proposed venue legislation. I am sure all agree that the legislation is needful.").

<sup>275</sup> Letter from Alfred Murrah to Ramsey Clark, December 27, 1965, Neal Papers, Box 4, Folder XYZ ("[i]t would be unfortunate, however, if the legislation was so restricted to nullify its intended salutary purposes.").

<sup>276</sup> Letter from Ramsey Clark to Emanuel Celler, January 6, 1966, reprinted in Hearings before Subcommittee No. 5 of the Committee on the Judiciary of the House of Representatives, 89th Cong. 27-28 (August 31, 1966) [hereinafter House Hearings].

<sup>277</sup> *Id.*

enthusiastically endorsed the bill on behalf of the Department.<sup>278</sup>

Having achieved DOJ's support, the Committee began preparations to report this development to the Judicial Conference at its upcoming March 1966 meeting.<sup>279</sup> This bothered Judge Ryan, who resisted removal of his veto provision. Ryan objected to any endorsement of Clark's suggested amendments in the Coordinating Committee's report to the Judicial Conference, "since it presents but one view which is opposed to the specific approval by the Conference and this Committee of legislation which has already been introduced."<sup>280</sup> Robson attempted to smooth things over in a subsequent letter to the whole Committee, putting the question of the content of the report to a majority vote.<sup>281</sup> As Murrah probably could have predicted, the majority overruled Ryan and expressed its support of Clark's proposed amendments to the Judicial Conference, which approved the acceptance of the amendments over Judge Ryan's dissent.<sup>282</sup> Moreover, anticipating subsequent Congressional hearings on the bill, the Committee authorized Robson to designate Committee members to appear at any such hearings, and "[o]ver Chief Judge Ryan's objection the designated judges were authorized to express their personal views on suggested changes."<sup>283</sup> As a result, the judges appearing at any hearings could effectively disown Ryan's veto provision.

Despite the approval of the DOJ and continuing support of the Judicial Conference, the bill remained bogged down in the House.<sup>284</sup> As the summer of 1966 wore on, the judges agreed to attempt to lobby the Senate to hold hearings on the bill first.<sup>285</sup> Becker personally reached out to Senator Edward Long from his home state of Missouri.<sup>286</sup> Long responded, agreeing

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<sup>278</sup> *Id.*

<sup>279</sup> Letter from Alfred Murrah to William Becker, February 15, 1966, Becker Papers, Box 15, Folder 34.

<sup>280</sup> Letter from Sylvester Ryan to Edwin Robson, February 16, 1966, Neal Papers, Box 4, Folder XYZ.

<sup>281</sup> Letter from Edwin Robson to Co-Ordinating Committee on Multiple Litigation, February 21, 1966, Becker Papers, Box 15, Folder 34.

<sup>282</sup> Report of Proceedings of the Judicial Conference, March 10-11, 1966, at 25.

<sup>283</sup> Minutes of Meeting of Co-Ordinating Committee on Multiple Litigation, Philadelphia, PA, March 31, 1966, Becker Papers, Box 9, Folder 21.

<sup>284</sup> Letter from William E. Foley, Deputy Director of the Administrative Office of the United States Courts to Edwin Robson, April 12, 1966 (noting that "I regret that I do not have any worthwhile suggestions as to how we can move this any faster unless someone has direct access to the congressman and can urge it on him.").

<sup>285</sup> *See, e.g.*, Letter from Edwin Robson to Sen. Everett M. Dirksen, August 16, 1966, Becker Papers, Box 15, Folder 34 ("The bill . . . has become bogged down in Congressman Celler's committee.").

<sup>286</sup> Letter from William Becker to Sen. Edward V. Long, August 1, 1966, Becker Papers, Box 15, Folder 34.

to move things forward, but inquiring about the Ryan Amendment, which Becker assertively undermined, claiming that “I believe that I can say that practically all of the judges who have reviewed this proposed bill would consider the bill to be a great advance if adopted in the form suggested by the Attorney General.”<sup>287</sup> With things apparently gaining steam in the Senate, the House Judiciary Committee surprised the judges by scheduling a bill a hearing on August 31, 1966. Once again, things appeared to be on track, but the judges’ biggest obstacle was developing: the organized opposition of the lawyers they had rebuffed in November 1964.

#### B. Roadblock: Opposition by the American Bar Association

The ABA was often an important ally of the Judicial Conference.<sup>288</sup> Going back to the Taft era, the Judicial Conference had relied on the ABA as an advocate for legislation that would be politically challenging for judges to support, such as salary increases or provision for additional judgeships.<sup>289</sup> On the other hand, ABA opposition could be the death knell for even a proposal supported by the Judicial Conference.<sup>290</sup> As discussed in Part II, the lawyers in the Antitrust Section of the ABA had been full partners in the creation of the Handbook. But by the time the MDL statute was introduced, relations had cooled—perhaps because defendants’ experience with the Handbook’s recommendations in their harshest form turned out not to be to their advantage.

When the Committee asked for comments from defense counsel in November 1964, the lawyers’ main contention was that the proposal should be referred to the ABA for review. The judges roundly rejected this proposal. Having been rebuffed, some lawyers opposed to the bill decided to generate formal ABA opposition through its Antitrust Section, whose executive council contained numerous lawyers for defendants in the electrical cases. At the Section’s April 1965 meeting, it was announced that an ad hoc committee had been formed to study the MDL legislation.<sup>291</sup> On April 13, 1966, with the legislation pending in the House Judiciary

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<sup>287</sup> Letter from William Becker to Sen. Edward V. Long, August 9, 1966, Becker Papers, Box 15, Folder 34 (only “[o]ne judge on the drafting committee wished to give the district court from which the action was transferred a veto power”).

<sup>288</sup> Fish, *supra* note 73, at 331-332 (noting the ABA’s importance in “congressional enactment of measures important to the federal courts”).

<sup>289</sup> *Id.* at 336.

<sup>290</sup> DEBORAH C. BARROW & THOMAS G. WALKER, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM 256 (1988) (noting that opposition from the “organized bar” meant “little chance of success”); Baar, *supra* note 74, at 99.

<sup>291</sup> 27 A.B.A. Section on Antitrust Law x (1965).

Committee, the ad hoc committee recommended that the Antitrust Section adopt a resolution opposing the legislation and that this resolution be presented to the ABA as a whole.<sup>292</sup> On August 10, at the nationwide meeting of the House of Delegates in Montreal, after a brief statement in support of the resolution opposing the bill by lawyer Richard McLaren of Chicago, the ABA adopted it without debate.<sup>293</sup>

The Committee was blindsided. As Robson described in a letter to Becker on August 16, 1965, the ABA “unbeknownst to anybody, voted to oppose the legislation. Both Perry [Goldberg] and [Judge] Joe Estes were in Montreal as members of the section, and received no notice that this was coming up for discussion.”<sup>294</sup> Robson summarized: “It is apparent from the sessions that Perry and Joe attended that the cards were stacked against us by the defendants.”<sup>295</sup>

Following adoption of its resolution, the ABA drafted a report outlining its opposition. The main thrust of the report is that the statute goes too far, too fast, and that the electrical-equipment cases demonstrated that regular procedures were adequate to meet the demands of a crisis.<sup>296</sup> Becker and Robson did not see a copy of the report until August 30, the night before the House Subcommittee hearing, so they dictated responses to the criticisms in their Washington hotel the night before the hearing.<sup>297</sup>

### C. The House Hearings

The House Hearings commenced the following morning. The MDL statute was one of four statutes the subcommittee was considering that day.<sup>298</sup> Robson and Becker appeared on behalf of the Committee, as did Neal. In their testimony, the judges adhered to their established strategy: emphasizing the urgent need for the legislation. Neal went first, describing

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<sup>292</sup> 30 A.B.A. Section on Antitrust Law ix (1966).

<sup>293</sup> 52 A.B.A. J. 976 (1966). The ABA further resolved, “the Section of Antitrust Law is authorized to urge the foregoing views of the American Bar Association on the Committee on the Judiciary.” Proceedings of the House of Delegates at the 1966 Annual Meeting, Montreal, Canada, August 8-11, 1966, 91 Ann. Rep. A.B.A. 347, 374 (1966).

<sup>294</sup> Letter from Edwin Robson to William Becker, August 16, 1965, Becker Papers,

<sup>295</sup> *Id.*

<sup>296</sup> Report of Section of Antitrust Law to the House of Delegates of American Bar Association on H.R. 8276, 98th Congress, reprinted in House Hearings, at 33-36.

<sup>297</sup> Letter from William Becker to Sen. Edward V. Long, September 6, 1966, Becker Papers, Box 15, Folder 34; *Multidistrict Litigation: Hearings Before Subcomm. on Improvements of Judicial Machinery of the Comm. On the Judiciary*, 89th Cong (1966) at 24 [hereinafter “Senate Hearings”] (“We discovered the existence of this document only the day before we were to appear before the House committee on H.R. 8276.”).

<sup>298</sup> *Judicial Administration: Hearing Before the Committee on the Judiciary*, 89th Cong. (1966) [hereinafter “House Hearings”].

the successes of the electrical-equipment cases, but then turned to the “different theory” underlying the MDL statute.<sup>299</sup> The procedure followed in the electrical cases was “cumbersome” and “fragile . . . because it is dependent on the unanimous agreement of the judges involved for it to work.”<sup>300</sup> Moreover, “perhaps most important, section 1404(a) is inadequate because it leaves the question of transfer to the determination of the court in a particular case and to the initiative of the parties in that case.”<sup>301</sup> The bill would respond by providing “some machinery in the Federal judiciary which can determine what ought to be done from the standpoint of the judiciary as a whole, and the interests not only of the parties in a single case in a single district but of the parties affected by the entire mass of litigation.”<sup>302</sup>

Judge Becker testified next and amplified the need for the bill:

We feel that there is a litigation explosion occurring in the Federal courts along with the population explosion and the technological revolution; that even with the addition of many new judges, the caseload, the backlog of cases pending, is growing; and that some new tools are needed by the judges in order to process the litigation which results from the matters which I have mentioned, as well as from extensions of the jurisdiction of the Federal courts by acts of Congress, and this is a method which we think will work.<sup>303</sup>

Becker then endorsed the two amendments suggested by Deputy Attorney General Clark. Becker noted the Committee’s endorsement of the first proposed amendment, exempting suits brought on behalf of the government. With respect to the second suggestion, the deletion of the Ryan Amendment allowing for a transferor-court veto, Becker stated that “I am authorized to state that this suggested amendment has the approval of a majority of the Committee and I feel and the majority of the Committee feel that this change should be made, so we are in agreement with the Department of Justice on this matter.”<sup>304</sup> Becker closed by again stressing the apparently

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<sup>299</sup> House Hearings at 22.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 23

<sup>303</sup> House Hearings, 27

<sup>304</sup> *Id.* at 27. Murrah testified even more forcefully along these lines in the Senate hearings, responding to Sen. Tydings’ question about the veto provision: “I suppose it is fair to say, of course, that when you are hammering out proposed legislation of this kind, especially with hardheaded federal judges, you have to make some concessions along the way, sometimes even to the point of emasculation. I think it is appropriate to say that I

limited nature of the proposal when compared to a complete transfer—that it would not require the creation of a new court or the appointment of any new judges, and that there was a “mandatory duty” to remand the case when pretrial proceedings are concluded.<sup>305</sup>

Although no witnesses appeared against the bill, the report of the ABA opposing its adoption was entered into the record, as was Becker and Robson’s point-by-point refutation of it, dictated in their hotel the night before. The Becker/Robson rejoinder is remarkable for its force. The thrust of the judges’ response is that current procedure is plainly inadequate to deal with the massive litigation on the horizon, and that a failure to do so would threaten the basic functioning of the federal courts. The judges also appealed to process—an appeal we now know was disingenuous in light of Becker’s papers:

[T]he Coordinating Committee wishes to inform your Committee that before final drafts of H.R. 8276 were submitted to the Judicial Conference, conferences were held with lawyers representing both the plaintiffs and defendants in the electrical equipment antitrust cases. The lawyers consulted represented the major portion of the antitrust bar of the United States and many of their suggestions were incorporated in what is now H.R. 8276. On the other hand, no opportunity was given by the Council of the Section of Antitrust Law for discussion or hearing of objections to the report discussed hereinabove.<sup>306</sup>

#### D. Shifting Attention to the Senate

Due to the ABA’s opposition, the judges did not leave the House hearings confident, so they turned their attention to lobbying the Senate Judiciary Committee, which eventually agreed to hold a hearing on the bill in October in Chicago.<sup>307</sup> The Senate immediately proved to be a more promising avenue. Senator Long and Senator Joseph Tydings of Maryland, the Chairman of the Subcommittee on Improvements in Judicial Machinery, introduced the bill in the Senate on September 9, 1966—with both of

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never did approve of the provision which allowed veto power to one judge. My argument was that if you do that, you almost completely render the legislation impotent.” Senate Hearings, at 55-56.

<sup>305</sup> *Id.*

<sup>306</sup> House Hearings, at 32.

<sup>307</sup> Letter from William Becker to Sen. Edward V. Long, September 6, 1966, Becker Papers, Box 15, Folder 34.

Clark's amendments incorporated.<sup>308</sup> That Tydings was the chair was serendipitous. Not only was he exceptionally interested in improving the operations of the federal courts,<sup>309</sup> his mentor in both law school and beyond was Chief Judge Roszel Thomsen of the District of Maryland, an influential member of both the Coordinating Committee and the Rules Committee.<sup>310</sup>

The hearing was held on October 20-21, 1966. The only Senator in attendance was Tydings, and again only witnesses in favor of the bill testified. But this time, nearly the entire Co-Ordinating Committee attended. As in the House hearing, Robson, Becker, and Neal each testified, trumpeting the success of the electrical-equipment actions but pressing the need for machinery in the future that did not rely on the voluntary cooperation of judges. This time, they were joined by an additional witness, Charles Bane, the lawyer for plaintiff Commonwealth Edison in the electrical litigation and a booster of the statute.

Becker and Bane targeted the ABA's opposition, both in process and substance.<sup>311</sup> On process, they attacked the means by which the ABA's report was drafted—as an ad hoc committee report, approved by the executive council of the Antitrust Section, and then approved without debate by House of Delegates.<sup>312</sup> In Becker's view, "this recommendation of the American bar loses a great deal of its value and influence under the circumstances."<sup>313</sup> Becker also implied that his opponents' activities were shady, noting that "[t]he recommendation was prepared by a special committee which had been appointed and, which, so far as I know, never granted a hearing to anyone," and "the Coordinating Committee and lawyers who were supporting this proposal for new section 1407 were never given an opportunity to discuss it."<sup>314</sup> Moreover, Becker added, "Several members of the Coordinating Committee are members of the Antitrust section. . . . Nothing was ever said at the meeting they attended. I undertook recently, therefore, to find out how this could happen and I learned on

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<sup>308</sup> Becker later thanked Long for introducing the bill: "This proposed legislation appears to be a very minor matter, but I can assure you that it is truly of great importance." Letter from William Becker to Sen. Edward Long, October 17, 1966, Becker Papers, Box 15, Folder 34.

<sup>309</sup> See, e.g., Joseph F. Spaniol, Jr., *The Federal Magistrates Act: History and Development*, 1974 ARIZ. ST. L.J. 565 (noting Tydings's interest in judicial administration).

<sup>310</sup> Senate Hearings at 3. Tydings refers to Thomsen as his "former mentor . . . who taught me most of the law I know, not only when I was a U.S. Attorney but even earlier when I was in law school at the University of Maryland." *Id.* at 4.

<sup>311</sup> *Id.* at 24.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

reliable information from a person intimately connected with this recommendation opposing H.R. 8276 was never made known to the membership of the Antitrust Section.”<sup>315</sup>

For his part, Bane attributed the ABA’s recommendation to the influence of defense lawyers on the executive council, contending that “there is a substantial influence in this report by parties who defend electrical equipment antitrust cases and very ably defend them. But at no time did they abandon the advocacy of their clients’ causes.”<sup>316</sup> Bane added that he was present at the Montreal ABA meeting and “despite the circumstance that I am a chairman of a committee of the antitrust law section, at no time did I have any indication . . . that the antitrust section was presenting to the house of delegates this type of a resolution.”<sup>317</sup> Bane also cited the judges’ offer to counsel to comment on the bill, noting that “the defendants did not comment, but the plaintiffs did. . . . I can say that plaintiffs’ counsel by and large were wholeheartedly in favor of these proposals.”<sup>318</sup>

The witnesses on the second day of hearings repeated the themes of the first day: the urgent need for the legislation, the success of the electrical-equipment cases, the unlikely success of future attempts at voluntary coordination, and the unrepresentative and biased nature of the ABA opposition. Two other lawyers in the electrical-equipment cases joined Bane in support of the bill, Ronald W. Olson, who represented plaintiffs, but also Edward R. Johnston, who represented defendant McGraw-Edison Company, and who, at the time, was the senior partner at Raymond, Mayer, Jenner & Block. Johnston affirmed the value of coordinated proceedings for a defendant. He noted the “distinct advantage” of “uniformity of action,” and recognized that without coordination before a single judge, “it becomes necessary for counsel charged with the representation of a defendant nationally to either attend the hearings in the different districts or to spend a great amount of time with local counsel apprising them of the facts and the legal questions involved.”<sup>319</sup>

Johnston also undermined the ABA, albeit diplomatically, noting that there was “no debate on any of these resolutions,” and he “therefore cannot attach great importance to the resolution. I have the greatest respect for the

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<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at 38. Bane added his view that defense counsel were opposed to the bill and that they “are quite likely in the future, in the event that this this were tried on a voluntary basis, to be more sophisticated and experienced in their opposition than they were about the electrical equipment litigation, and I am just not at all certain that they might not in some quarters be effective in their opposition.” *Id.* at 37.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.* at 39.

<sup>319</sup> *Id.* at 43.

members who are on the council—some of them are very close friends of mine—and yet I know that there were at least one or two members on the council who did not favor this type of pretrial proceeding.”<sup>320</sup>

Murrah anchored the testimony, expressing in stark terms the urgent need for the legislation, offering that “I think it is very important to say that this multiple-district litigation can very well break our backs out of sheer weight of numbers unless we do have an orderly procedure for it.”<sup>321</sup>

The Senate subcommittee scheduled a third day of hearings in Washington for January 24, 1967. For the first time, this hearing would feature witnesses testifying in opposition to the bill—including Phillip Price of Dechert, Price & Rhoads in Philadelphia, which had represented defendant I-T-E Circuit Breaker in the electrical cases, and William Simon, of Howrey & Simon in Washington, who had chaired the ABA ad hoc committee that produced the report in opposition to the bill.<sup>322</sup>

Upon learning that Price would appear, Becker sought to preemptively counter his credibility. Becker sent a letter to George Trubow, counsel to the subcommittee, attaching documents from the electrical equipment litigation to “show the unsound and uncooperative tactics of I-T-E Circuit Breaker.”<sup>323</sup> Becker added,

I-T-E resisted going to trial and did not undertake a settlement program until it was in the early processes of a jury trial in Chicago. The object of the committee was to terminate the cases by trial or settlement or both. Until the Chicago trial, I-T-E expressed an unwillingness to do either. If the Judges had not co-ordinated their efforts these cases would probably still be clogging the dockets in many districts. Mr. Price’s testimony should be evaluated in light of the actions of his firm in representing I-T-E Circuit Breaker in the electrical equipment litigation.<sup>324</sup>

The hearing commenced on January 24, 1967, again with Tydings the

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<sup>320</sup> *Id.* at 47.

<sup>321</sup> *Id.* at 54.

<sup>322</sup> Minutes of the Meeting of the Co-Ordinating Committee, Chicago, IL, January 20, 1967, Becker Papers Chronological Files, Box 11, Folder 1 (“Phillip Price of Dechert, Price & Rhoads (Philadelphia) and a Mr. Simon, representing the American Bar Association, are expected to testify. . . . Judge Becker said it should be noted for the record that portions of Mr. Price’s statement (distributed to members of the Committee) were inaccurate.”).

<sup>323</sup> Letter from William Becker to George Trubow, Deputy Counsel to the Senate Judiciary Committee, January 12, 1967, Becker Papers, Box 15, Folder 34.

<sup>324</sup> *Id.*

only Senator in attendance. Price did not hold back. Still upset about the handling of the I-T-E cases, Price excoriated both the judges and their bill, arguing that it “would lead to the same kind of abuses which have grown up and which appeared during the course of the electrical cases.”<sup>325</sup> Price got nowhere, however, with Tydings, who took up Becker’s critique that Price’s opposition to the bill was motivated by the defendants’ interest in increasing delay as a weapon against plaintiffs.<sup>326</sup>

Simon then attempted to rehabilitate the ABA’s report, arguing that the electrical cases proved that existing procedures were adequate to deal with massive litigation and casting coordinated proceedings as “a conflict between justice and efficiency.”<sup>327</sup> Tydings took the bait, characterizing the ABA’s stance as opposed to fair administration of justice:

Well, as I gather, basically the American Bar Association has taken the position that if they have a hundred or 200 cases, and each one with the same set of facts, the same pretrial for each different district, that if they want to take up the taxpayer’s dollar and the court’s time and make it a hundred times as long and more difficult for the judiciary of the United States, that is fine, because the interests of the attorneys and the litigators is the most important.<sup>328</sup>

Judge Thomas Clary of Philadelphia attended the hearing on behalf of the Committee and reported to his colleagues by letter. Clary felt good about how it went.<sup>329</sup> Clary also reported a conversation he initiated with subcommittee counsel George Trubow after the hearing. Clary learned from Simon’s testimony that the ad hoc committee of the ABA Antitrust Section was appointed by the section’s chair Edgar Barton, of White & Case in New York, which had represented General Electric in the electrical cases.<sup>330</sup> Reminiscent of the views expressed by Becker, Robson, and Murrah in 1964, Clary explained that the ABA’s position “is to oppose any legislation looking toward improvement in expediting antitrust cases and supporting

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<sup>325</sup> *Id.* at 107.

<sup>326</sup> *Id.* at 115 (responding to Price’s testimony: “As a matter of fact, in many instances, it is to the benefit of the counsel to delay the trial, if necessary, to postpone it and drag it out for years. In the electrical equipment cases, they could have been dragged out for 20 years, if they hadn’t been consolidated for pretrial as they were.”).

<sup>327</sup> *Id.* at 121.

<sup>328</sup> *Id.* at 124. *See also id.* at 128.

<sup>329</sup> Letter from Thomas Clary to the Co-Ordinating Committee on Multiple Litigation, January 27, 1967, Neal Papers, Box 4, Folder XYZ.

<sup>330</sup> *Id.* (noting that “most of us will remember his active participation in all proceedings before the Co-Ordinating Committee”).

vigorously an extension of loopholes which would avoid responsibility for antitrust violation.”<sup>331</sup>

During the spring of 1967, following the hearings, the Committee encouraged judges to commence a letter-writing campaign to their Senators.<sup>332</sup> The judges participated eagerly.<sup>333</sup> In the meantime, Becker liaised with Senator Tydings’ office to respond to supplemental statements offered by Price, of the Dechert firm, and Cravath, Swaine & Moore (which had represented Westinghouse in the electrical cases) submitted to the committee offering amendments to the bill.<sup>334</sup> Perhaps recognizing Tydings’ commitment to the legislation from the tenor of his testimony, Price encouraged several amendments, all of which tended to make MDL consolidation more difficult—in particular, allowing transfer only on a showing that there is a “substantial number” of civil actions in which “common questions of fact and law predominate” and transfer only to the district “most convenient to the parties and witnesses.”<sup>335</sup> The Cravath memorandum argued that coordination of multidistrict litigation should occur only under rare circumstances and suggested amendments such that only a party could move for transfer and when doing so it must provide a list of all related litigation in any district, that transfer be for trial as well as pretrial proceedings, and that any transfer orders be immediately appealable to the Supreme Court.<sup>336</sup> The Cravath memo also echoes Price’s request for a requirement that common questions of law and fact “predominate.”<sup>337</sup>

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<sup>331</sup> *Id.*

<sup>332</sup> Letter from William Becker to Judges Before Whom Multiple Litigation Is or Has Been Pending, April 3, 1967, Becker Papers, Box 15, Folder 34 (“It is suggested that, if you approve of the bill, you support its passage by writing members of the Senate who represent your state or whom you know.”).

<sup>333</sup> *See, e.g.*, Letter from Judge Roy M. Shelbourne to William Becker, April 19, 1967, Becker Papers, Box 15, Folder 34 (“I have received your letter of April 17, with enclosures. I, of course, will write to the Honorable John S. Cooper and the Honorable Thurston B. Morton, United States Senators from Kentucky, urging the passage of S. 159.”); Letter from Judge Bailey Brown to Judge William Becker, April 19, 1967, Becker Papers, Box 15, Folder 34 (“In response to your letter of April 17 I have written to Senator Gore.”).

<sup>334</sup> Trubow reached out to Becker for comments on these statements. Letter from George Trubow to William Becker, February 10, 1967, Becker Papers, Box 15, Folder 34 (re Price statement); Letter from George Trubow to William Becker, February 13, 1967, Becker Papers, Box 15, Folder 34.

<sup>335</sup> Supplemental Statement of Phillip Price on S. 159, Becker Papers, Box 15, Folder 34.

<sup>336</sup> Memorandum for the Subcommittee on Improvements in Judicial Machinery of the Committee of the Judiciary of the United States Senate by Cravath, Swaine & Moore, February 10, 1967, Becker Papers, Box 15, Folder 34.

<sup>337</sup> *Id.*

Becker responded forcefully in private correspondence.<sup>338</sup> He referred to the suggestion of a predominance requirement as “undesirable and crippling,” and he objected that requiring of common questions of “law” would preclude use of the procedure in diversity cases, such as products-liability, in which the law to be applied would be that of multiple states.<sup>339</sup> Here, Becker again sought to undermine Price’s credibility: “It is difficult for me to believe that the author here has a genuine concern in view of past attitudes in the electrical equipment cases . . . wherein I proposed to transfer the cases of the client of the author to its home state [and] local counsel objected.”<sup>340</sup> Becker summarized, simply that the proposed amendments “are calculated to cripple the bill.”<sup>341</sup>

With respect to the Cravath memo, Becker rejected the idea that massive litigation or that the use of MDL would be rare or even exceptional: “All I can say on this is that prophesy is a risky business. I can imagine future developments which will make the electrical equipment cases seem to be a relatively regular phenomenon.”<sup>342</sup> Becker accurately predicted the future of MDL: a products liability action related to “injurious effects of a birth-control drug,” or an “automobile manufacturer sells millions of a model of an automobile with an obviously unsafe feature in violation of federal law, and massive litigation results.”<sup>343</sup> With respect to the rest of Cravath’s suggestions, Becker stated simply that they were “vague and unconvincing” and would “render the bill worthless from a judicial standpoint.”<sup>344</sup> Becker also took aim at Cravath’s credibility,

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<sup>338</sup> Letter from William Becker to George Trubow, March 28, 1967, Becker Papers, Box 15, Folder 34.

<sup>339</sup> Comments on Supplemental Statements of Mr. Phillip Price on Senate Bill 159, March 18, 1967, Becker Papers, Box 15, Folder 34 (“But the words ‘of law’ should not used at all because of obvious reasons. Suppose the United States Courts are flooded with hundreds of thousands of diversity damage actions arising in 50 states as must result if a drug (such as a birth control pill) was alleged to have side effects injurious to women generally. The principal issue of fact would be the issue of alleged injurious effects of the drug. Nevertheless the law applicable to the facts could be different in some respect in each state. The suggested amendment would exclude use of the efficient and economical procedures of the bill.”).

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> Comments on Memorandum for the Subcommittee on Improvements in Judicial Machinery of the Committee of the Judiciary of the United States Senate by Cravath, Swaine & Moore, Dated February 10, 1967, March 18, 1967, Becker Papers Box 15, Folder 34.

<sup>343</sup> *Id.* at 2. For current examples of Becker’s prediction having come to fruition, see *In re Yasmin & Yaz (Drospirenone) Marketing, Sales Practices, and Products Liability Litig.*, MDL No. 2100 (S.D. Ill.); *In re General Motors Ignition Switch Litig.*, MDL No. 2543 (S.D.N.Y.).

<sup>344</sup> *Id.*

characterizing its position as biased: “Advocates necessarily must in appraising a judicial reform take into account the interests of their clients and of their own practice. Judges necessarily must consider only the interests of the administration of justice.”<sup>345</sup>

On May 26, 1967, the judges received good news. Tydings reported that the Subcommittee was preparing a report of the bill with three amendments intended to “clarify certain provisions of the bill, but make no substantial changes.”<sup>346</sup> The amendments were limited. Though two of them do address somewhat some of the objections to the bill, they do not go to the scope of the statutory power to consolidate. The three amendments were: (1) adding that “convenience of the parties and witnesses” as a factor in the decision to transfer alongside the “just and efficient conduct of the action”; (2) allowing parties to initiate a motion for consolidation; and (3) allowing appeal of an order to transfer by the Panel on an extraordinary writ.<sup>347</sup> The Senate Judiciary Committee endorsed the bill as amended on July 27, 1967, and the Senate passed it on the consent calendar—with no roll-call vote—on August 9, 1967.<sup>348</sup> The short report from the Senate Judiciary Committee highlights all of the judges’ tactics, particularly emphasis on the urgent need for the legislation in light of demands on the federal courts and the unlikelihood of the cooperation of the electrical cases ever occurring again. The Senate Report does not even mention the ABA’s opposition to the bill.<sup>349</sup>

#### E. Back to the House—and Overcoming the ABA

Even having achieved passage in the Senate, the Committee still faced an uphill climb in the House, where the bill had languished for two years due to the ABA’s opposition. In August 1967, Robson and Becker met to determine how to proceed.<sup>350</sup> The demands on Judge Becker arising from his work on the Co-Ordinating Committee had by then begun to take a toll. Due to the end of the electrical-equipment litigation, there was no longer any source of funding for the Committee. Nevertheless, the Committee

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<sup>345</sup> *Id.* Letter from George Trubow to William Becker, May 1, 1967, Becker Papers, Box 15, Folder 34.

<sup>346</sup> Letter from Sen. Joseph Tydings to Edwin Robson, May 25, 1967, Neal Papers, Box 4, Folder XYZ.

<sup>347</sup> S. REP. NO. 90-454, at 3 (1967). The Report notes that the “amendments suggested in this report were the result of recommendations by members of the bar acquiesced in by the coordinating committee.” *Id.* at 6.

<sup>348</sup> Cong. Rec. 22124 (1967).

<sup>349</sup> S. REP. NO. 90-454, at 4-7 (1967).

<sup>350</sup> Meeting of Judges Becker and Robson, Kansas City, Important Items for Discussion, August 21, 1967, Becker Chronological Files, Box 18, File 1.

continued to coordinate pretrial proceedings in a variety of large-scale cases, including the Technograph patent litigation, antitrust actions in the Concrete Pipe, Rock Salt, and Schoolbook industries, and litigation involving helicopter and airplane crashes.<sup>351</sup>

Feeling the pinch, the Committee redoubled its efforts to achieve passage in the House. Judges Murrah, Becker, and Robson met in Chicago on September 8, 1967, and, according to minutes of the meeting labeled “Personal and Confidential,” they developed a plan. The judges would attempt to lobby the key lawyers behind the ABA opposition directly:

Judge Murrah described a discussion that he recently had with a Washington lawyer, Leonard J. Emmerglick, regarding the suspected subtle opposition to [the legislation]. Emmerglick informed Judge Murrah that the opposition is based on certain fears, entertained by lawyers (particularly some New York lawyers) who make a career of handling antitrust cases.

Judge Murrah said he would like to initiate an informal meeting with some of the leading members of the bar to speak frankly with them about S. 159 for the purpose of allaying some of the misapprehensions upon which the opposition is based. Judge Murrah said that unless such a meeting is held, various members of the bar (especially those residing in New York) may be able to prevent the passage of S. 159. Others present agreed with Judge Murrah’s proposal.<sup>352</sup>

Murrah perhaps recognized the sensitive nature of this strategy, when, upon receipt of the minutes, he wrote to Judge Becker’s law clerk, stating:

Your proposed minutes certainly do reflect what was said and done at the breakfast session re S. 159.

But I doubt the efficacy of perpetuating it in the minutes lest they get in the hands of those who would misunderstand and misuse them. I would suggest that we refrain from perpetuating our session, but if the other judges think it would serve a useful purpose, I shall not object.<sup>353</sup>

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<sup>351</sup> Report of the Co-Ordinating Committee on Multiple Litigation to the Judicial Conference, September 6, 1967, Becker Chronological Files, Box 20, Folder 4, at 21.

<sup>352</sup> Minutes of the Steering Committee, Chicago, IL, September 8, 1967, Becker Chronological Files, Box 11, Folder 7.

<sup>353</sup> Letter from Alfred Murrah to William Levi, Law Clerk to Judge William Becker,

Becker responded, noting that the minutes were marked personal and confidential and circulated only to those in attendance, but offered to “have them recalled and amended.”<sup>354</sup>

Shortly thereafter, Murrah reported that a meeting with these New York antitrust lawyers had been scheduled for October 19, 1967 at the Bar Association of New York City.<sup>355</sup> The meeting was attended by the judges of the Coordinating Committee and numerous lawyers who had been involved in the electrical-equipment cases, as well as lawyers who had been on the executive council of the ABA Antitrust Section when it opposed the bill—including Whitney North Seymour, the managing partner of Simpson, Thacher & Bartlett, Bethuel Webster, prominent New York City lawyer and confidant of Mayor John Lindsay, Cyrus Anderson, the general counsel of the Pittsburgh Plate & Glass Company, and Marcus Mattson, a prominent Los Angeles antitrust lawyer.<sup>356</sup>

Becker’s handwritten notes of the meeting survive.<sup>357</sup> Judge Ryan, apparently over his amendment to the statute being unceremoniously disowned, took the lead explaining to the lawyers the need for the legislation in cases other than antitrust, such as products liability, securities, and patent. Ryan added that he understood that the bill had been opposed by defense attorneys, and that the Committee did not “want to force [the] bill down [the] throat of the bar—we want the support of [the] bar.” Ryan therefore expressed his hope that the ABA would recognize the need for the bill, but he also made clear: “If [the] Bar doesn’t agree [the] judges owe it to courts to push [the] bill as it is.” Whitney North Seymour, a prominent partner of Simpson Thacher & Bartlett, responded that the situation had gotten “off track” but believed that after further consultation with the bar agreement might be reached. The notes—albeit somewhat sparse—suggest that, at the judges’ urging, the Antitrust Section agreed to take a second look at the legislation.<sup>358</sup>

In the meantime, the judges stepped up their correspondence campaign with Congressmen.<sup>359</sup> For the time being, though, the bill remained held up,

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September 27, 1967, Becker Chronological Files, Box 11, Folder 7.

<sup>354</sup> Letter from William Becker to Alfred Murrah, October 3, 1967, Becker Chronological Files, Box 11, Folder 7.

<sup>355</sup> Letter from Alfred Murrah to the Co-Ordinating Committee, October 3, 1967, Becker Chronological Files, Box 16, Folder 1; Letter from Alfred Murrah to the Co-Ordinating Committee, October 11, 1967, Becker Chronological Files, Box 12, Folder 10.

<sup>356</sup> This material cited in this paragraph is from Becker’s Chronological Files, Box 12, Folder 1.

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> Minutes of the Special Preliminary Meeting of the Co-Ordinating Committee on

due to ABA opposition.<sup>360</sup> Pleas from Becker for relief from his workload became stronger, claiming that he was “barely able to keep the work of the Co-Ordinating Committee from coming to a complete halt.”<sup>361</sup> He continued:

It would be very detrimental to the effort of the judiciary of the United States to meet the increasing burden of the litigation explosion if the efforts of this Committee were terminated. It is simply beyond the capacity of an active judge and a law clerk to carry on this extra burden for any protracted length of time.<sup>362</sup>

#### F. The Dam Breaks

The dam finally broke in January 1968, when the ABA suddenly changed its position. Lawyer (and later district judge) Richard McLaren notified Murrah that the ad hoc committee of the antitrust section had issued a new report in favor of the bill.<sup>363</sup> McLaren noted that the “basic reasons for a change in position are the changes in the bill itself, the assurances contained in the Senate Report, and, most particularly, the need for legislation demonstrated by the representatives of the Judicial Conference.”<sup>364</sup> McLaren added, referring to the October meeting:

I think we both understand that there was a breakdown in communications between our Section and the Judicial Conference prior to our earlier adverse report on H.R. 8276. This was particularly regrettable in the light of the fine cooperation and understanding we had in connection with the development of the Handbook and other matters in the past, and I am particularly pleased that the air has now been

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Multiple Litigation, Kansas City, MO, November 3, 1967, Becker Chronological Files, Box 11, Folder 8 .

<sup>360</sup> Robson had reached out to Rep. Robert McClory of Illinois, who had reached out to Celler. McClory reported to Robson that Celler had written him, noting that the “matter is a very involved one and the American Bar Association, through its Antitrust Section, has issued criticism of the bill.” Letter from Hon. Robert McClory to Judge Edwin Robson, November 8, 1967, Neal Papers, Box 4, Folder XYZ.

<sup>361</sup> Letter from William Becker to Alfred Murrah, November 20, 1967, Becker Chronological Files, Box 16, Folder 1.

<sup>362</sup> *Id.*

<sup>363</sup> Letter from Richard McLaren to Alfred Murrah, January 11, 1968, Neal Papers, Box 4, Folder XYZ.

<sup>364</sup> *Id.*

cleared.<sup>365</sup>

The ABA's new report, to be submitted to its upcoming House of Delegates meeting scheduled for February in Chicago, cites the amendments to the bill and the assurances in the Senate Report that the transfer procedure will be used only in exceptional cases.<sup>366</sup> The report also cites a greater understanding of the need for the bill, which was "brought to our attention by members of the Judicial Conference," including the need for the legislation in cases "outside the antitrust field."<sup>367</sup> Soon after the ABA issued its report, on February 20, 1968, the ABA House of Delegates adopted a resolution in support of the bill.<sup>368</sup>

It is not entirely clear why the ABA made this 180-degree turn. One could just take McLaren at his word—that the Committee was persuaded by the amendments and convinced of the need for the legislation. This is possible, but seems unlikely in light of its prior vociferous opposition and the fact that the amendments to the statutory language (adding "convenience of the parties and witnesses as a standard," allowing a party to a litigation to move for consolidation, and providing for review of JPML orders only by extraordinary writ)<sup>369</sup> were marginal and only barely responsive to their more fundamental criticisms.

Another theory is that the lawyers may simply have mellowed in their opposition. With the benefit of hindsight, perhaps some defense counsel came to recognize the potential benefits of the bill to their clients and had come to the conclusion that their clients had not come out so badly in the electrical-equipment cases. After all, their clients were able to settle the entire litigation fairly promptly and move on. One of the great benefits of consolidated litigation for defendants is the opportunity to achieve closure through a global settlement. It is possible that the defendants realized that, with the dust now settled, that the coordinated proceedings worked in their favor.<sup>370</sup>

To me, however, the most persuasive theory is that the October 1967 New York meeting had an effect. McLaren alludes to the meeting in his letter, and the judges may have been especially convincing about the need for the legislation in areas beyond antitrust. Moreover, at least based on Becker's notes, the judges appear to have leaned on the lawyers, claiming

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<sup>365</sup> *Id.*

<sup>366</sup> Report of Section of Antitrust Law to the House of Delegates of the American Bar Association on S. 159, 90th Congress, January 19, 1968, Neal Papers, Box 4, Folder XYZ.

<sup>367</sup> *Id.*

<sup>368</sup> Proceedings of the House of Delegates: Chicago, Illinois, February 19-20, 1968, 54 A.B.A. J. 510, 521 (1968).

<sup>369</sup> S. REP. NO. 90-454 at 2.

<sup>370</sup> See Silver & Miller, *supra* note 23, at 123.

that they would push the bill with or without their support. While it is unclear how effective this brute-force approach would have been, it is clear that these lawyers—all from major law firms or corporations—were repeat players in high-stakes, federal litigation. One might rationally assume that antagonism with these judges was not in these lawyers’—or their clients’—best interests.

There was another reason for the lawyers present at the meeting to be interested in warmer relations with the Committee. Judge Becker was taking the lead in the first draft of what would become the Manual for Complex and Multidistrict Litigation.<sup>371</sup> As Arthur Miller remembers it, “the lawyers were fighting the manual as it was then drafted tooth and nail” because it appeared to facilitate the kind of benefits for plaintiffs that the defendants complained of in the electrical cases.<sup>372</sup> Perhaps recognizing that aggregate litigation would be the way of the future, these large-firm lawyers may well have decided that they would be better off participating in the Manual’s creation rather than stonewalling it.

There is evidence to support this theory in Becker’s papers. In his letter informing Judge Murrah of the ABA’s change of heart, McLaren mentions the Manual specifically, noting, “I am concerned a new misunderstanding may be abuilding.”<sup>373</sup> McLaren asks for a seat at the table, seeking the opportunity to formally comment on the draft *Manual*, suggesting that “I believe the path will be much smoother in the long run, and far greater progress will be made in the long run if time and opportunity are allowed for the organized bar to study, comment upon, and get used to the ‘Outline’ before it is formally adopted.”<sup>374</sup>

Lo and behold, such a meeting between the lawyers at the New York meeting and the judges drafting the Manual did, in fact, come about, on June 4, 1968. A transcript of this meeting survives in Judge Becker’s papers.<sup>375</sup> At the meeting, lawyer Cyrus Anderson of Pittsburgh Plate & Glass—who was the Chair of the ABA Antitrust Section at the time the

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<sup>371</sup> See Arthur R. Miller, *In Memoriam: Judge William H. Becker*, 807 F. Supp. Lxxii (W.D. Mo. 1992) (“it was Judge Becker’s pen that really was reflected in the first draft of the manual”). See also Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 296 n.26 (2013) (“The motor force behind the drafting of the Manual was the leadership of William H. Becker.”).

<sup>372</sup> *Id.*

<sup>373</sup> Letter from Richard McLaren to Alfred Murrah, January 11, 1968, Neal Papers, Box 4, Folder XYZ.

<sup>374</sup> *Id.*

<sup>375</sup> Transcript of Proceedings of United States Judicial Conference Committee on Complex and Multi-district Litigation, Denver CO, June 4, 1968, Becker Chronological Files, Box 13, Folder 2.

unfavorable report on proposed § 1407 was issued, and who was present at the October 1967 New York meeting—spoke first, on behalf of the newly formed ABA Special Committee on Complex and Multi-district Litigation. Anderson highlighted the meeting Judge Murrah had set up “between the Judicial Conference Coordinating Committee and our ABA antitrust section group.”<sup>376</sup> Anderson continues:

Last fall when S-159 became hot, the Coordinating Committee asked the anti-trust section to reconsider its former adverse position respecting an earlier version of that Bill. That we did, and I think the rest is now history.

To make a long story short, a new ABA report came out recommending adoption of the S-159 in light of various changes that were made in committee and the Bill was recently enacted into law, as you know. Now, at our October, 1967 meeting with the Coordinating Committee, the draft outline of the proposed Manual came up for discussion. Our ABA committee promised to study it. . . . Thanks to Judge Murrah and his recommendation, and those of others . . . our committee was formed.<sup>377</sup>

At the meeting, Anderson, joined by several others who were present at the New York meeting, and McLaren, who wrote the report endorsing the MDL statute, gave “a preliminary identification of some of the problem areas in the revised outline,” primarily the commanding tone of the suggestions in the Manual that judges take rigid control of discovery and move as quickly as possible.<sup>378</sup> There were several additional meetings between the Coordinating Committee and the ABA Committee throughout the course of 1968, and the Manual ultimately did reflect the lawyers’ desire that the Manual be written as a set of flexible suggestions.<sup>379</sup>

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<sup>376</sup> *Id.* at 5.

<sup>377</sup> *Id.* at 5-6.

<sup>378</sup> McLaren also opines: “I was awfully sorry that that relationship between our group, well, the organized Bar and the Judicial Conference Committee sort of lapsed after 1960. In fact, I think it got worse than that. We ended up on opposite sides of some different matters working more or less at cross purposes separately. . . . I am delighted that contact has been reestablished and more than pleased that we were able to change our position on the new S-159 and see it go through, and I am delighted that we are working on this very worthwhile project.” *Id.* at 16.

<sup>379</sup> See generally MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION (1st ed. 1969). For instance, these same lawyers met with the Coordinating Committee in San Francisco on July 24, 1968. At this meeting, the lawyers repeatedly expressed their view that the draft of the Manual was written in terms of rigid commands to judges rather than flexible suggestions. See Transcript of Special Meeting re: ABA Special Committee

In any event, Anderson's description of events regarding the MDL statute was completely accurate: the bill did pass in the House quickly once the ABA reversed itself. At a meeting of the Coordinating Committee in Philadelphia on January 18, the judges discussed the need to capitalize on the ABA's new position.<sup>380</sup> Speed remained critical to the judges because, as Becker observed, without additional staff "the day-to-day operations of the Committee could not continue for long," and Murrah regretted that "despite the chaos in the federal judicial system which would result from a discontinuance of the Co-ordinating Committee's services, he had exhausted what he felt to be 'all available resources' in obtaining additional staff assistance."<sup>381</sup> Foley noted, "action upon S. 159 by the House could provide an additional alternative for obtaining staff assistance in the future since, as Foley pointed out, funds could be released from the Administrative Office if S. 159 were to be passed and became a law," so again Foley urged the judges to contact as many Congress members as possible.<sup>382</sup>

There was little debate from then on in the Congress. The House Judiciary Committee reported the bill on February 28, 1968.<sup>383</sup> According to Rep. Mathias, of Maryland, who spoke on the House floor, "In our deliberations in both the Subcommittee and the full Committee on the Judiciary, we did not have a single voice raised in opposition to the bill. All of those present agreed that it was a necessary and desirable piece of legislation."<sup>384</sup> The bill then passed on March 4, 1968, with no dissent.<sup>385</sup> President Johnson signed the bill on April 29, and Chief Justice Warren appointed the first Judicial Panel on Multidistrict Litigation on May 29. Unsurprisingly, its membership included Judges Murrah, Becker, and

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Recommended Changes in the Proposed Manual for Complex and Multiple Litigation, San Francisco, CA July 24, 1968, in Becker Chronological Files, Box 13, Folder 2. For instance, the lawyers sought an explicit statement in the Manual that its suggestions were flexible and could be tailored to the individual case, a statement that eventually was included. *Id.* at 32 (testimony of Leonard Emmerglick).

<sup>380</sup> Minutes of Special Preliminary Meeting of the Co-Ordinating Committee on Multiple Litigation, Philadelphia, PA, January 18, 1968, Becker Chronological Files, Box 11, Folder 6, at 2-6.

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> H.R. REP. NO. 90-1130 (1968)

<sup>384</sup> 90 CONG. REC. H4927-4928 (March 4, 1968) (statement of Rep. Mathias). Mathias added that he had "discussed [the bill] personally with several of the distinguished Federal judges who have firsthand knowledge and experience with this kind of problem. I know how urgently they feel the bill is needed in order to make the administration of justice more expeditious and more efficient." *Id.* at 4927.

<sup>385</sup> *Id.* at 4928. The House corrected three typographical errors in the bill. Tydings had to return to the Senate floor on April 10, 1968 to amend it. 90 CONG. REC. S9448 (April 10, 1968) (statement of Sen. Tydings).

Robson.<sup>386</sup> Three years after it was introduced in the House and Senate, the Multidistrict Litigation Act was now law. After the House passed the legislation, the Wall Street Journal reported, tersely, “Congress has just passed without fanfare a bill likely to result in a substantial speedup in the handling of basically similar court suits.”<sup>387</sup> With that short statement, the era of multidistrict litigation had begun.

## V. ASSESSING THE JUDGES’ EFFORTS

When considered in light of its creators’ goals, MDL is a remarkable success story. A small group of men—mainly Neal, Murrah, Becker, and Robson—invented and shepherded to passage a statute creating, out of whole cloth, the power to consolidate potentially thousands of cases filed around the country in a single court before a single district judge. A half a century later, the MDL statute is playing the central role in a litigation world they accurately predicted.

At least for civil-procedure enthusiasts, the story of the judges’ legislative swashbuckling is compelling in its own right. But the story of MDL is also revealing in important ways, particularly if one approaches procedure from the perspective that it is primarily about power—in Stephen Burbank’s words, “who has it and who should have it both in litigation and in making the rules for litigation.”<sup>388</sup> Here, a small group of judges engineered a transfer of power in large litigations from parties and district judges in individual cases around the country to themselves as members of the newly formed Judicial Panel on Multidistrict Litigation and the MDL judges the Panel selected. The MDL statute was an intentional power grab, accomplished at an especially opportune moment. The judges knew this, and they took full advantage of their success in the electrical-equipment cases and the perception of an imminent litigation crisis.<sup>389</sup> As believers in judicial control of cases, they believed that litigants, particularly defendants

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<sup>386</sup> Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001, 1005 n.22 (1974) (describing the membership of the original panel).

<sup>387</sup> *Congress Passes Bill to Speed Up Handling of Similar Civil Suits*, WALL ST. J., Mar. 20, 1968.

<sup>388</sup> Burbank, *supra* note 36, at 513.

<sup>389</sup> It is noteworthy that the MDL judges’ reaction to a litigation explosion was to create a statute facilitating litigation rather than attempting to shut it out, as would be the typical response to such claims beginning in the 1970s. *See id.* at 515. *See also* Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1890 (2014) (describing the “tort reform” movement’s efforts “vigorously and systematically to blame most of America’s woes on a frightening, unjustified, and greed-inspired ‘litigation explosion’” and to support “a broad range of legislative and judicial reform measures designed to drive plaintiffs from the courts”).

who enjoyed war-of-attrition-like advantages from delay, and uncooperative judges who were not believers in active case management simply could not be in charge. Rather power had to be centralized before judges who could manage cases to a conclusion, as was accomplished in the mass settlements of the electrical-equipment cases.

To say that MDL was a power grab is not to cast aspersions on the judges' good intentions. Nor is it to say that they paved the road to hell. Effective administration of justice and our commitment to private enforcement of the law require some mechanism to aggregate large numbers of cases, particularly in a system with limited judicial resources.<sup>390</sup> Whether MDL is preferable to other available alternatives is an open question, and that debate is dynamic and ongoing.<sup>391</sup> But what the history should lay to rest are any perceptions that the ambitions of the statute and its creators were modest. To the contrary, their aims were nothing short of changing the way the courts process what they believed would be the lion's share of federal civil cases.

Moreover, to achieve this expansive vision, the judges were willing to go to great lengths. Although they were successful, some of their tactical maneuvers should nevertheless give us pause. That the judges entered the legislative fray is not itself a problem. Judges' participation in lawmaking is inevitable.<sup>392</sup> And it is particularly beneficial when it comes to matters of procedure, in which judges have particular expertise and a stake in the outcome.<sup>393</sup> Dialogue between the branches on issues of court administration is salutary, especially when one recognizes that Congressional acts increasing litigation may place burdens on courts

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<sup>390</sup> See, e.g., COFFEE, *supra* note 4, at 98 (noting courts' "determination to find a solution, indeed any solution, to impending caseload crisis that they perceived mass torts to pose for them"); Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 *FORDHAM L. REV.* 1177, 1186 (2010) (noting the benefits of aggregate settlements).

<sup>391</sup> See Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 *B.U. L. REV.* 1155, 1165 (2006); See *Cimino v. Raymark Indus.* 751 F. Supp. 649, 652 (E.D. Tex. 1990) (reflecting that if a right to trial is insisted upon in mass-tort cases, that means "these cases will never be tried").

<sup>392</sup> See, e.g., Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 *N.Y.U. L. REV.* 1165, 1168 (1996) ("Judges have always played an important extrajudicial role in the legislative process by proposing, drafting, testifying on, and lobbying for and against innumerable proposals regulating or affecting court operations.").

<sup>393</sup> Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why & When?*, 49 *ALA. L. REV.* 221, 222 (1997) (emphasizing the "importance of early and ongoing cooperation between the federal judiciary and the Congress in responding to calls for procedural change"); CHRISTOPHER E. SMITH, *JUDICIAL SELF INTEREST: FEDERAL JUDGES AND COURT ADMINISTRATION* 9-11 (1995) (noting judges' "tremendous influence" in matters of procedure).

without sufficient accompanying resource allocations.<sup>394</sup> Such dialogue also enhances interbranch relations and may lead to better procedural law.<sup>395</sup> More generally, to criticize the judges for lobbying Congress ignores the reality that judges regularly lobby Congress.<sup>396</sup> As Judith Resnik's work on the development of the Judicial Conference and Administrative Office demonstrates, the judiciary has long been an active political player.<sup>397</sup> So anyone shocked by the judges' tactics in this case might also have been shocked to learn that there was gambling going on at Rick's Café Americain.<sup>398</sup>

But that does not mean that some of the judges' actions did not cross the line of acceptable judicial lobbying. And even if one embraces judicial involvement in legislation, when judges do step into the political thicket they put themselves in, as Charles Geyh describes it, a "precarious position."<sup>399</sup> When they lobby Congress, judges shed their role of neutral arbiter and act as an interest group.<sup>400</sup> And if they are lobbying for legislation that enhances their own power at the expense of litigants and has

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<sup>394</sup> Robert A. Katzmann, *The Underlying Concerns* in ROBERT A. KATZMANN, JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 8 (Robert A. Katzmann, ed. 1988) (describing the dynamic of Congressional actions increasing court activity without additional appropriations); Roger E. Hartley, *It's Called Lunch: Judicial Ethics and the Political and Legal Space for the Judiciary to Lobby*, 56 ARIZ. L. REV. 383, 389-90 (2014).

<sup>395</sup> Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. L.J. 909, 911 (2007) (arguing that judicial involvement in politics is inevitable and necessary: "the critical role that politics of a certain sort must play in the work of courts and the judiciary if they are to continue to serve as the guardians of our fundamental rights"); Deanell Reece Tacha, *Judges and Legislators: Renewing the Relationship*, 52 OHIO ST. L.J. 279 (1991) (arguing for "systematic dialogue between those who make and those who interpret legislation.").

<sup>396</sup> Russell R. Wheeler & Robert A. Katzmann, *A Primer on Interbranch Relations*, 95 GEO. L.J. 1155, 1160 (2007); John W. Winkle, *Interbranch Politics: The Administrative Office of the U.S. Courts as Liaison*, 24 JUST. SYS. J. 43, 48 (2003).

<sup>397</sup> See, e.g., Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269, 288 (2000) ("the last forty years of Judicial Conference reports offer many examples of policymaking—acts of 'political will' that judges routinely as adjudicators claim to be beyond their ken").

<sup>398</sup> *Casablanca* (Warner Bros. 1942).

<sup>399</sup> Geyh, *supra* note 392, at 1170; Burbank, *supra* note 395, at 917 (noting judges' dilemma: "participating in a political system without becoming a victim of politics"); Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269, 289 (2000) (judicial involvement in legislation is "an act of redefining the identity of the Third Branch").

<sup>400</sup> SMITH, *supra* note 393, at 18 ("dependence on legislative action forces [judges] to engage in the kinds of political strategies, such as lobbying and persuasion, that other interest parties employ when seeking beneficial legislation"); FISH, *supra* note 71, at 432 ("To obtain favorable legislative action, judges, behaving like interest groups, generally must take the initiative.").

the effect of reducing their caseload, they run the risk of sacrificing their legitimacy and independence, which relies in part on perceptions of their remaining above the fray even when their interests and the public's overlap.<sup>401</sup> Here, the judges were very much in the fray, and they were rather aggressive. Some of their activities, such as drafting legislation, testifying in Congressional hearings, and engaging in a letter-writing campaign are wholly unobjectionable.<sup>402</sup> But trumpeting extensive cooperation with lawyers when it barely happened, undermining lawyers' credibility in private memoranda to Senate committees, and strong-arming lawyers who would likely appear before them face to face are all actions that might rightly make us queasy.<sup>403</sup> Ultimately, of course, the judges succeeded in their aims. And, scholarly criticism notwithstanding, the judges' product has been impervious to any threat to its legitimacy. But Judge Becker's papers reveal that the judges were willing to throw sharp elbows to succeed.

One should be hesitant, however, to extrapolate from the judges' conduct lessons about the proper role for judges in procedural lawmaking, if for no other reason than that the landscape of procedural lawmaking is quite different today. The judges launched MDL at a moment when Judicial Conference influence was at its height,<sup>404</sup> and when the Congress was well disposed to initiatives that enhanced private litigation to enforce the substantive law.<sup>405</sup> The judges' efforts also came at the end of the period when procedure could masquerade as mere "adjective" law, or as the "handmaiden" of the substantive law.<sup>406</sup> Beginning with the clash over the

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<sup>401</sup> Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rules: Comment on Macey*, 23 J. LEGAL STUD. 647, 654 (1994) (explaining how judges' self interest and public interest overlap); Christopher E. Smith, *Judicial Lobbying and Court Reform: U.S. Magistrate Judges and the Judicial Improvements Act of 1990*, U. ARK. LITTLE ROCK L. REV. 163 (1991) ("strategic political activity by judges aimed at influencing legislation may negatively influence popular respect for, and confidence in, courts.").

<sup>402</sup> Geyh, *supra* note 392, at 1210 ("Congress needs the judiciary's expertise to make informed legislative choices, and the judiciary needs informed legislative choices to maintain control of its dockets and preserve the integrity of the judicial process.").

<sup>403</sup> See, e.g., Stephen C. Yeazell, *Judging Judges, Judging Rules*, 61 LAW & CONTEMP. PROBS. 229 (1998) ("When judges rather than lawyers frame rules by which they will decide between litigants, judges open themselves to criticism and the perception of partiality. That perception becomes acute when the judge decides an issue under a rule that grants the court broad powers of discretion.").

<sup>404</sup> Russell Wheeler, *Empirical Research and Politics of Judicial Administration*, 51 LAW & CONTEMP. PROBS. 31, 52-53 (1988); Fish, *supra* note 71, at 301.

<sup>405</sup> Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1542, 1547 (2014); SEAN FARHANG, *THE LITIGATION STATE* 233 (2010); ROBERT A. KAGAN, *ADVERSARIAL LEGALISM* 47 (2001) (describing increase in federal statutes relying on private enforcement).

<sup>406</sup> Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic*

Federal Rules of Evidence in 1973 and the unexpected explosion of class actions, that myth was exploded.<sup>407</sup> It is fair to say that Congress is now well aware of the power of procedure—and even its political salience. Efforts at so-called litigation reform are now “political footballs” providing point-scoring opportunities.<sup>408</sup> In the 1960s, the judges’ actions—important as they were—could still generally fly under the radar.

Also, notably, the process of procedural lawmaking is now much more open than the 1960s. The world of MDL, and of the original 1938 Federal Rules for that matter, in which a small insider group of academics and lawyers created a new procedural system behind closed doors, is a thing of the past, as is the relative homogeneity of demography and interest among federal judges and the federal-court bar.<sup>409</sup> At the time leading up to the MDL statute, federal judges and the lawyers who appeared before them were remarkably philosophically aligned, but the fight over MDL revealed early cleavages between the bench and the bar, especially the defense bar, whose complaints about plaintiffs’ lawyers run amok would soon be heard, and acted upon, by Chief Justice Burger.<sup>410</sup>

Now, by virtue of the 1988 amendments to the Rules Enabling Act, the process of Supreme Court rulemaking—and by extension Congressional procedural legislating—has become far more transparent and participatory.<sup>411</sup> And, as the flood of comments on the recent amendments to the discovery rules demonstrates, changes in procedural law attract the attention and resources of those potentially affected, on both sides of the proverbial “v.”<sup>412</sup> Although one might lament the challenges associated with the new world of procedural lawmaking, “politicization” is not an epithet.<sup>413</sup> Open participation of potentially impacted groups is a necessary corollary to the recognition of the power of procedure.<sup>414</sup> And the

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*Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 896-903 (1999).

<sup>407</sup> Stephen B. Burbank, *Procedure, Politics, and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1674 (2004) (describing “dramatic changes in Congress’s attitudes toward procedural lawmaking” after 1973); Geyh, *supra* note 392, at 1187.

<sup>408</sup> Burbank, *supra* note 36, at 516 (observing that by the 90s “civil justice reform” was a “political football”).

<sup>409</sup> Burbank, *supra* note 407, at 1722.

<sup>410</sup> Burbank & Farhang, *supra* note 405, at 1588.

<sup>411</sup> *Id.* at 1593 (describing the 1988 amendments to the Enabling Act).

<sup>412</sup> Richard Marcus, *How to Steer an Ocean Liner*, 18 LEWIS & CLARK L. REV. 615, 616 (2014) (noting that proposed amendments “attracted 2300 public comments and also produced three oversubscribed public hearings”).

<sup>413</sup> Martin H. Redish and Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules*, 90 MINN. L. REV. 1303, 1334 (2006).

<sup>414</sup> *Id.* at 1305 (describing supposed dichotomy between procedure and substance is “political nonsense”); Bone, *supra* note 406, at 903 (describing increased interest-group activity at all stages of rulemaking).

politicization of rulemaking became inevitable in any event once Congress woke up to the fact that it “holds the cards” when it comes to procedural law.<sup>415</sup> The story of MDL is therefore an artifact from a different world.

But while the circumstances surrounding the passage of MDL may belong to a different time, MDL of course exists in the present. And to express qualms about the judges’ methods in advancing the bill does not diminish the impact of the statute. Current criticisms of MDL suggest that the statute was intended to be used rarely, or that MDL was a modest procedural innovation whose powers have been expanded out of proportion by imperialistic district judges like Jack Weinstein or Eldon Fallon.<sup>416</sup> It is easy to understand why this is the common perception. The drafters intentionally pitched the statute as one to be used only in exceptional circumstances, and current MDL judges are innovating at a rapid clip without much in the way of formal limitations on their power. But the history demonstrates that the judges who developed the statute did not intend it to play a limited role or for MDL judges to feel hemmed in.

For one thing, the judges believed MDL would be invoked regularly in all subjects of cases as mass torts would become the grist of the federal-litigation mill; that was one reason Judge Becker opposed amendments to the statute that would restrict its use. Nor was MDL exclusively about discovery; the judges insisted from the beginning that the MDL court must have the power to grant dispositive motions. MDL was about judges’ having complete control over cases to bring them to a conclusion, as they had in the electrical-equipment litigation. Moreover, the goals of the drafters were to ensure flexibility in the hands of the district judge assigned to MDL cases. There is a live debate over whether judges are using the power created by the MDL statute in a beneficial way and whether the MDL statute is consistent with principles of due process, but the debate should not be about whether the judges’ use of the statute is inconsistent with its drafters’ intent. In short, MDL is currently playing the role its drafters intended.

Beyond restoring the ambitious aims of the statute’s drafters to the conversation, one final aspect of the creation of MDL that must be emphasized is the drafters’ early understanding of the dynamic of how aggregation can be tolerated in American litigation. The central problem in aggregate litigation is balancing the persistent need for efficient processing of claims in a system that relies on litigation for enforcement of rights with the foundational American norms of individual participation and a day in court.<sup>417</sup> The damages class action—and its later use in the service of global

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<sup>415</sup> Burbank, *supra* note 407, at 1678.

<sup>416</sup> *Supra* notes 23—25, and accompanying text.

<sup>417</sup> Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context:*

settlement—has proved to be too blunt a tool, at least according to the Supreme Court.<sup>418</sup> As a result, unless something unexpected happens, the experiment in mass-tort class actions spawned by the 1966 Rule 23 amendments is coming to an end.<sup>419</sup> But the need for aggregation—by litigants on both sides and the courts—remains. MDL fills that gap. And, despite continuing scholarly critique, MDL remains unmolested by due-process attack.<sup>420</sup>

The question of what makes MDL work—and in what respects it doesn't—is fertile ground for future research on theoretical and empirical fronts. But as a matter of doctrine, one aspect of MDL that renders it palatable in a way damages class actions are not is its accommodation of traditional American litigation norms of individual and decentralized control.<sup>421</sup> Unlike a class action, there are no absentees in an MDL; every party has filed her own case in the forum of her choice and is represented by a lawyer of her own choosing. The cases retain their individual identities within the mass and remain governed by the law that would be applicable had they remained in their original forum.<sup>422</sup> And, perhaps most

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*A Preliminary View*, 156 U. PA. L. REV. 1439, 1484 (2008) (detailing “the most critical dilemma of modern procedure, that is, how to provide sufficient access to court in a society that depends heavily on private litigation for compensation for injury and the enforcement of important social norms with (1) fidelity to those norms, (2) due attention to the interests of litigants and others affected by litigation, and (3) adequate attention to the limited capacity of American courts”).

<sup>418</sup> COFFEE, *supra* note 4, at 114 (describing the Supreme Court’s “basic message was that sprawling classes could not be certified”); Sherman, *supra* note 17, at 2212 (contending that the class action had “bitten off too much”); *see also* Robert Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013).

<sup>419</sup> COFFEE, *supra* note 4, at 2 (arguing that the class action’s “dismantling appears to be the major procedural project of the contemporary Supreme Court in the twenty-first century”).

<sup>420</sup> Redish & Karaba, *supra* note 18, at 115 (2015); R. Marcus, *supra* note 11, at 2248 (noting that MDL has “not caused the same kind of controversy the class action produced”).

<sup>421</sup> Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867, 1870 (2000) (“The model of one-by-one resolution of each individual’s rights in the context of our system of federalism is the predominant model. Circumventing those principles, even if it means a more efficient overall outcome, is not acceptable.”); Yeazell, *supra* note 29, at 268 (“The roots of the difficulty lie in a tension basic to modern and legal political thought: a belief in individual autonomy and a desire to achieve forms of political and economic organization incompatible with strong individual autonomy.”).

<sup>422</sup> Bradt, *supra* note 10, at 762 (describing how cases within MDL “retain their individual character”); Jeremy T. Grabill, *The Pesky Persistence of Class Action Tolling in Mass Tort Multidistrict Litigation*, 74 LA. L. REV. 433, 457 (2014) (noting that “MDL consolidation of related lawsuits does not merge the suits into one massive case”); Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918, 933 (1995)

importantly, there is the prospect of return to the forum whence they came for trial, something a party may always demand. All of this notwithstanding, MDL's look a great deal like class actions from the ground. The cases proceed en masse, directed by lead lawyers appointed to steering committees and paid from a common fund. Case-management orders apply universally to all of the cases, as do the orders on many motions, including dispositive motions like those brought under Rule 12(b)(6) and near-dispositive motions like those to exclude an expert witness. And, most importantly, most MDLs are resolved by global settlement, settlements which can sometimes be quite coercive. Perhaps the most controversial example is the Vioxx settlement, which required lawyers for plaintiffs to inform their clients that they would withdraw from the representation if the clients chose to go to trial.<sup>423</sup> Indeed, large MDLs are so much like class actions that judges have taken to referring to them as quasi-class-actions.

Yet, unlike class actions, courts have accepted MDL. There are numerous reasons for this, the most important of which is likely how MDL accommodates the interests of powerful repeat players.<sup>424</sup> But another reason is that MDL's incorporation of traditional norms of individual control insulate the structure from the kinds of due-process attacks that plagued the class action.<sup>425</sup> And it is these features of individual control that facilitate the aggressive consolidation that the statute provides.

One contribution of this paper is to demonstrate that the people who created the statute understood this dynamic well. The judges behind MDL intended to centralize power over national litigation in the hands of a single judge who could control cases and manage them to a resolution. In so doing, that judge would keep the federal judicial system going in the face of a litigation explosion. The judges understood both that complete transfer of cases would face "massive resistance" from both lawyers and judges. But they also believed that consolidation must be ironclad and not vulnerable to opt out by parties who wanted to go it alone. Their solution was the MDL structure, a device that preserved individual control enough to give cover to the centralization of control they thought necessary. That centralization of control troubles critics because the statute alone seems to provide no

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(describing the "ongoing rhetorical commitment to individual processing" in MDL).

<sup>423</sup> See Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 218.

<sup>424</sup> See Mullenix, *supra* note 18, at 421 (describing how "the interest of the plaintiff and defense bars (and the judiciary) converged to encourage development" of MDL as an alternative to class actions).

<sup>425</sup> See Marcus, *supra* note 11, at 2259 (describing how MDL's "preference for individual judicial administration reflects a distinctive feature of the American judicial attitude").

meaningful limits on the power of the MDL judge, at least so long as the case remains in the pretrial phase. But the judges who built the statute, as proponents of active case management, understood that pretrial was the main event. Now, in a litigation universe dominated by MDL, there may be good reason to applaud and criticize what the drafters created, but commentators should begin the conversation with a clear-eyed appraisal of what the statute is – a device intended to concentrate judicial power.

#### CONCLUSION

With the demise of the mass-tort class action, multidistrict litigation is now in the spotlight as the key mechanism facilitating mass-tort litigation in the federal and state courts. But with success comes attention, and MDL's ascendance has brought significant criticism. One aspect of this criticism is that judges exercising imperial control over national litigation are acting beyond the scope of the statute, a modest tweak to the venue rules that fifty years after passage is now being abused. This paper goes back to the roots of the MDL statute to examine the intentions of the small group that created it and the methods they used to manage its passage without a single dissenting vote in Congress. The judges' contemporaneous papers demonstrate that, far from a modest tweak, they intended MDL to be an ambitious statute designed to transfer power over dispersed nationwide litigation from the hands of litigants and many judges into the hands of a single judge who could shepherd the litigation to a final resolution. The statute's proponents thought such power was necessary in order to avoid the federal courts' becoming overwhelmed by a coming "litigation explosion" primarily sparked by an increase in mass-tort cases. They were remarkably prescient: the explosion in mass tort did come, and after a long period of class-action dominance, the MDL statute is now playing essentially the role they expected it would.

Perhaps the last word should go to Judge Becker, speaking in 1972 about how the electrical-equipment litigation spawned a "revolution in the national administration of civil justice."<sup>426</sup> He added:

From a perspective, it seems to me that the most significant and least noted event in the history of the electrical equipment litigation was the sudden and inescapable realization that in these times we cannot afford the concept of a provincial bar and a provincial judiciary. Under the pressure of the circumstances, the Bar was treated

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<sup>426</sup> William H. Becker, *Modern Pretrial Practice in Complex Cases*, 41 ANTITRUST L.J. 581, 583 (1972).

as a national bar, guided by voluntarily formed national steering committees and freely permitted to act in any district of the nation. Under the same pressures the federal judges were treated as a national, rather than provincial, resource to be deployed and employed where and when needed.<sup>427</sup>

It is fair to say that Judge Becker's revolution persists.

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<sup>427</sup> *Id.*