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## ARTICLE

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

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*One of the central stories in current procedural law is the recent and rapid ascendance of federal multidistrict litigation, or, as it is commonly known, MDL. 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 MDL statute beyond its modest ambitions. But what were the original purposes of MDL, and where did the statute come from? This Article 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*

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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 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,

<sup>1</sup> 28 U.S.C. § 1407 (2012).

<sup>2</sup> See, e.g., 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”); Howard M. Erichson, *Symposium: Multidistrict*

scholars have characterized the device, commonly referred to as “MDL,” as an obscure device or “disfavored judicial backwater.”<sup>3</sup>

To the extent MDL was ever 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 with 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 June 2014, 36% of all filed federal civil 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 been considered by some courts, at least for a brief period, as appropriate subjects for class actions.<sup>7</sup> As astute an observer as Professor John Coffee has

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*Litigation and Aggregation Alternatives*, 31 SETON HALL L. REV. 877, 881 (2001) (suggesting that MDL “cannot be understood without reference to . . . the class action”); Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883, 885 (2001) (noting that “[m]uch of the attention civil procedure scholars have accorded mass torts” had focused on the class action mechanism); Judith Resnik, *From “Cases” to “Litigation,”* LAW & CONTEMP. PROBS., Summer 1991, at 5, 29-35 [hereinafter Judith Resnik, *From “Cases” to “Litigation”*] (explaining the importance of MDL while noting its “relative absence (until recently) from the academic literature on federal procedure”).

<sup>3</sup> Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 552 (2013) [hereinafter Mullenix, *Aggregate Litigation*]; see also DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL § 1:1 (2006) (describing the Judicial Panel on Multidistrict Litigation’s “relative inconspicuousness” and “obscurity in the vast majority of cases”).

<sup>4</sup> See JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE 132 (2015) (“[A]fter 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 Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1507 (2008) [hereinafter Burbank, *CFAA in Historical Context*] (describing how “the federal appellate courts pretty quickly put an end” to mass-tort class actions and how “the Supreme Court made it very 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, 1346-47 (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. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 798 (2010) (discussing the “massive increase in MDL aggregate litigation” in federal courts that occurred from 2004–2008).

<sup>6</sup> See MDL STANDARDS AND BEST PRACTICES x (DUKE LAW CTR. FOR JUDICIAL STUDIES, Proposed Draft 2014), [https://law.duke.edu/sites/default/files/centers/judicialstudies/MDL\\_Standards\\_and\\_Best\\_Practices\\_2014-REVISED.pdf](https://law.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf) [<https://perma.cc/9X4U-8N4Q>] (listing these statistics); see also Emery G. Lee III et al., *Multidistrict Centralization: An Empirical Examination*, 12 J. EMPIRICAL LEGAL STUD. 211, 221-22 (2015) (showing the increase in the Panel’s caseload from 1968 to 2012).

<sup>7</sup> See Thomas Metzloff, *The MDL Vortex Revisited*, 99 JUDICATURE 36, 40 (2015) (explaining that MDL is “in fact dominated by mass-tort cases at a remarkable level”); see also Richard Marcus, *Bending in the Breeze: American Class Actions in the Twenty-First Century*, 65 DEPAUL L. REV. 497, 503-04 (2016) [hereinafter R. Marcus, *Bending in the Breeze*] (describing the brief “golden age” of mass-tort class actions).

lauded the rise of MDL, while saying that “[t]his achievement may have been the product of dumb luck, because the [Judicial Panel on Multidistrict Litigation] was created before the modern class action even arose.”<sup>8</sup>

The central aim of this Article is to demonstrate that the preeminence of MDL is not the product of dumb luck, but a realized ambition. 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 the judges 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 Congress, and eventually overcoming resistance from corporate defense lawyers who sought to kill the proposal. As those current federal litigation statistics amply demonstrate, their project was remarkably successful. Not only were the judges ahead of their time, their creation was built to last. Some fifty years later, 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-much-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.”<sup>9</sup> After pretrial proceedings are concluded, the statute mandates that cases be remanded to the courts from which they were transferred for trial.<sup>10</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

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<sup>8</sup> COFFEE, JR., *supra* note 4, at 155; *see also* Richard Marcus, *America’s Dynamic and Extensive Experience with Collective Litigation* (“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.”), in *RESOLVING MASS DISPUTES: ADR AND SETTLEMENT OF MASS CLAIMS* 148, 166 (Christopher Hodges & Astrid Stadler, eds., 2013).

<sup>9</sup> 28 U.S.C. § 1407(a) (2012).

<sup>10</sup> *Id.*; *see also* *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 34 (1998) (affirming that § 1407 “obligates the Panel to remand any pending case to its originating court when . . . pretrial proceedings have run their course”).

pretrial proceedings conclude, that is, while they are within the control of the MDL judge.<sup>11</sup> In a world where trials are exceedingly rare, pretrial proceedings are the main event.<sup>12</sup>

In sum, this structure makes MDL, according to one prominent federal district judge, "a 'once-in-a-lifetime' opportunity for the 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>13</sup> Indeed, as another prominent district judge has described it, "[I]t 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>14</sup> While the concept of the "settlement class" under Rule 23(b)(3) has withered under Supreme Court scrutiny and after the passage of the Class Action Fairness Act of 2005, MDL has begun to accomplish essentially the same end.<sup>15</sup>

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>16</sup>

<sup>11</sup> Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 400-01 (2014) [hereinafter Burch, *Remanding Multidistrict Litigation*]. 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. Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 759 (2012).

<sup>12</sup> See Marc A. Galanter & Angela M. Frozema, *A Grin Without A Cat: The Continuing Decline & Displacement of Trials in American Courts*, DAEDALUS, Summer 2014, at 121 (explaining how "the decline [in trials] has become institutionalized in the practices and expectations of judges, administrators, lawyers, and parties").

<sup>13</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) [hereinafter R. Marcus, *Cure-All*] (describing how MDL allows for "order [to] be produced 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 a "dominant consideration" for courts in MDL).

<sup>14</sup> *DeLaventura v. Columbia Acorn Tr.*, 417 F. Supp. 2d 147, 152 (D. Mass. 2006).

<sup>15</sup> See COFFEE, JR., *supra* note 4, at 116 (describing MDL as "group litigation that is the functional equivalent to a class action [that] has come to supplant the class action in the mass tort field"); Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers' Powers*, 79 GEO WASH. L. REV. 628, 657 (2011) ("[T]he MDL process helped to make plausible the bundling of mass torts."); Willging & Lee, *supra* note 5, at 801 (citing empirical evidence "suggest[ing] that the MDL process has supplemented and perhaps displaced the class action device as a procedural mechanism for large settlements").

<sup>16</sup> See John G. Heyburn II & Francis E. McGovern, *Evaluating and Improving the MDL Process*, LITIGATION, Summer/Fall 2012, at 26, 26 ("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 the benefits to plaintiffs and defendants of aggregation).

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 through settlement.<sup>17</sup> And, for judges, the power of MDL to vacuum thousands of cases filed nationwide into one courtroom carries significant docket-clearing benefits.<sup>18</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>19</sup> But others contend that MDL is a raw deal for individual plaintiffs, who, compared to those in a class action, have fewer formal protections from unfairness but equally little control over the day-to-day conduct of the litigation.<sup>20</sup> For instance, although an MDL is not a 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>21</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>22</sup> In addition,

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<sup>17</sup> See Burch, *Remanding Multidistrict Litigation*, *supra* note 11, at 414 ("Centralization likewise advantages defendants by making meaningful closure possible through a global settlement.").

<sup>18</sup> See, e.g., Fallon et al., *supra* note 13, at 2337-42, (describing the benefits of establishing a centralized forum where cases can be litigated and the courts' interest in promoting effective pretrial discovery); Edward F. Sherman, *When Remand Is Appropriate in Multidistrict Litigation*, 75 LA. L. REV. 455, 470 (2014) (describing judges' view of MDL as "reducing the costs in both time and money of full-bore individual litigation").

<sup>19</sup> See COFFEE, JR., *supra* note 4, at 155 ("[T]he most successful step taken in the administration of aggregate litigation in the United States was the creation of the JPML in 1968 . . ."); Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2209 (2008) [hereinafter Sherman, *The MDL Model*] (defending MDL as achieving the efficiencies of a class action within a "looser and more flexible structure").

<sup>20</sup> See Elizabeth Chamblee Burch, *Aggregation, Community, and the Line Between*, 58 U. KAN. L. REV. 889, 898 (2010) [hereinafter Burch, *Aggregation*] (describing MDL as "a procedural no man's land"); Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 391 (2011) [hereinafter Mullenix, *Dubious Doctrines*] (arguing that MDL "has stripped away protections afforded by [the] class action"); Martin H. Redish & Julie M. 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) ("[T]he current practice of MDL actually makes the modern class action appear to be the pinnacle of procedural due process by comparison.").

<sup>21</sup> See, e.g., Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 994 (2012) ("[A] plaintiff drawn into MDL proceedings has little power to opt out in any meaningful sense."); Redish & Karaba, *supra* note 20, at 111 (noting that "all MDLs are mandatory" (emphasis in original)).

<sup>22</sup> See Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 73 (2015) [hereinafter Burch, *Judging Multidistrict Litigation*] (describing the importance of steering committees); Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in*

unlike a class action, there is no requirement that a judge review a settlement for fairness.<sup>23</sup> But judges nevertheless play an active role in brokering global settlement deals, and some of those agreements (most notably in the massive set of cases arising from the use of the drug Vioxx) have been criticized as unduly coercive to the individual plaintiffs.<sup>24</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>25</sup>

Underlying both the criticism and laurels is the sense that MDL was never intended to play the leading role it now does and has been impressed into service as a second-best, jury-rigged alternative to the now-unavailable class action.<sup>26</sup> Dotting these assessments is the perception that MDL “has clearly become much more important than was envisioned by Congress back in the 1960s,”<sup>27</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>28</sup> Given MDL’s recent ascendance, and the sparseness of the legislative history, this perception is wholly understandable. The MDL statute attracted very little controversy

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*Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 541 [hereinafter Erichson, *Beyond the Class Action*] (finding that MDL committees “dominate the conduct of pretrial litigation”).

23 Compare 28 U.S.C. § 1407(a) (2012), with FED. R. CIV. P. 23(e) (demonstrating the difference in the review process for MDL and class actions with respect to a judge’s ability to review settlements for fairness).

24 See Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979, 1000-04 (2010) (describing how, almost immediately after the Vioxx settlement “was announced, legal ethicists voiced concerns” about the agreement); see also Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 218 (describing the “novel” nature of the Vioxx settlement, which extended offers to settle individually, but which required all clients to accept for the offer to be valid).

25 See Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 111 (2010) (“[J]udges 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 clients well.”).

26 See, e.g., Jeremy T. Grabill, *The Pesky Persistence of Class Action Tolling in Mass Tort Multidistrict Litigation*, 74 LA. L. REV. 433, 457 (2014) (“MDL consolidation merely brings related lawsuits before one judge so that they can be organized and managed collectively to avoid the need to conduct duplicative discovery.”); Mullenix, *Aggregate Litigation*, *supra* note 3, at 553 (contending that parties and courts are “manipulating MDL procedure to accomplish ends the mechanism was never intended to perform”).

27 RICHARD L. MARCUS, EDWARD F. SHERMAN, & HOWARD M. ERICHSON, *COMPLEX LITIGATION* 140 (5th ed. 2010); see also Metzloff, *supra* note 7, at 38 (contending that MDL “was anticipated to be the exception rather than the rule”); Mullenix, *Dubious Doctrines*, *supra* note 20, at 424-25 (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, *The MDL Model*, *supra* note 19, at 2205 (describing MDL as a “modest procedural development”).

28 See Mullenix, *Dubious Doctrines*, *supra* note 20, 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 the lack of “systematic judicial or other regulatory oversight” of settlements reached in MDL cases).

after it passed in 1968 and not much public attention for decades thereafter.<sup>29</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>30</sup>

But the story of MDL 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,<sup>31</sup> relatively little has been written about the development of the Multidistrict Litigation Act of 1968 beyond review of its meager legislative history. Indeed, there was almost no debate in Congress; after languishing in committee for several years, the Act suddenly passed on the consent calendar of both houses with no dissenting votes.<sup>32</sup> And the idea of transfer to a different district for pretrial proceedings seems to have appeared almost out of thin air, with no pedigree in procedure at law or equity.

This Article 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<sup>33</sup> and Dean Phil C. Neal of the University of Chicago Law School.<sup>34</sup> Becker was the chairman of the Coordinating Committee on Multiple Litigation (the Committee), 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 the dean of the University of Chicago Law School, was the Committee's executive secretary. These two men, along with Chief Judge Alfred Murrah of the Tenth Circuit Court of Appeals and Judge Edwin Robson of the Northern District of Illinois,

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<sup>29</sup> See Resnik, *From "Cases" to "Litigation," 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>30</sup> Cf. Howard M. Erichson, *The Role of the Judge in Non-Class Settlements*, 90 WASH. U. L. REV. 1015, 1018-20 (2013) (explaining how MDLs figure into the settlement of mass disputes).

<sup>31</sup> See generally David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953-1980*, 90 WASH. U. L. REV. 587 (2013) (describing the history and use of Rule 23 from 1953 to 1980); John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. C. L. REV. 323 (2005) (providing an account of the 1996, 1998, and 2003 amendments to Rule 23). Histories of the class action's development prior to the amendments are also comprehensive. See generally STEPHEN C. YEAZELL: FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 238-66 (1987) (describing the legislative history of Rule 23 and detailing in particular the actions of the advisory committee).

<sup>32</sup> See 90 CONG. REC. 4927-28 (March 4, 1968) (recording how "the rules were suspended and the bill, as amended, was passed").

<sup>33</sup> Papers of Judge William H. Becker, Chairman, Coordinating Committee on Multiple Litigation, 1962-1968 (on file at the National Archives at Kansas City, Records of the Administrative Office of the United States Courts, Record Group 116). 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].

<sup>34</sup> Papers of Phil C. Neal, Dean, University of Chicago Law School, Chicago, IL [hereinafter Neal Papers] (on file at the University of Chicago Library, Special Collections Research Center).

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. Nor did they intend its use to be 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 with the 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—an explosion caused by booms in population, technology, and expanded rights of action created by 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, these judges believed that individual litigants and judges could not be left in charge of litigation. Litigants—and in particular 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 single and active judge—specifically a judge committed to strong pretrial case management who would direct the conduct of the nationwide litigation from the bench.

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 in which the norms were party control of the course of litigation and decentralized district courts with little national coordination. The papers reveal the judges 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. The transfer structure might also, however, create the necessary central control for a single judge to manage the litigation.<sup>35</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 quite savvy. First, they understood that such a significant departure from past practice would have to be embodied in a

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<sup>35</sup> See *infra* Part III.

statute, not a Federal Rule of Civil Procedure, which could be vulnerable to challenge under the Rules Enabling Act.<sup>36</sup> Second, they understood the necessity of achieving support of the Judicial Conference and Department of Justice.<sup>37</sup> And third, the judges realized that in order 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.<sup>38</sup> Therefore, 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.<sup>39</sup> The lawyers' change of heart, perhaps due to the judges finally 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 (the Panel).<sup>40</sup> The Panel, in turn, was staffed primarily by the men who drafted the statute.<sup>41</sup>

In telling this story, this Article makes three primary contributions. First, it describes for the first time the development and passage of MDL. Becker's 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. Congress was well disposed to reforms in judicial administration that would enhance 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 the 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 the Act today in a litigation world that is admittedly quite

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<sup>36</sup> See *infra* text accompanying notes 249–54.

<sup>37</sup> See *infra* subsections III.C., IV.A.

<sup>38</sup> See *infra* subsection IV.B.

<sup>39</sup> See *infra* subsection IV.E.

<sup>40</sup> See *infra* subsection IV.F.

<sup>41</sup> See *infra* Part V.

different.<sup>42</sup> But the story of the statute’s origins should disabuse observers 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 Article 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>43</sup> It is the retention of the individual identities of the component lawsuits that gives the doctrinal cover to judges’ control of the litigation. In other words, the patina of individual control within a coercive mechanism is what makes MDL tolerable as a matter of due process. Whether MDL ultimately makes litigants better off than possible alternatives is a subject 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—something its creators understood well.

The Article 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, as well as the electrical-equipment litigation that spawned the committee that wrote the MDL statute. In Parts III and IV, I detail the process of drafting and the passage of the statute, drawing on Becker’s 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 that procedure is about power, both in terms of the law determining who controls litigation and who gets to make that law.<sup>44</sup> The story of MDL is a story about the power of

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<sup>42</sup> See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1026 (1982) [hereinafter Burbank, *The Rules Enabling Act*] (noting, in a different context, that “[o]f course, the history is not a Baedeker”).

<sup>43</sup> See Bradt, *supra* note 11, at 791 (noting that “cases within [an MDL] retain their individual identities”); see also R. Marcus, *Cure-All*, *supra* note 13, at 2265 (noting “an inherent tension in the split authority arrangement Congress built into the statute”).

<sup>44</sup> See Stephen B. Burbank, *Procedure and Power*, 46 J. LEGAL EDUC. 513, 513 (1996) [hereinafter Burbank, *Procedure and Power*] (“[T]he most important developments in federal civil procedure in

procedure. In particular, it is the story of how a small group of judges developed a tool to transfer power in large-scale litigation away from the parties and from 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, except by statutory amendment. 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 just 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>45</sup> To accomplish these transfers, the statute mandates creation of a panel of seven federal judges, appointed by the Chief Justice of the Supreme Court, called the Judicial Panel on Multidistrict Litigation.<sup>46</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>47</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 [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>48</sup> All later-filed cases involving the same subject matter are transferred rather seamlessly as “tagalong cases” to the MDL judge.<sup>49</sup> The Panel’s transfer orders are reviewable only by extraordinary writ;<sup>50</sup> the Panel’s orders denying transfer are not reviewable at all.<sup>51</sup> The statute

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the last ten to fifteen years have concerned power: who has it and who should have it both in litigation and in making the rules for litigation.”).

<sup>45</sup> 28 U.S.C. § 1407 (2012).

<sup>46</sup> *Id.* § 1407(d).

<sup>47</sup> *Id.* § 1407(c).

<sup>48</sup> *Id.* § 1407(a).

<sup>49</sup> See 15 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3865 (4th ed. 2015) (discussing the process for transferring tag-along matters, for which “there is considerable pressure to have . . . transferred expeditiously”).

<sup>50</sup> 28 U.S.C. § 1407(e).

<sup>51</sup> *Id.*

mandates that the cases be remanded to the districts from which they came at the conclusion of pretrial proceedings.<sup>52</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.<sup>53</sup> The result 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>54</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%.<sup>55</sup> Moreover, when cases involving the same subject matter are pending in both federal MDL proceedings and state court MDL analogs, the state court judges often coordinate with and defer to the federal MDL judges to reach a resolution.<sup>56</sup>

Although the MDL statute was little noticed when it was passed in 1968 and remained that way 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 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>57</sup>

Strikingly, 96% of these cases are what are commonly considered “mass tort” cases—that is, tort claims involving similar claims by a large group of

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<sup>52</sup> *Id.* § 1407(a); *see also* *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (affirming that § 1407 “obligates the Panel to remand any pending case to its originating court when . . . pretrial proceedings have run their course”).

<sup>53</sup> *See* Bradt, *supra* note 11, at 788.

<sup>54</sup> *See* Bradt, *supra* note 11, at 790-91.

<sup>55</sup> *See* Burch, *Judging Multidistrict Litigation*, *supra* note 22, at 73 (“[T]ransferee judges have remanded a scant 2.9% of cases to their original districts.”).

<sup>56</sup> *See* Thomas, *supra* note 5, at 1358 (discussing how coordination of analogous state and federal claims “likely involves some persuasion and influence by the MDL judges over their state court colleagues, urging them to follow the MDL court’s lead”).

<sup>57</sup> MDL STANDARDS AND BEST PRACTICES, *supra* note 6, at x-xi.

plaintiffs—and the vast majority of those are state-law products liability cases.<sup>58</sup> Some MDLs are enormous. For instance, the pelvic-mesh product liability cases, consolidated in the Southern District of West Virginia, contain nearly 50,000 cases.<sup>59</sup> Those are at the high end of the spectrum, but there are currently twenty pending MDLs containing more than one thousand component cases, amounting to over 115,000 cases.<sup>60</sup>

Without belaboring the point, 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, were class actions brought in state court.<sup>61</sup> Rule 23(b)(3) 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 Products, Inc. v. Windsor*<sup>62</sup> and *Ortiz v. Fibreboard Corp.*<sup>63</sup> When lawyers turned to comparatively friendly state courts, Congress responded by extending federal jurisdiction over class actions in the Class Action Fairness Act of 2005.<sup>64</sup> The catch-22 created by that combination (there is federal jurisdiction over these class actions, but under Rule 23 they cannot be certified as class

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<sup>58</sup> See Metzloff, *supra* note 7, at 41 (“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>59</sup> See *id.* at 42 tbl.2 (listing MDL No. 2327, Ethicon, Inc., as having 23,569 pending actions and 24,220 historical actions as of March 2015).

<sup>60</sup> See U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT – DISTRIBUTION OF PENDING MDL DOCKETS BY ACTIONS PENDING 6 (2017), [http://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_Actions\\_Pending-January-17-2017.pdf](http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-January-17-2017.pdf) [https://perma.cc/5GZS-3DST]; see also *In re Pelvic Repair Sys. Prod. Liab. Litig.*, MDL Nos. 2187, 2325, 2326, 2327, 2387, 2440, 2511 (S.D. W. Va. 2015).

<sup>61</sup> See R. Marcus, *Bending in the Breeze*, *supra* note 7, at 499-503 (discussing the, albeit brief, “golden age” of class actions).

<sup>62</sup> 521 U.S. 591 (1997).

<sup>63</sup> 527 U.S. 815 (1999). See Burbank, *CAFA in Historical Context*, *supra* note 4, at 1507 (describing how “the federal appellate courts pretty quickly put an end” to mass-tort class actions and how “the Supreme Court made it very difficult for the lower federal courts to certify [mass tort] cases, first under Rule 23(b)(3) in *Amchem*, and then under Rule 23(b)(1) in *Ortiz*”).

<sup>64</sup> See Burbank, *CAFA in Historical Context*, *supra* note 4, at 1494-1509 (discussing the history of, and changes brought by the Class Action Fairness Act to, mass tort and settlement classes in federal court); Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 372-73 (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.”); see also Willging & Lee, *supra* note 5, at 803-04 (comparing the procedural questions raised by MDL to those in the class action context).

actions) created a vacuum for aggregate mass-tort litigation.<sup>65</sup> Hiding in plain sight was the MDL statute, which has emerged as the primary alternative for mass-tort litigation.<sup>66</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, MDL 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>67</sup> From an efficiency standpoint, 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>68</sup> 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 is precisely *because* MDL achieves many of the efficiencies of class actions without all of the procedural protections for absent plaintiffs.<sup>69</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>70</sup> plus show that the common questions predominate over individual questions,<sup>71</sup> demonstrate that the class action is a superior way of proceeding,<sup>72</sup> and provide notice and the opportunity to opt

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<sup>65</sup> See Myriam Gilles, *Tribal Rituals of the MDL: A Comment on Williams, Lee, and Borden, Repeat Players in Multidistrict Litigation*, 5 J. TORT L. 173, 176 (2012) ("MDL proceedings have become an even more active venue for aggregating and resolving mass litigation in the 'post-class action' era . . ."); see generally Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013) (discussing how courts have limited the viability of class actions).

<sup>66</sup> See Burbank, *CAFA in Historical Context*, *supra* note 4, at 1538 (arguing that "CAFA may dry up the market for statewide class actions, leading counsel who understand the dynamics of the MDL process to seek to be the first in line" to file suit (internal citation omitted)); Deborah R. Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Torts*, 26 REV. LITIG. 883, 907 (2007) (discussing the major increase in products liability MDLs); Rubenstein, *supra* note 5, at 144 n.40 ("In the wake of *Anchem* and *Ortiz*, however, MDLs have become *the* forum for resolution of mass tort matters.").

<sup>67</sup> See R. Marcus, *Cure-All*, *supra* note 13, at 2279 (noting MDLs' potential for "resolving dispersed litigation" while registering "prudential concerns and statutory concerns" raised by their operation); Willging & Lee, *supra* note 5, at 803-05 (comparing the procedural protections offered by class actions to MDLs).

<sup>68</sup> See Sherman, *The MDL Model*, *supra* note 19, 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>69</sup> See Burch, *Aggregation*, *supra* note 20, at 898 (describing MDL as "a procedural no man's land" that leaves plaintiffs "without the protections of either" individual or class action litigation).

<sup>70</sup> FED. R. CIV. P. 23(a)(1)-(4); see also GEOFFREY C. HAZARD, JR. ET AL., *CIVIL PROCEDURE* §§ 7.21-7.22 (6th ed. 2011) (discussing Rule 23(a)'s prerequisites and requirements under 23(b)).

<sup>71</sup> FED. R. CIV. P. 23(b)(3).

<sup>72</sup> *Id.*

out to class members.<sup>73</sup> MDL requires none of that. All that is necessary for consolidation is one common question of fact,<sup>74</sup> and there is no opportunity to opt out.<sup>75</sup> 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 the MDL is terminated or settled.<sup>76</sup>

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 must be protected from incompetent or unscrupulous representation.<sup>77</sup> In MDL, it is said that none of these additional protections need to exist because the plaintiff prosecutes her own case with her own attorney.<sup>78</sup> This, however, is not an accurate portrayal of how MDL actually works. In practice, the MDL process 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>79</sup>

The three most prominent strands of criticism of MDL are that (1) MDL insufficiently protects individual plaintiffs' due process rights, including the right to a meaningful day in court,<sup>80</sup> (2) there are no established rules governing MDL judges' procedures, resulting in inconsistency,<sup>81</sup> and (3) MDL cases take a very long time to litigate.<sup>82</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

<sup>73</sup> *Id.* 23(c)(2).

<sup>74</sup> See Burch, *Remanding Multidistrict Litigation*, *supra* note 11, at 403 (“[C]ases need to share but one common question of fact.”).

<sup>75</sup> See *supra* note 21 and accompanying text.

<sup>76</sup> See *supra* notes 24–25 and accompanying text.

<sup>77</sup> See Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the MDL Judge*, 105 CALIF. L. REV. (forthcoming 2017) (discussing the role of the judge in protecting absentee class members).

<sup>78</sup> See Bradt, *supra* note 11, at 791 (“[T]he cases in an MDL keep their individual character.”).

<sup>79</sup> See Burch, *Judging Multidistrict Litigation*, *supra* note 22, at 73 (“[J]udges appoint steering committees and other lead lawyers to conduct discovery, disseminate information, draft motions, negotiate settlements, and try bellwether cases.”); Erichson, *Beyond the Class Action*, *supra* note 22, at 540–41 (discussing how MDL “litigation comes to resemble a class action in the sense that hub lawyers conduct important work in the litigation on behalf of a large group of clients”).

<sup>80</sup> See Redish & Karaba, *supra* note 20, at 115 (arguing that the way MDLs “crudely and artificially reshape[]” individuals’ claims into a “generic lowest common denominator” violates the Fifth Amendment).

<sup>81</sup> See Erichson, *Beyond the Class Action*, *supra* note 22, at 524–25 (identifying MDLs’ lack of the same procedural safeguards of class actions as a significant problem); see also Bradt, *supra* note 11, at 786–87 (discussing how briefing and argument before the Panel is dominated by where to transfer the cases “as the parties vie for their preferred venue and even district judge”).

<sup>82</sup> See Heyburn & McGovern, *supra* note 16, at 31 (noting delays as “the single most prominent complaint about multi-district litigation”).

global settlement negotiated in a distant court by someone else's lawyer that the plaintiffs have little practical choice but to accept.<sup>83</sup> In sum, what makes MDL such an effective means of resolving mass litigation is also what provokes intense criticism: the almost unlimited discretion of the district judge that 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>84</sup> In one sense, the crackdown on alleged lawlessness of class actions has facilitated a shift to MDL and potential lawlessness in the *other* direction.<sup>85</sup>

Compared to the class action, MDL was, until recently and with notable exceptions, relatively underemphasized in academic literature.<sup>86</sup> But now that MDL is in the spotlight, it has begun to attract significant attention as well as trenchant commentary. This reaction proceeds from the accurate perception that MDL has emerged only after the demise of the mass-tort class action.<sup>87</sup> Much of this commentary, however, also proceeds from the assumption that MDL was intended to be used rarely and that the statute's aims were modest—that it is only the vacuum created by the class action that has spawned its expanded use and judges' imperialistic conceptions of their power in MDL cases.<sup>88</sup> This characterization of the statute raises the questions: What did its creators intend in the early 1960s before the class action boom? How did this statute come to be? And, given how controversial it has become, how 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 long before its passage, with the creation of the Judicial Conference in 1922 and the activities of its Pretrial

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<sup>83</sup> See Mullenix, *Dubious Doctrines*, *supra* note 20, at 391 (describing MDL as having "stripped away" the protections of Rule 23); Silver & Miller, *supra* note 25, 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.")

<sup>84</sup> See Redish & Karaba, *supra* note 20, at 115 ("[N]o court appears to have even considered, much less ruled upon, a due process challenge to MDL."); see also R. Marcus, *Cure-All*, *supra* note 13, at 2248 (noting that MDL has "not caused the sort of controversy the class action produced" (internal citation omitted)).

<sup>85</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 courts . . . ignoring *Iqbal*—lawlessness cubed").

<sup>86</sup> See 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 generally *supra* note 2.

<sup>87</sup> See *supra* notes 65–66 and accompanying text.

<sup>88</sup> See *supra* notes 26–28 and accompanying text.

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. From their creation in the Judiciary Act of 1789, federal district courts were traditionally decentralized and autonomous with largely immobile judges.<sup>89</sup> The first Congress, drawing on suggestions in the Federalist Papers,<sup>90</sup> divided the country into geographically drawn judicial districts, all of which were located within the borders of a state.<sup>91</sup> This geographic decentralization was intentional because it allowed local figures throughout the country to represent the federal government to a dispersed population.<sup>92</sup> As Alison LaCroix has observed, “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 general government.”<sup>93</sup> Despite being the local face of the federal government, the federal district courts were essentially autonomous and disconnected entities.<sup>94</sup> Throughout the nineteenth century, the district courts operated with almost no centralized oversight and possessed relatively limited jurisdiction.<sup>95</sup>

In the 1920s, however, Chief Justice William Howard Taft sought to unify both the federal courts and federal judges.<sup>96</sup> The fractured nature of the federal

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<sup>89</sup> See Ronald J. Krotoszynski, Jr., *The Unitary Executive and the Plural Judiciary: On the Potential Virtues of Decentralized Judicial Power*, 89 NOTRE DAME L. REV. 1021, 1040-42 (2014) (describing the structure of the early federal judiciary).

<sup>90</sup> See THE FEDERALIST NO. 81, at 398 (Alexander Hamilton) (Lawrence Goldman ed., 2008) (“[I]t will be found highly expedient and useful to divide the United States into four or five or half a dozen districts . . .”).

<sup>91</sup> See Krotoszynski, *supra* note 89, at 1041 (“Congress designed the lower federal courts to be local institutions within the states . . .”).

<sup>92</sup> See *id.* at 1044 (“[F]ederal courts were to be local federal institutions and would operate in a decentralized fashion.” (emphasis in original)); Alison L. LaCroix, *Federalists, Federalism, and Federal Jurisdiction*, 30 LAW & HIST. REV. 205, 206 (2012) (noting that Justices Marshall and Story believed deeply that “the inferior federal courts were and ought to be the principal physical embodiment of the national government, reaching into the otherwise highly localized space of the cities, towns, and countryside”).

<sup>93</sup> LaCroix, *supra* note 92, at 207; see also PETER GRAHAM FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 7-8 (1973) (“[A]rticulation of national law and assimilation of state and local values . . . consumed the time and energy of the judges from Washington.”).

<sup>94</sup> See FISH, *supra* note 93, at 12 (“[E]ach court administratively constituted an independent and autonomous unit.”).

<sup>95</sup> See *id.* at 13 (noting that “decentralizing features of the Act of 1789 were everywhere in evidence”); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 273 (2003) (“Only in the twentieth century did federal judges gain the capacity to function as a cohort . . .”).

<sup>96</sup> See Carl Baar, *Federal Judicial Administration: Political Strategies and Organizational Change* (calling the outcome of Taft’s efforts “the most important change in the judicial branch of the federal government during the past half-century”), in RUSSELL R. WHEELER & HOWARD R. WHITCOMB, *JUDICIAL ADMINISTRATION: TEXT AND READINGS* 97, 97 (1977). In this regard, one should also consider Chief Justice Taft’s support of the merger of law and equity. See Burbank, *The Rules Enabling Act*, *supra* note 42, at 1069-70 (detailing Taft’s proposal that the Court should have the power to “blend”

courts and the absence of a representative voice in Congress prevented the judiciary from formulating and effectively supporting reforms to remedy the numerous problems it was facing.<sup>97</sup> Among the most glaring problems, according to Taft, was "delayed justice" in crowded, urban federal courts that negatively affected the legitimacy of the courts.<sup>98</sup> To solve this problem, Taft supported the creation of a nationally unified and geographically unconstrained corps of judges belonging 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>99</sup> Taft's plan centered on convincing Congress to authorize the Chief Justice to appoint a force of "judges-at-large" who could travel as needed to different districts to combat overwhelmed dockets and delay.<sup>100</sup> But Taft's attempt to create such a "flying squadron" of judges never really got off the ground.<sup>101</sup> 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 presented by federal

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law and equity "into a code" with the same procedure (quoting William Howard Taft, *Three Needed Steps of Progress*, 8 A.B.A. J. 34, 35 (1922))).

<sup>97</sup> See FISH, *supra* note 93, at 24 (citing Taft's desire for "administrative integration of the judiciary" in order to create a centralized means of control).

<sup>98</sup> *Id.* at 19; see also JUSTIN CROWE, BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT 198-212 (2012) (summarizing Taft's goals, which often related to judicial autonomy, and his political savvy in achieving many of them).

<sup>99</sup> William Howard Taft, *Address of the President*, in REPORT OF THE THIRTY-SEVENTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 384 (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 our judicial force to the disposition of the increasing business").

<sup>100</sup> See 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) ("Taft wanted Congress to commission eighteen 'judges-at-large' to be dispatched at the discretion of the Chief Justice.").

<sup>101</sup> See *id.* (describing how Congress rejected Taft's proposal to create a "flying squadron of judges" (quoting Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341, 356 (2004))).

judgeships).<sup>102</sup> Local lawyers similarly bristled at the idea of appearing before judges whose predilections were unknown.<sup>103</sup>

Although his attempts to achieve a flexible and mobile judiciary failed, Taft succeeded in convincing Congress to authorize the creation of a multi-judge body responsible for proposing legislation in the judiciary's interest that was capable of enhancing communication among federal judges.<sup>104</sup> In 1922, Congress passed legislation creating the Conference of Senior Circuit Judges, the predecessor to the modern Judicial Conference.<sup>105</sup> According to judicial-administration scholar Peter Graham Fish, the Conference "created an institutional framework with administrative leadership and informal responsibility lodged in the Chief Justice and the presiding officers of the intermediate appellate courts."<sup>106</sup> The Conference received additional resources in 1939 when Congress created the Administrative Office of the U.S. Courts, which serves as an institutional liaison between Congress and federal judges.<sup>107</sup> Over the years, Taft's creation has been wildly successful in becoming, as Judith Resnik describes it, "the corporate policymaking voice for the federal judiciary."<sup>108</sup>

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<sup>102</sup> See FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 236 (1928) (ascribing the failure of Taft's proposal to survive the committee stage to the fact that "[r]egard for local representation is one of the most obstinate characteristics of American politics"); 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."); 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."); Ruger, *supra* note 101, at 356 (pointing out that Taft's "plan encountered heated opposition in Congress because of the proposal's sharp break from the traditional conception of geographic fixity").

<sup>103</sup> See FISH, *supra* note 93, at 60 (noting that "such judges [were] met with criticism from local lawyers" who complained of uncertainty and the judges' unfamiliarity with the local context).

<sup>104</sup> See 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) (describing how Taft "launch[ed] a comprehensive lobbying campaign on behalf of legislation that would enhance the Court's policymaking capacity"); Fish, *supra* note 102, at 136 (noting Taft's success in establishing "a policy-making institution with ready access to Congress").

<sup>105</sup> An Act for the Appointment of an Additional Circuit Judge for the Fourth Judicial Circuit, for the Appointment of Additional District Judges for Certain Districts, Providing for an Annual Conference of Certain Judges, and for Other Purposes, ch. 306, 42 Stat. 837 (1922).

<sup>106</sup> FISH, *supra* note 93, at 39.

<sup>107</sup> See John W. Winkle III, *Interbranch Politics: The Administrative Office of U.S. Courts as Liaison*, 24 JUST. SYS. J. 43, 45 (2003) (describing the Administrative Office as the "chief administrative policymaker for the federal courts").

<sup>108</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).

The Conference develops policy proposals primarily through committees of judges appointed by the Chief Justice.<sup>109</sup> Certain committee members develop the various federal rules of practice and procedure while others develop legislation to present to the Conference as a whole, and then, with the Conference’s approval, to Congress.<sup>110</sup> One of the most influential committees is the Committee on Pretrial Procedure (the Pretrial Committee), established in 1943. Up until that point, the prevailing norm among federal judges was to remain passive in cases until trial, leaving it to the parties to manage litigation at their own pace unless the judge was called upon to decide a motion.<sup>111</sup> Even though the original 1938 Federal Rules of Civil Procedure included a provision for pretrial conferences, judges rarely used it.<sup>112</sup> The Pretrial Committee sought to change that by 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.<sup>113</sup> The Pretrial Committee’s chairman, Chief Judge Alfred Murrah of the Tenth Circuit (who, when appointed to the district court at age thirty-two, was one of the youngest federal judges ever), traveled the country proselytizing experienced judges and training new ones about the virtues of active case management to sharpen the issues for trial, reduce costs and delays, and facilitate settlement when appropriate.<sup>114</sup>

By the 1950s, the Pretrial Committee’s efforts were gaining traction, particularly as the federal courts were more regularly confronted with complicated, large-scale, multi-party cases.<sup>115</sup> Murrah argued, “[T]he judicial

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<sup>109</sup> See FISH, *supra* note 93, at 269-71 (detailing the development and organization of the Judicial Conference’s committee system).

<sup>110</sup> See *id.* at 271 (discussing the creation of “a Committee on Committees” by the Judicial Conference to take stock of and manage this administrative framework).

<sup>111</sup> See Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 670-71 (2010) (discussing the old norm of “federal judges sit[ting] back passively and let[ting] the lawyers manage their cases unless and until they encounter[ed] a problem that require[d] judicial attention”).

<sup>112</sup> See Burbank, *Procedure and Power*, *supra* note 44, at 514 (“[F]ederal judges, accustomed to a relatively passive role in common law cases, were loath to use the tools that *were* given them in 1938 . . . .” (emphasis in original)).

<sup>113</sup> See Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 173-74 (1997) (discussing the Judicial Conference’s authorization of educational seminars for judges).

<sup>114</sup> See *id.* at 174 (“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.’” (citations omitted)); see also William J. Brennan, Jr., *Remarks on Pretrial Procedure in Protracted Civil and Criminal Litigation*, 23 F.R.D. 319, 379 (1958) (suggesting that effective pretrial management “puts people in a frame of mind to settle”).

<sup>115</sup> See 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 at a pace to be determined by the parties—and more as managers of a costly and complicated process.”).

process was literally breaking down under the weight of these cases.”<sup>116</sup> In 1949, due to the increase in complex antitrust actions in the 1940s brought both by the government and private plaintiffs, Chief Justice Vinson appointed a subcommittee of ten federal judges to study the problem of large-scale, “protracted” litigation—so-called “big cases.”<sup>117</sup> As part of this subcommittee, Murrah continued to circulate around the country, frequently speaking to judicial meetings to expound on the importance of pretrial conferences and control of discovery in complex cases.<sup>118</sup>

In 1951, the subcommittee issued the “Prettyman Report,” named after its chairman E. Barrett Prettyman, Chief Judge of the D.C. Circuit.<sup>119</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 because of the congestion they created in the district courts.<sup>120</sup> The Prettyman Report refrained from proposing new legislation or rules to respond to the “big cases,” but instead offered suggestions based on the experiences of judges and lawyers in litigating these cases.<sup>121</sup> Foremost among these suggestions was increased pretrial procedure and “rigid control” by the trial judge from the outset of the litigation.<sup>122</sup>

The Prettyman Report was met with widespread praise.<sup>123</sup> And in 1955, still troubled by the problem of delay in federal litigation, Chief Justice Warren

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<sup>116</sup> Alfred P. Murrah, *Proceedings of the Seminar on Protracted Cases for United States Judges*, 23 F.R.D. 319, 386 (1958) [hereinafter Murrah, *Proceedings*]; see also 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>117</sup> See Murrah, *Proceedings*, *supra* note 116, at 319 (discussing the “panel of federal judges appointed by the Chief Justice . . . to study the problems of procedure in protracted civil and criminal litigation”); see also Breck P. McAllister, *The Judicial Conference Report on the “Big Case”: Procedural Problems of Protracted Litigation*, 38 A.B.A. J. 289, 289-92 (1952) (summarizing the report of the Judicial Conference of the United States “entitled ‘Procedure in Anti-Trust and Other Protracted Cases’”); E. Barrett Prettyman, *Needed: New Trial Technique: Suggestions for the Trial of Complicated Cases*, 34 A.B.A. J. 766, 767 (1948) (arguing that “[o]ur time-honored trial procedure” was not designed for the “complicated, cumbersome and expensive” cases that were “coming to the trial Courts in increasing number”).

<sup>118</sup> See Earl Warren, *The Problem of Delay: A Task for Bench and Bar Alike*, 44 A.B.A. J. 1043, 1045 (1958) (noting Murrah’s efforts over the past ten years to demonstrate to federal judges the importance of pretrial procedure).

<sup>119</sup> See Judicial Conference of the U.S., *Procedure in Anti-Trust and Other Protracted Cases*, 13 F.R.D. 41, 62 (1951).

<sup>120</sup> *Id.* at 64.

<sup>121</sup> See *id.* (noting that the “Committee does not recommend legislation or rules” based on the belief that the most effective “remedial methods and measures” came from the “experienced judges”).

<sup>122</sup> *Id.* at 66.

<sup>123</sup> See, e.g., SECTION OF ANTITRUST LAW, AM. BAR ASS’N, REPORT OF THE COMMITTEE ON PRACTICE AND PROCEDURE IN THE TRIAL OF ANTITRUST CASES 1-3 (1954) (reviewing the

formed a new subcommittee (which included several of the same members as the 1949 subcommittee, including Murrah as chairman) to translate the Prettyman Report into courtroom action.<sup>124</sup> Warren actively promoted the project, lauding Murrah personally in his keynote speech at the annual meeting of the American Bar Association (ABA) in 1958.<sup>125</sup> In that speech, Warren decried how "interminable and unjustifiable delays 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>126</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>127</sup>

Ultimately, the result of these discussions and "[t]hree years of intensive investigation" by the subcommittee was the *Handbook of Recommended Procedures for the Trial of Protracted Cases* (the *Handbook*), adopted by the Judicial Conference of the United States in March 1960.<sup>128</sup> In an introductory note, Judge Prettyman noted that the *Handbook* primarily would respond to the "lack of central control" of cases by trial judges.<sup>129</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, (4) confined discovery to prevent fishing expeditions, and (5) careful planning of trial procedure.<sup>130</sup> In short, the *Handbook* endorsed all of the tenets of what we now consider typical case management.<sup>131</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.

report positively); Leon Yankwich, *Short Cuts in Long Cases*, 13 F.R.D. 41, 48 (1953) (affirming that the Committee was correct to emphasize that "much can be achieved through pre-trial" procedure).

<sup>124</sup> See Resnik, *From "Cases" to "Litigation,"* *supra* note 2, at 30 (discussing how "Chief Justice Warren appointed another committee . . . charged with considering the problems of 'protracted cases.'").

<sup>125</sup> See Warren, *supra* note 118, at 1045 (attributing improvements in the administration of such cases to the "untiring efforts of such men as . . . Alfred P. Murrah").

<sup>126</sup> *Id.* at 1043.

<sup>127</sup> *Id.* at 1045.

<sup>128</sup> Alfred P. Murrah, *Foreword* to JUDICIAL CONFERENCE STUDY GRP. ON PRETRIAL PROCEDURE IN PROTRACTED LITIG., HANDBOOK OF RECOMMENDED PROCEDURES FOR THE TRIAL OF PROTRACTED CASES 5, 5 (1960).

<sup>129</sup> E. Barrett Prettyman, *Preface* to HANDBOOK OF RECOMMENDED PROCEDURES FOR THE TRIAL OF PROTRACTED CASES, *supra* note 128, at 9, 10.

<sup>130</sup> See HANDBOOK OF RECOMMENDED PROCEDURES FOR THE TRIAL OF PROTRACTED CASES, *supra* note 128, at 23-24 (listing these "solutions for handling the big case").

<sup>131</sup> See generally Gensler, *supra* note 111, at 669 (examining the prominence of case management in modern complex litigation); Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1027 (2013) (discussing how the "managerial judge . . . displaced the passive umpire as the dominant paradigm in the federal courts").

### 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>132</sup> Before the electrical-equipment cases began, civil antitrust actions comprised a significant amount of the 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>133</sup> In 1959, for instance, 315 antitrust cases were filed in the federal courts, amounting to approximately one per district judge.<sup>134</sup>

In 1960, though, virtually every significant American manufacturer of electrical equipment, from General Electric to Westinghouse on down, was indicted under the Sherman Act.<sup>135</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>136</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>137</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

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<sup>132</sup> See Burbank, *Procedure and Power*, *supra* note 44, at 515 (discussing “[t]he crisis emerging from the electrical equipment antitrust cases”).

<sup>133</sup> See Warren Olney III, *Meeting the Impact of Antitrust Litigation in the United States District Courts* (noting that “antitrust litigation does have a heavy impact on the business of the federal courts,” but “[n]umerically, antitrust cases account for but a small percentage of the total caseload”), in N.Y. STATE BAR ASS’N, 1960 ANTITRUST LAW SYMPOSIUM: NEW THEORIES OF FEDERAL TRADE COMMISSION ENFORCEMENT 3, 4 (1960).

<sup>134</sup> See *id.* (reporting this statistic).

<sup>135</sup> See generally Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621, 621 (1964) (discussing the flood of cases against the electrical equipment industry). 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), which discusses the electrical industry’s multi-billion-dollar violations of antitrust laws.

<sup>136</sup> See CHARLES A. BANE, *THE ELECTRICAL EQUIPMENT CONSPIRACIES: THE TREBLE DAMAGE ACTIONS* 83 (1973) (“[I]n the light of the total sales that seemed to have been involved in the claims, estimated in the range from \$6 to \$7 billion, . . . it is clear that the claims for damages, after trebling, were in the hundreds of millions of dollars.”).

<sup>137</sup> *Id.* at 14. (quoting Chief Judge James Cullen Ganey).

entered in September 1962.<sup>138</sup> Congressional hearings held by Senator Estes Kefauver followed.<sup>139</sup>

Although the criminal cases concluded by the fall of 1962, the civil litigation was just beginning. As Charles Bane, the lawyer who represented plaintiff Commonwealth Edison, noted, "[I]t was clear to . . . 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>140</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 conspiracies, which had allegedly stretched back to the 1940s.<sup>141</sup> Having realized that the overcharges amounted to up to forty percent for some products, plaintiffs filed treble-damage actions nationwide against the manufacturers, mostly in the plaintiffs' home districts.<sup>142</sup> As Bane put it, "[t]oward the end of 1961 the filings for treble damages had swollen to a torrent."<sup>143</sup> Over 1800 cases were filed in thirty-five federal districts.<sup>144</sup> As Chief Judge Thomas Clary of the Eastern District of Pennsylvania noted, "[I]n 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>145</sup> Although the cases were scattered throughout the country, the courts with the most individual filings were in major cities, with New York, Chicago, Philadelphia, and Seattle leading the way.<sup>146</sup>

This opening of the floodgates caught the attention of the Judicial Conference, and in February 1962, Chief Justice Warren formed a subcommittee

<sup>138</sup> See *id.* at 20-21. 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, 838-39 (1993).

<sup>139</sup> See generally *Price Fixing and Bid Rigging in the Electrical Manufacturing Industry: Hearings Before the Subcomm. on Antitrust & Monopoly of the S. Comm. on the Judiciary*, 87th Cong. 16507 (1961).

<sup>140</sup> BANE, *supra* note 136, at 50.

<sup>141</sup> See *id.* at 50-51 (discussing the organization that was formed to "carry[] through expert studies to find the answers to the damages questions . . . raised by the Philadelphia convictions").

<sup>142</sup> See *id.* at 75 (describing how the investor-owned utilities "generally [filed suit] in their home federal districts").

<sup>143</sup> *Id.* at 81.

<sup>144</sup> See Neal & Goldberg, *supra* note 135, at 622 (referring to the filings as an "avalanche of over 1,800 complex, protracted cases filed in thirty-five districts").

<sup>145</sup> Proceedings of the Twenty-Eighth Annual Judicial Conference: Third Judicial Circuit of the United States, 39 F.R.D. 375, 497 (1965) [hereinafter *Judicial Conference Proceedings*] (statement of Thomas J. Clary, C.J., U.S. Dist. Court for the E. Dist. of Pa.); see also BANE, *supra* note 136, at 83 ("[T]he 1,912 separate cases in fact represented over 25,000 separate antitrust claims.").

<sup>146</sup> The number of cases filed in each relevant districts was as follows: S.D.N.Y., 427; N.D. Ill., 226; E.D. Pa., 182; and W.D. Wash., 141. Neal & Goldberg, *supra* note 135, at 622 tbl.3.

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>147</sup> As Warren noted, “A proper solution of these problems . . . [was] essential to the proper administration of our court system.”<sup>148</sup> The new committee, christened the Coordinating Committee on Multiple Litigation, included seven judges: Alfred P. Murrah (Chairman; C.J., 10th Cir.), George H. Boldt (J., W.D. Wash.), Thomas J. Clary (C.J., E.D. Pa.), Joe E. Estes (C.J., N.D. Tex.), Edwin A. Robson (J., N.D. Ill.), Sylvester J. Ryan (C.J., S.D.N.Y.), and Roszel C. Thomsen (C.J., D. Md.).<sup>149</sup> Judges William H. Becker (J., W.D. Mo.) and William M. Byrne (J., S.D. Cal.) were added later in 1962.<sup>150</sup> Murrah, appointed to the bench by Franklin Roosevelt, was the first chairman.<sup>151</sup> 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>152</sup> In so doing, the Committee agreed “that the principles enumerated in the [*Handbook*] are applicable and should be applied to these cases.”<sup>153</sup> The Judicial Conference endorsed these plans, and the Committee was off and running.<sup>154</sup> The Committee’s operations were centered in Chicago, in an office adjoining Judge Robson’s chambers. Dean Phil C. Neal of the nearby

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<sup>147</sup> Press Release, Admin. Office of the U.S. Courts 1-2 (Feb. 7, 1962) [hereinafter Feb. 1962 Press Release] (on file at Becker Papers, *supra* note 33, Box 6, Folder 16) (announcing the membership of the Coordinating Committee).

<sup>148</sup> *Id.* at 2; *see also* Edward Ranzal, *Warren Combats Utility-Suit Jam*, N.Y. TIMES, Feb. 7, 1962, at A1 (describing how Chief Justice Warren had created a panel of federal judges to deal with the “more than 1,500 damages suits filed against electrical equipment manufacturers”).

<sup>149</sup> *See* Feb. 1962 Press Release, *supra* note 147, at 1 (announcing the members of the Coordinating Committee).

<sup>150</sup> *See* Neal & Goldberg, *supra* note 135, at 623 (listing Judges Byrne and Becker as members of the Coordinating Committee).

<sup>151</sup> *See id.*

<sup>152</sup> SUBCOMM. ON MULTIPLE LITIG., REPORT OF THE SUBCOMMITTEE OF THE COMMITTEE ON PRETRIAL PROCEDURE FOR CONSIDERING DISCOVERY PROBLEMS ARISING IN MULTIPLE LITIGATION WITH COMMON WITNESSES AND EXHIBITS 5 (1962) (on file at Becker Papers, *supra* note 33, Box 6, Folder 15) [hereinafter REPORT OF THE SUBCOMM. ON MULTIPLE LITIG.].

<sup>153</sup> *Id.* at 4-5.

<sup>154</sup> *See* ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES: PROCEEDINGS, MARCH 8-9, 1962, at 26 (1962) (“[T]he Conference desires to express its approval and encouragement of the forthcoming meetings of judges aimed to effect voluntary coordinating procedures in processing the civil antitrust cases in the electrical equipment industry.”).

University of Chicago Law School was named Executive Secretary, and he hired Perry Goldberg, a 1960 graduate of the school, as his clerk.<sup>155</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.<sup>156</sup> The first major innovation of the 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 already issued in the cases pending before him in the Southern District of New York.<sup>157</sup> The orders were developed at national meetings—first by the Committee, finally with all of the judges assigned to the cases, and then after hearings open to all attorneys.<sup>158</sup> 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>159</sup> Although it was not unanimous, the level of cooperation by district judges was remarkable.<sup>160</sup>

The pretrial orders followed the guidance of the *Handbook* by placing control of discovery within the hands of the judge.<sup>161</sup> Moreover, these orders stayed already issued discovery requests or scheduled depositions in order to coordinate discovery on a national level, including having uniform sets of interrogatories issued to the defendants in cases involving major product

<sup>155</sup> See Neal & Goldberg, *supra* note 135, at 621, 624-25 (listing the titles of each man vis-à-vis the subcommittee and offering a brief biographical background of each).

<sup>156</sup> See, e.g., Judicial Conference Proceedings, *supra* note 145, at 515 (statement of Benjamin P. Kaplan, Professor, Harvard Law Sch.) (“Now bear in mind that the Coordinating Committee can do nothing except by voluntary cooperation . . . Unless the judges act with substantial unanimity on these Orders, the plan would break down.”); see also Phil C. Neal, *Multi-district Coordination—The Antecedents of § 1407*, 14 ANTITRUST BULL. 99, 101 (1969) (“The Committee was of course operating without statutory or other formal authority. The success of its effort depended entirely upon the willingness of all the judges responsible for the cases to follow the lead of the Committee.”).

<sup>157</sup> See Neal & Goldberg, *supra* note 135, at 623 (discussing how the “set of seven pretrial orders recommended by the Co-ordinating Committee” was developed from Chief Judge Ryan’s previously entered orders).

<sup>158</sup> See *id.* at 623-24 (describing this process).

<sup>159</sup> See *id.* at 624 (discussing how the cases were handled on the “local” level).

<sup>160</sup> See *id.* at 623 (discussing “several important objectives” that were effectively “accomplished” by the pretrial orders). 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 based on his “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-dooper Court.” Reporter’s Transcript Motion to Bring in Additional Parties, Motion to Enter National Pre-trial Orders at 2, 4, Sacramento Mun. Util. Dist. v. Gen. Elec. Co., Nos. 8380-83, 8403-04 (N.D. Cal. Aug. 12, 1963).

<sup>161</sup> See BANE, *supra* note 136, at 123 (discussing how the pretrial orders “took control of discovery from counsel . . . and placed that control in the judges”).

lines.<sup>162</sup> 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.<sup>163</sup> In order to manage the nationwide depositions of defense witnesses, the plaintiffs’ lawyers met in Chicago to appoint a “steering committee.”<sup>164</sup> The steering committee would decide in what order the witnesses would be deposed and divide up the workload.<sup>165</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.<sup>166</sup> Later a similar depository funded by plaintiffs was established in New York for plaintiffs’ documents.<sup>167</sup>

The Committee also created a schedule of national depositions—first by plaintiffs, then by defendants—that were presided over by a judge who would make legal rulings, and which were held around the country so that common witnesses would be deposed only once.<sup>168</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 that any other lawyer could ask additional questions.<sup>169</sup>

Although discovery was moving full steam ahead, the judges had been requesting that the parties consider settlement since December 1962.<sup>170</sup> In response, the plaintiffs’ steering committee began developing damage models and lump-sum proposals for the defendants.<sup>171</sup> Settlement talks did not heat up, however, until the government settled its claims against the defendants in

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<sup>162</sup> See *id.* at 123-24 (discussing how the pretrial orders set about to achieve coordinated discovery); see also Neal & Goldberg, *supra* note 135, at 626 (“Suits in three product lines, steam turbine-generators, hydrogenerators and power transformers, were selected for priority . . .”).

<sup>163</sup> See BANE, *supra* note 136, at 125 (discussing the cases put on the “back burner” in order).

<sup>164</sup> See *id.* at 131 (“Approximately eighty attorneys representing plaintiffs met in Chicago . . . and organized the plaintiffs’ counsel Steering Committee.”).

<sup>165</sup> See *id.* at 131-34 (discussing how the Steering Committee set about to “carry out the plaintiffs’ obligations under the deposition program”).

<sup>166</sup> See *id.* at 135 (describing the establishment of a “national document depository[y]” of defendants’ documents in Chicago).

<sup>167</sup> See Neal & Goldberg, *supra* note 135, at 627 (“[P]laintiffs agreed to establish a national depository in New York similar to the defendants’ depository in Chicago.”).

<sup>168</sup> See *id.* at 625-26 (discussing the process of coordinating and executing the committee’s national deposition plan).

<sup>169</sup> See BANE, *supra* note 136, at 129-30 (detailing the parameters set by the pretrial orders regarding depositions); see also Judicial Conference Proceedings, *supra* note 145, at 498 (statement of Thomas J. Clary, C.J., U.S. Dist. Court for the E. Dist. of Pa.) (noting that “an assorted 180—by actual count—lawyers from throughout the country were present in the courtroom” for the first national deposition).

<sup>170</sup> See BANE, *supra* note 136, at 215 (noting that “[a]s early as December 1962, . . . Judge Clary requested the parties to the Philadelphia actions to open settlement negotiations”).

<sup>171</sup> See *id.* at 220-21 (describing the various models and formulas used by plaintiffs to calculate their damages).

the spring of 1963,<sup>172</sup> and General Electric, the largest defendant, came to the table with the civil plaintiffs.<sup>173</sup> From the beginning, the judges played an active role in the negotiations between General Electric and the plaintiffs, including most notably the private conferences conducted by Chief Judge Ryan and Judges Robson and Wilfred Feinberg (J., S.D.N.Y.).<sup>174</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 utility executive was asking for would break General Electric and put it out of business."<sup>175</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>176</sup> Although they were not required to do so, the judges nevertheless held hearings to approve the fairness of the settlements.<sup>177</sup> The plaintiffs' 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, "[W]e believe we can honestly attribute [the settlement agreement] to your Honor and your Honor's efforts, and we wish to thank you for it."<sup>178</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.<sup>179</sup> The judges' plan was to transfer these remaining cases for trial to one district court per product

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<sup>172</sup> See *id.* at 225 (noting that, upon settling the criminal charges against the defendants, Attorney General Robert F. Kennedy stated that the "Department of Justice ha[d] a responsibility to help clean up [the] congestion" created by the private civil litigation).

<sup>173</sup> See *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 others, with General Electric.").

<sup>174</sup> See *id.* at 238, 244-45 (describing the conferences and small meetings that these judges held with the parties during the negotiation process).

<sup>175</sup> *Id.* at 239.

<sup>176</sup> See *id.* at 250 (noting estimations of the payments reaching as high as \$300 million).

<sup>177</sup> See *id.* at 259-61 (describing the settlements which "were made subject to court approval," despite "[s]uch approvals . . . not [being] required by federal rules in any of the cases"). Apparently, another reason the parties sought judicial approval of the settlements as fair and reasonable was to justify the decision of plaintiffs' officers and directors in approving the settlement. *Id.* at 261. Moreover, approval of the settlements as "price adjustments" rather than treble damages carried important tax consequences for both the plaintiffs and the defendants. *Id.* 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.* at 261-62.

<sup>178</sup> *Id.* at 259-60.

<sup>179</sup> See *id.* at 339 (noting that while "practically all claims of plaintiffs against practically all defendants" were resolved or close to resolution, over 1000 claims against I-T-E Circuit Breaker Company were still pending).

line.<sup>180</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.<sup>181</sup> By the end of 1965, I-T-E was the defendant with the largest number of cases still pending against it—“some 365”<sup>182</sup>—and the Committee determined that Judge Robson should try those cases in the Northern District of Illinois.<sup>183</sup> 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>184</sup> I-T-E went so far as to seek mandamus against Becker in the Eighth Circuit, but its gambit was unsuccessful.<sup>185</sup> 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>186</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>187</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>188</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>189</sup> No less

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<sup>180</sup> See *id.* at 339-41 (discussing the Coordinating Committee’s proposed plan to handle the outstanding cases); see also *Atl. City Elec. Co. v. I-T-E Circuit Breaker Co.*, 247 F. Supp. 950, 953 (S.D.N.Y. 1965) (“There are obvious advantages to having the remaining cases in a particular produce line centered in one locale before one judge.”).

<sup>181</sup> See *id.* (discussing how I-T-E “had refused to discuss settlement” and had “consistently resisted all steps looking toward trial of the cases in which it was a party defendant”); see also *Multidistrict Litigation: Hearings Before the Subcomm. on Improvements in Judicial Mach. of the S. Comm. on the Judiciary*, 89th Cong. 103 (1967) [hereinafter Jan. 24, 1967 Senate Hearings] (statement of Philip Price, Esquire, Dechert, Price & Rhoads) (explaining that Dechert was “‘national counsel’ for I-T-E Circuit Breaker Company”); *infra* text accompanying notes 438-39 (recounting I-T-E attorney Phillip Price’s testimony before the subcommittee in opposition to the MDL bill).

<sup>182</sup> See BANE, *supra* note 136, at 339.

<sup>183</sup> See *id.* at 339-40 (describing how the Committee determined that “all cases were to be transferred to the Northern District of Illinois”).

<sup>184</sup> See *Kan. City Power & Light Co. v. I-T-E Circuit Breaker Co.*, 240 F. Supp. 121, 124 (W.D. Mo. 1965) (Becker, J.) (ordering the transfer of five civil damages actions against I-T-E); see also BANE, *supra* note 136, at 340 (“Judge Becker, initially acting almost on his motion but ultimately on the basis of plaintiffs’ motion, ordered the transfer of five cases . . .”).

<sup>185</sup> See *I-T-E Circuit Breaker Co. v. Becker*, 343 F.2d 361, 364 (8th Cir. 1965) (per curiam) (refusing to grant I-T-E’s petition for writ of mandamus against Judge Becker).

<sup>186</sup> *Id.* at 362.

<sup>187</sup> *Id.*

<sup>188</sup> See BANE, *supra* note 136, at 378 (detailing the “true courthouse steps settlement” that occurred on the first day of trial).

<sup>189</sup> See *id.* at 379 (describing how the I-T-E settlement “broke the logjam” and led to the resolution of “practically all of the remaining pending cases” by the end of 1966); see also Milton

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>190</sup>

But the reaction to the mass settlements was not universal praise. The pace of the national discovery program played a role in resolving the cases. As one of the lead lawyers for the plaintiffs, Charles Bane, put it, "[D]oubtless the pressures of the national discovery program contributed greatly to the defendants' desire to be relieved of the burden of the electrical equipment cases."<sup>191</sup> Defense counsel roundly criticized the speed with which discovery proceeded, judges' lack of regard for their arguments, and their impression that the hearings were simply for show, the Committee having decided on pretrial orders in advance of argument.<sup>192</sup> They also complained that "it became very clear . . . that the national program of the Committee would move forward and that 'nothing' would interfere with its progress," particularly pleas for relief from the pace of discovery by the defendants.<sup>193</sup> Defense lawyer John Logan O'Donnell complained that the coordinated proceedings inured to the exclusive benefit of the plaintiffs. O'Donnell argued that the Committee's actions eliminated 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

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Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 COLUM. L. REV. 1, 9 (1971) ("[A]lthough a total of 1,912 cases had been filed, only nine trials were required.").

<sup>190</sup> Earl Warren, Chief Justice, Supreme Court of the U.S., Address to the Annual Meeting of the American Law Institute, in *MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION* 6 (1st ed. 1969); see also, S. REP. NO. 90-454, at 4 (1967) (observing that the Committee's "procedures worked exceptionally well"); Resnik, *From "Cases" to "Litigation," supra* note 2, at 32 ("Much legal commentary describes the work of the Committee as successful.").

<sup>191</sup> BANE, *supra* note 136, at 266.

<sup>192</sup> See, e.g., John Logan O'Donnell, *Pretrial Discovery in Multiple Litigation from the Defendants' Standpoint*, 32 ANTITRUST L.J. 133, 137 (1966) (arguing that the way discovery was handled "virtually eliminated" defendants' "ability . . . to point out and question specific characteristics of the cases"). Typical of the allegations of a power grab by the judges are the comments of 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 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 protest by the parties, and that was almost invariably applied and 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*, in N.Y. STATE BAR ASS'N, 1966 ANTITRUST LAW SYMPOSIUM 55, 58 (1966).

<sup>193</sup> McAllister, *supra* note 192, at 60.

as to tax the energy and perseverance of the best of lawyers.”<sup>194</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>195</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>196</sup>

For their part, plaintiffs, perhaps recognizing the benefits of coordination and speed, were generally in favor of coordinated proceedings.<sup>197</sup>

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.<sup>198</sup> By the middle of the 1960s, the

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<sup>194</sup> O’Donnell, *supra* note 192, at 138.

<sup>195</sup> *Id.* at 138-39.

<sup>196</sup> William M. Sayre, *Developments in Multiple Treble Damage Act Litigation—Introduction*, in N.Y. STATE BAR ASS’N, 1966 ANTITRUST LAW SYMPOSIUM 46, 51-52 (1966).

<sup>197</sup> See BANE, *supra* note 136, at 131 (noting that while defendants’ counsel were objecting to the national deposition program, nearly eighty plaintiffs attorneys were meeting to organize a litigation steering committee); see also Charles A. Bane, *Pretrial Discovery in Multiple Litigation from the Plaintiffs’ Standpoint*, 32 ANTITRUST L.J. 117, 129 (1966) (proclaiming that the national discovery program in the electrical-equipment cases “must be considered to have been an unqualified success”).

<sup>198</sup> See Neal, *supra* note 156, at 104 (noting that by the time the electrical-equipment cases ended, “other judges had begun to come to the Committee for advice and aid”).

Committee was coordinating cases pending around the country dealing with subjects as diverse as patents and airplane crashes, as well as large-scale antitrust cases involving the concrete pipe, children's schoolbooks, and rock salt industries.<sup>199</sup> The Committee coordinated this litigation at the request of other judges despite having no permanent staff, source of funding, or any statutory authority to act.<sup>200</sup> By the mid-1960s the Committee—whose members had advocated strong pretrial management even before their approach had proven successful in the electrical-equipment litigation—was riding high. 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 its inception that the Coordinating Committee began to consider more permanent mechanisms for the type of coordination 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>201</sup> This early move toward a broader application of the case-management techniques the Committee was pioneering is unsurprising. The enthusiasm of both Chief Justice Warren and the Committee's members for the innovations of the *Handbook* was especially great for strong judicial control over discovery and early definition of the 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 to codify a new statute or rule of civil procedure that would coordinate litigation pending in multiple districts. In support of this effort, the Committee began studying various consolidation

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<sup>199</sup> See Co-Ordinating Comm. for Multidistrict Litig., Minutes of Special Preliminary Meeting of the Co-Ordinating Committee 2-3 (Nov. 3, 1967) [hereinafter Co-Ordinating Committee Nov. 3, 1967 Meeting Minutes] (on file at Becker Chronological Files, *supra* note 33, Box 11, Folder 8) (describing Committee member's coordination of various multidistrict cases).

<sup>200</sup> See *id.* at 2 (discussing how to delegate the Committee's workload given "the absence of a staff for the Co-Ordinating Committee"); see also Neal, *supra* note 156, at 104 (discussing the quickly expanding caseload of the Committee).

<sup>201</sup> ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES: PROCEEDINGS, SEPTEMBER 19-20, 1962, at 45 (statement of Alfred P. Murrah, Chairman, Comm. on Pretrial Procedure).

mechanisms in federal courts around the country.<sup>202</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>203</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.<sup>204</sup> 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"<sup>205</sup> 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."<sup>206</sup> This would mean 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 originally in a single district."<sup>207</sup> With 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 some of the advantages which would be available if the federal district courts were parts of one court rather than many courts."<sup>208</sup>

Emphasizing "the interest of the public in the efficient administration of justice, and the interest of all the other litigants in clearing the dockets of the courts,"<sup>209</sup> 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

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<sup>202</sup> See CO-ORDINATING COMM. FOR MULTIPLE LITIG., REPORT OF THE CO-ORDINATING COMMITTEE FOR MULTIPLE LITIGATION OF THE UNITED STATES DISTRICT COURTS, A SUB-COMMITTEE OF THE COMMITTEE ON PRE-TRIAL PROCEDURE AND PRACTICE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1963) (on file at Becker Papers, *supra* note 33, Box 23, Folder 51) (discussing the Committee's approach for executing national coordination of the electrical-equipment cases).

<sup>203</sup> See Earl Warren, Chief Justice, Supreme Court of the U.S., Address to the Fortieth Annual Meeting of the American Law Institute (May 22, 1963), in 40 A.L.I. PROC. 25, 34 (1963) (commending the subcommittee of the Judicial Conference Committee on Pretrial Procedure for its work on "discovery problems arising in multiple litigation").

<sup>204</sup> See Phil C. Neal, Exec. Sec'y, Coordinating Comm. for Multidistrict Litig., Talk at the Annual Judicial Conference of the Seventh Federal Circuit at the Ambassador West (May 14, 1963) (on file at Becker Papers, *supra* note 33, Box 17, Folder 39, Divider 4).

<sup>205</sup> *Id.* at 16.

<sup>206</sup> *Id.* at 17.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 16-17.

<sup>209</sup> *Id.* at 17-18.

proper district."<sup>210</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>211</sup>

By summer, however, Neal, Judges Becker and Robson, and the Committee's law clerk, Perry Goldberg, began laying out options for 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,<sup>212</sup> typically, litigation involving common questions would be pending in multiple districts without the assigned judges being aware.<sup>213</sup> As a result, they understood the need for some federal mechanism for identifying multidistrict cases for special treatment.<sup>214</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>215</sup> 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>216</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,"<sup>217</sup> but they expressed concern about complete transfer of all related cases nationwide to a single district because it "might present problems with due process overtones."<sup>218</sup> Nevertheless, the drafters emphasized the need for "centralization of the power to make decisions."<sup>219</sup> By the fall of that year, however, the drafters believed they had developed a solution: "Consolidation before [a] panel of Judges" who would facilitate "[a]ssignment of cases to one

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<sup>210</sup> *Id.* at 18.

<sup>211</sup> *Id.*

<sup>212</sup> DISCOVERING INSTANCES OF MULTIPLE LITIGATION - A CLUE TO THE NEED FOR MANUALLY OPERATED RULES? 5 (1963) (on file at Becker Papers, *supra* note 33, Box 17, Folder 39, Divider 1).

<sup>213</sup> *See id.* at 1-4 (discussing the difficulty of identifying instances of multiple litigation).

<sup>214</sup> *See id.* at 4-6 (identifying the need for "rules or [a] formula . . . to deal with future situations" like the one presented by the electrical-equipment cases).

<sup>215</sup> *Id.* at 2.

<sup>216</sup> *Id.* at 5.

<sup>217</sup> *Id.* (emphasis in original).

<sup>218</sup> *Id.* at 6.

<sup>219</sup> *Id.*

judge and consolidation for pre-trial purposes” combined with “[v]enue problems and consolidation of cases in one district for pre-trial and trial.”<sup>220</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>221</sup> Early that summer, Neal reached out to the Rules Committee’s reporters, Professors Benjamin Kaplan and Albert Sacks of Harvard Law School.<sup>222</sup> Kaplan responded with interest,<sup>223</sup> and he and Sacks agreed to attend the Coordinating Committee’s next meeting in November 1963 in New York to collaborate.<sup>224</sup>

Though the Rules Committee significantly reworked Rule 23 in ways that brought on the class-action revolution,<sup>225</sup> they explicitly did not intend so-called “mass accidents” to be the typical grist for the class-action mill.<sup>226</sup> In other words, the Rules Committee did not intend 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 hoped to

<sup>220</sup> Perry Goldberg, Coordinating Comm. for Multiple Litig., Outline of Suggested Topics for Discussion on Problems Related to Multiple Litigation 1 (Oct. 16, 1963) (on file at Becker Papers, *supra* note 33, Box 17, Folder 39, Divider 1).

<sup>221</sup> See Letter from Edwin A. Robson, Judge, U.S. Dist. Court for the N.D. Ill., to the Coordinating Comm. for Multiple Litig. (Nov. 4, 1963) (on file Becker Papers, *supra* note 33, Box 18, Folder 19) (suggesting an agenda and setting out the contents of the upcoming meeting).

<sup>222</sup> See Letter from Benjamin Kaplan, Reporter, Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S., to Phil C. Neal, Dean, Univ. of Chi. Law Sch. (May 28, 1963) (on file at Neal Papers, *supra* note 34, Box 4, Folder XYZ) (“Al Sacks tells me that you expressed interest in our draft rule on class actions.”).

<sup>223</sup> See *id.* (“We’d be delighted to know what you [Neal] think of it.”).

<sup>224</sup> See Letter from Benjamin Kaplan, Reporter, Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S., to Phil C. Neal, Dean, Univ. of Chi. Law Sch. (Nov. 6, 1963) (on file at Neal Papers, *supra* note 34, Box 4, Folder XYZ) (“Al and I plan to be in New York . . . , and we will await word about where and when to meet you.”). 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, Reporter, Comm. on Rules of Practice and Procedure, to Dean Acheson (Dec. 4, 1963), *microformed on* CIS No. CI-7003 (Cong. Info Serv.) (noting Thomsen’s proposal that the two committees consult with one another).

<sup>225</sup> See Burbank, *CAPA in Historical Context*, *supra* note 4, at 1487 (noting that the drafters of Rule 23(b)(3) “were aware that they were breaking new ground and that those effects might be substantial”).

<sup>226</sup> See 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) (“[T]he Committee stated that litigation arising from ‘mass accidents’ injuring numerous persons would ordinarily not be appropriate for class handling.”). One focus of the amendments was the facilitation of civil rights suits seeking injunctions under Rule 23(b)(2). See D. Marcus, *supra* note 31, at 608 (noting that committee “[m]embers designed Rule 23(b)(2) expressly for [civil rights enforcement]”); R. Marcus, *Bending in the Breeze*, *supra* note 7, at 500 (“[O]ne goal of the 1962-1966 rewriting of Rule 23 was to . . . enable injunction suits to enforce civil rights.”).

clarify an outmoded and vague rule to better reflect current practice.<sup>227</sup> If the Rules Committee had any ideological valence, it was to better facilitate civil rights class actions.<sup>228</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>229</sup> Although Kaplan was committed to retaining Rule 23(b)(3), despite its somewhat "adventurous" quality, he agreed that 23(b)(3) should be used sparingly in cases where the damages to individual plaintiffs justified separate litigation.<sup>230</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 generally not 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>231</sup> According to the Coordinating Committee's minutes, after review of the suggested Rule 23 amendments "[t]he consensus was that the proposed rule [23] change would be most beneficial for resolving certain existing ambiguities of class actions, but that a general solution of the problems posed by multiple litigation w[ould] require more comprehensive treatment."<sup>232</sup> Judge Becker added that the "[b]ig problem in electrical suits is one of *management*," adding that the "[p]roblem cannot be handled under rule making power . . . . Who's

<sup>227</sup> See Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 669-70 (1979) (discussing the intentions and goals of the drafters of the 1966 amendment and concluding that "the rulemakers apparently believed that they simply were making rule 23 a more effective procedural tool").

<sup>228</sup> See D. Marcus, *supra* note 31, 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, 702-08 (2011) (describing the centrality of facilitating desegregation cases to the drafters of the Rule 23 amendments).

<sup>229</sup> See Resnik, *From "Cases" to "Litigation," supra* note 2, at 9-15 (quoting the Frank-Kaplan correspondence about their concern that the class action not be used for mass tort claims); see also John P. Frank, *Response to 1996 Circulation of Proposed Rule 23 on Class Actions* ("There was great concern that in mass torts perhaps there should be no class actions at all."), in 2 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 264, 268 (1997).

<sup>230</sup> See Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 498 (1969) (arguing that making each individual plaintiff meet the amount in controversy was "inapposite to the new Rule [23]").

<sup>231</sup> See Co-Ordinating Comm. for Multiple Litig., Bulletin No. 20 to the Judges Before Whom Electrical Equipment Anti-trust Cases Are Pending 2 (Nov. 27, 1963) [hereinafter Bulletin No. 20] (on file at Becker Papers, *supra* note 33, Box 8, Folder 19) (discussing the continued need for "solutions" outside of the Rule 23 amendments).

<sup>232</sup> *Id.*

going to say where the cases should go?”<sup>233</sup> Becker and the Committee concluded that it was necessary to “[c]reate a new package for multiple litigation.”<sup>234</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 anti-trust cases, but nevertheless of a sizable character—will henceforth be a staple item appearing with increasing frequency on the Federal court calendars.”<sup>235</sup> The memo also describes the attendees’ consensus that district judges must have significant flexibility in handling large litigations, stating, “[I]t would be unwise to introduce stiff rules excluding judicial discretion. On the contrary, a good deal of play in the joints is imperatively required.”<sup>236</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 litigants a fair amount of freedom while at the same time not undercutting the values (which in part accrue to the individuals) of efficient unitary adjudication.”<sup>237</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>238</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>239</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

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<sup>233</sup> Co-Ordinating Comm. for Multiple Litig., Minutes of Meeting of Co-Ordinating Committee Held on Sunday, November 17, 1963, at 3:00 PM, at 2 (Nov. 17, 1963, 3:00 PM) (statement of William H. Becker, J., U.S. Dist. Court for the W.D. Mo.) (emphasis in original) (on file at Becker Papers, *supra* note 33, Box 10, Folder 23). The notes also reflect that the Committee’s work went beyond antitrust and included “[d]isaster (cases)” and “[p]roducts [l]iability” cases as well. *Id.* at 1 (statement of Edwin A. Robson, J., U.S. Dist. Court for the N.D. Ill.).

<sup>234</sup> *Id.* at 2.

<sup>235</sup> Memorandum to the Chairman & Members of the Advisory Comm. on Civil Rules 4 (Dec. 2, 1963), *microformed on* CIS No. CI-7104 (Cong. Info Serv.) [hereinafter Memorandum to the Advisory Comm. on Civil Rules].

<sup>236</sup> *Id.*

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

<sup>238</sup> *Id.* at 6.

<sup>239</sup> See Bulletin No. 20, *supra* note 231, at 2.

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>240</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.<sup>241</sup> 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.<sup>242</sup> This view was also eventually expressed in the Rule 23 advisory committee notes.<sup>243</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>244</sup> So Neal, Goldberg, and Judge Becker 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 "[c]ontract, fraud, negligence, antitrust and civil rights" as well as "[p]roducts liability cases with absolute liability."<sup>245</sup>

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<sup>240</sup> Co-Ordinating Comm. on Multiple Litig., Minutes of Meeting of Co-Ordinating Committee Held on Monday, November 18, 1963, at 9:30 A.M. at 4 (Nov. 18, 1963) [hereinafter Co-Ordinating Comm. Nov. 18, 1963 Meeting Minutes] (statement of George H. Boldt, J., U.S. Dist. Court for the W. Dist. of Wash.) (on file at Becker Papers, *supra* note 33, Box 17, Folder 39).

<sup>241</sup> See Bulletin No. 20, *supra* note 231, at 1-2 (reporting that the judges had met with Kaplan and Sacks and "[t]he consensus was that the proposed rule change would be most beneficial for resolving . . . ambiguities of class actions, but that a general solution of the problems posed by multiple litigation w[ould] require more comprehensive treatment"); see also Memorandum to the Advisory Comm. on Civil Rules, *supra* note 235, at 5. See generally Andrew D. Bradt, *Something Less and Something More: MDL's Roots As A Class Action Alternative*, 165 U. PA. L. REV. (forthcoming 2017).

<sup>242</sup> See Memorandum to the Advisory Comm. on Civil Rules, *supra* note 235, at 6 ("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.").

<sup>243</sup> See FED. R. CIV. P. 23 advisory committee's notes on the 1966 Amendment (noting that "[a] 'mass accident' . . . is ordinarily not appropriate for a class action" and that "[c]urrently the Coordinating Committee on Multiple Litigation . . . is charged with developing methods for expediting such massive litigation").

<sup>244</sup> See ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 42-43 (Mar. 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 of procedure for multiple litigation").

<sup>245</sup> Outline of Alternatives for Processing Multiple Litigation 3 (May 19, 1964) (on file at Becker Papers, *supra* note 33, Box 17, Folder 39). Among the alternatives they considered were complete transfer and consolidation under 28 U.S.C. § 1404(a), "limited transfer for discovery (other

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>246</sup> More aggressive consolidation alternatives, such as complete transfer through trial, would attract resistance from the Bar due to the "propriet[ar]y notion of their cases."<sup>247</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>248</sup>

Becker also added that even though he thought "[a] substantial case could be made for rule making authority on the theory that venue is procedural," he believed that the reform must be accomplished through legislation in order to eliminate doubts under the Rules Enabling Act.<sup>249</sup> Because venue had typically been a subject of legislation, Becker believed "no chance should be taken here if it can be avoided."<sup>250</sup> Nevertheless, Becker recognized the challenge of obtaining congressional approval, so he suggested that "a minimum amount of legislation be sought and that the rule making power be employed to the maximum" in order to "allow greater flexibility for amendment and supplement of the procedures."<sup>251</sup> In sum, Becker argued that Congress must authorize pretrial transfer but that the Rules Committee should be in charge of drafting

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aspects of pre-trial)," voluntary coordination of judges involved in multiple litigation, and expanded use of class actions. *See id.* at 3-5 (discussing these alternatives).

<sup>246</sup> William H. Becker, Proposal for Legislation and Rules for Multiple Litigation 1 (June 3, 1964) [hereinafter Becker Proposal] (on file at Becker Papers, *supra* note 33, Box 1, Folder 1).

<sup>247</sup> Co-Ordinating Comm. on Multiple Litig., Minutes of the Co-Ordinating Committee in the United States Courthouse in New York City 8 (June 5, 1964, 2:00 PM) [hereinafter Co-Ordinating Comm. June 5, 1964 Meeting Minutes] (on file at Becker Chronological Files, *supra* note 33, Box 1, Folder 1). Although the text of the minutes uses the word "propriety," I believe this is a typo and that 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 Coordinating Committee and Professors Kaplan and Sacks. *See* Co-Ordinating Comm. Nov. 18, 1963 Meeting Minutes, *supra* note 240. In discussing the possibility of formalizing change of venue in multiple litigation, Chief Judge Roy W. Harper of the Eastern District of Missouri expressed concern that local bars would oppose any such reform for fear of losing control over their cases in a national litigation. *See id.* at 4 ("Venue will be fought by [the] practicing Bar.").

<sup>248</sup> Becker Proposal, *supra* note 246, at 1.

<sup>249</sup> *Id.* at 2.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 1.

rules to provide standards for when such transfer would be appropriate and procedures for conducting the litigation following the transfer.<sup>252</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>253</sup> Judge Becker was enthusiastic, even though he recognized the political limitations to 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>254</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.<sup>255</sup> 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>256</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.<sup>257</sup> Indeed, the initial draft delegates to the Supreme Court, through the process created by the Rules Enabling Act,

the power to prescribe, by general rules . . . 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

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<sup>252</sup> See *id.* at 2-3 (discussing the need to seek "statutory authority for the transfer" but also for a statute that "delegated rule making power").

<sup>253</sup> Co-Ordinating Comm. June 5, 1964 Meeting Minutes, *supra* note 247, at 9.

<sup>254</sup> Letter from William H. Becker, Judge, W. Dist. of Mo., to Albert B. Maris, Senior Judge, U.S. Court of Appeals for the Third Circuit 3 (June 15, 1964) (on file at Becker Papers, *supra* note 33, Box 16, Folder 14).

<sup>255</sup> See Letter from William H. Becker, Judge, W. Dist. of Mo., to Alfred P. Murrah, Chief Judge, U.S. Court of Appeals for the Tenth Circuit 1 (June 26, 1964) (on file at Becker Papers, *supra* note 33, Box 16, Folder 4) ("On Wednesday, June 24, 1964, Judge Robson, Dean Neal, Perry Goldberg, and I met in Chicago . . .").

<sup>256</sup> See *id.* ("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.").

<sup>257</sup> See generally Co-Ordinating Comm. on Multiple Litig., Draft of § 1401. Change of Venue 1 (June 25, 1964) (on file at Becker Papers, *supra* note 33, Box 16, Folder 1).

therein, and the places where pre-trial proceedings shall be conducted, and the practice and procedure in such actions following transfer.<sup>258</sup>

Becker, Neal, and Goldberg continually revised the proposal throughout the summer of 1964.<sup>259</sup> 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, as well as for transfer to any district for “consolidated pre-trial proceedings” where “common elements may be present in the actions.”<sup>260</sup>

### C. Obtaining Judicial Conference Approval

Judges Becker, Boldt, Estes, and Murrah, as well as Dean Neal, Perry Goldberg, and Mr. Cooper met to consider the proposed draft in Chicago on July 28, 1964, with the intention of presenting the proposal to the Judicial Conference at its upcoming August meeting.<sup>261</sup> All of the judges recognized the importance of Judicial Conference approval. By the 1960s, Chief Justice Warren had realized Taft’s vision of using the Conference as a major driver of the courts’ Congressional agenda.<sup>262</sup> If they could secure approval from the Judicial Conference, the judges on the Committee could then set their sights on Congress. But without such approval there would be virtually no hope of getting Congressional attention, since the legislation would be seen as a pet project of a few judges rather than the position of the judiciary as a whole.<sup>263</sup>

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

<sup>259</sup> See, e.g., Draft Rule on Multi-District Litigation (July 16, 1964) (on file at Becker Papers, *supra* note 33, Box 16, Divider 1, File 3).

<sup>260</sup> *Id.* at 1-2.

<sup>261</sup> See Co-Ordinating Comm. on Multiple Litig., Meeting of Co-Ordinating Committee Judges in Chicago, July 28, 1964, at 1, 4 (July 28, 1964) [hereinafter Co-Ordinating Comm. July 28, 1964 Meeting Minutes] (on file at Becker Papers, *supra* note 33, Box 8, Folder 19) (listing the meeting’s attendees and noting their decision to have “Chief Judge Murrah . . . attempt to take the proposal straight to the top . . . at [the Committee on Revision of the Laws’s] meeting in August”). Although Murrah noted “the difficulties and delay involved with securing legislative passage,” the judges again agreed that “such a provision must take the form of legislation. Historically, venue is a statutory field.” *Id.* Becker’s notes provide additional color. In response to Murrah’s concerns about opposition to the legislation, Becker quotes himself as saying, “‘Venue is a substantial right’ – not for the rules.” William H. Becker, Handwritten Notes on Meeting of Co-Ordinating Committee Judges in Chicago, July 28, 1964, at 1 (July 28, 1964) [hereinafter Becker Notes on July 18, 1964 Meeting] (on file at Becker Papers, *supra* note 33, Box 8, Folder 19).

<sup>262</sup> See FISH, *supra* note 93, at 301 (explaining that “congressional committee chairmen looked to the Conference . . . for authoritative pronouncements of the judiciary’s legislative program”); see also Judith Resnik, *Judicial Independence and Article III: Too Little and Too Much*, 72 S. CAL. L. REV. 657, 666 (1999) (“Through the Judicial Conference, the judiciary can make policy.”).

<sup>263</sup> See FISH, *supra* note 93, at 304 (describing the huge importance of obtaining Conference approval).

Approval by the Conference would give the bill the imprimatur of the federal judiciary and would also invite the assistance of the legislative liaisons at the Administrative Office.<sup>264</sup>

The judges wanted to proceed as quickly as possible partly because, as noted above, the Committee was accepting requests by other judges to coordinate litigations other than the electrical cases, but had no explicit authorization—or resources—to do so.<sup>265</sup> 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>266</sup> As a result, Judge Becker thought it important that the group sidestep the lengthy process of presenting its draft for revisions by the Civil Rules Committee, which could take years and would also leave their statute vulnerable to revision by other judges.<sup>267</sup> Yet this presented a problem. Given its similarity to the large package of joinder provisions that had recently been produced by the Rules Committee,<sup>268</sup> it is likely that such a proposal *would* have been considered within that Committee's purview, and an attempt to circumvent its consideration might have risked losing the committee's support. Lack of support from such a crucial committee could have generated opposition to the proposal in the Judicial Conference.<sup>269</sup>

Murrah, the Judicial Conference stalwart since the early 1940s, had the answer. Rather than seek approval from the entire Rules Committee, Murrah decided 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, Judge Albert Maris of the Third Circuit.<sup>270</sup> The Coordinating Committee "felt that with the endorsement of these three people the provision would stand a good chance of winning widespread support."<sup>271</sup>

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<sup>264</sup> See *id.* at 303-06 (same).

<sup>265</sup> See *supra* text accompanying notes 198-200.

<sup>266</sup> See Becker Notes on July 18, 1964 Meeting, *supra* note 261, at 1 (detailing Becker's view that the judges would "never be able to do this again as in antitrust cases").

<sup>267</sup> See *id.* (noting Becker's desire that the group not "have proposal rise through rules committee").

<sup>268</sup> See Charles Alan Wright, *Proposed Changes in Federal Civil, Criminal, and Appellate Procedure*, 31 TENN. L. REV. 417, 436 (1964) (noting that the new (b)(3) provisions "might be appropriate" in situations like "the electrical cases which are now so numerous" as well as "airplane crash[es] or similar mass tort[s]").

<sup>269</sup> Cf. FISH, *supra* note 93, at 265-66, 271-72 (describing the importance of approval of legislative proposals by the relevant committees).

<sup>270</sup> Co-Ordinating Comm. July 28, 1964 Meeting Minutes, *supra* note 261, at 4; see *id.* (noting that Murrah "should attempt to enlist the support of Judge Maris, Professor Kaplan, and Dean Acheson [sic]").

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

At its July meeting the Coordinating Committee also considered “the problems that [were] likely to be encountered in seeking passage of this legislation” in Congress.<sup>272</sup> The major problem the Committee predicted—also noted by Judge Becker at the June meeting—was that “great opposition would arise from local lawyers fearful that all their business [was] about to be seized by the city attorneys.”<sup>273</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 the fact that transfer is *only* for pre-trial purposes.”<sup>274</sup> The judges also noted other potential “strategic weapons” they could deploy in support of the proposal, 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>275</sup>

Murrah presented the draft to the Pretrial Committee as a whole at its August 1964 meeting on Cape Cod, where the draft was approved in principle for presentation to the Judicial Conference.<sup>276</sup>

On behalf of the Pretrial Committee, Judge Murrah presented the proposed statute to the Judicial Conference at its September 1964 meeting.<sup>277</sup> The explanatory commentary drafted by Judge Becker and Dean Neal accompanied the statute.<sup>278</sup> The commentary is consistent with the strategy devised by the judges in Chicago; at numerous points, it emphasizes the statute’s purportedly modest aims<sup>279</sup>—in particular that the transfer would be for pretrial proceedings only 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>280</sup> Despite its supposed modesty, the comment is not shy about its “major innovation”: “the technique of transferring related cases to a single

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<sup>272</sup> *Id.* at 5.

<sup>273</sup> *Id.* at 6.

<sup>274</sup> *Id.* (emphasis in original).

<sup>275</sup> *Id.*

<sup>276</sup> See Letter from Alfred P. Murrah, Chief Judge, U.S. Court of Appeals for the Tenth Circuit to Joe E. Estes, Chief Judge, U.S. Dist. Court for the N. Dist. of Tex.; George H. Boldt, Judge, U.S. Dist. Court for the W. Dist. of Wash. & William H. Becker, Judge, U.S. Dist. Court for the W. Dist. of Mo. 1 (Aug. 10, 1964) (on file at Becker Chronological Files, *supra* note 33, Box 1, Folder 6) (noting “that it would be propitious for us to discuss this matter in connection with the meeting of the National Pre-Trial Committee, to be held . . . at . . . Harwich Port (Cape Cod)”).

<sup>277</sup> See *generally* Proposed Amendment to Title 28, U.S.C. § 1404 (Sept. 2, 1964) (on file at Becker Papers, *supra* note 33, Box 9, Folder 22, Divider 3) (detailing the Committee’s proposal).

<sup>278</sup> See *id.*

<sup>279</sup> See, e.g., *id.* at 26-27 (“The Statute does not change the existing methods of joint treatment and explicitly leaves untouched ‘the power to transfer for any or all purposes under any other statutory provision or rule.’”).

<sup>280</sup> *Id.* at 29.

district solely for pre-trial purposes.”<sup>281</sup> The note explains that such a provision was necessary because the general transfer provisions, Sections 1404(a) and 1406(a), only provided for transfer to a district where the case might otherwise have been brought—significantly limiting the possibility of transferring all related cases to a single district (if jurisdiction or venue would not lie against the defendant in that district).<sup>282</sup> Murrah successfully convinced the Judicial Conference to “approve[] the amendment in principle,”<sup>283</sup> but to delay submission of the proposal to Congress.<sup>284</sup>

#### D. *Rebuffing the Defense Bar*

After receiving 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>285</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>286</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.<sup>287</sup> At the hearing, Robson asked that the plaintiffs and defendants name representatives who could survey lawyers on their respective sides for their views on the proposal.<sup>288</sup> Charles Bane, the lawyer representing Commonwealth Edison in the Northern District of Illinois, responded that he, William Ferguson of Seattle, and Harold Kohn of Philadelphia would represent the plaintiffs.<sup>289</sup> On behalf of the defendants, Steven E. Keane of Milwaukee

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<sup>281</sup> *Id.* at 27.

<sup>282</sup> *See id.* at 28 (describing the limited flexibility of the then-existing transfer provisions).

<sup>283</sup> Memorandum from Meeting of All the Judges Before Whom Electrical Equipment Antitrust Cases Are Pending 18 (Oct. 2, 1964, 9:30 AM) (on file at Becker Papers, *supra* note 33, Box 9, Folder 22).

<sup>284</sup> *See id.* (“Chief Judge Murrah will work with Chief Judge Maris on the form of the legislation and on having it sponsored in Congress.”).

<sup>285</sup> *Id.* at 18.

<sup>286</sup> *Id.* at 19.

<sup>287</sup> *See id.* at 19 (“[C]opies of the proposed amendment would be distributed to the lawyers at the hearing on October 3 . . .”).

<sup>288</sup> *See* Letter from Steven E. Keane, Partner, Foley, Sammond & Lardner, to Edwin A. Robson, Judge, U.S. Dist. Court for the N. Dist. of Ill. 1 (Oct. 19, 1964) [hereinafter Defendants Committee Letter] (on file at Becker Papers, *supra* note 33, Box 16, Folder 4) (responding to Robson’s “request that three representatives each of counsel for the plaintiffs and for the defendants in the pending electrical equipment cases be designated to serve on a committee in connection with the proposed amendment of Section 1404”).

<sup>289</sup> *See* Letter from Charles A. Bane, Att’y, Isham, Lincoln & Beale, to Edwin A. Robson, Judge, U.S. Dist. Court for the N. Dist. of Ill. 1 (Oct. 9, 1964) (on file at Becker Papers, *supra* note

responded that he, Ralph L. McAfee of New York, and Edward W. Mullinix of Philadelphia would represent the defendants.<sup>290</sup>

On behalf of defense counsel, Keane refused to provide any comment on the proposal, explaining that “[t]here is, however, 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>291</sup> He added, “[S]ince 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 generally.”<sup>292</sup> Keane also offered, “Many of the lawyers who have been actively engaged in the electrical equipment litigation are giving thoughtful consideration to the proposed legislation, and we are certain they will be prepared to present their individual views to any appropriate committee of the Bar.”<sup>293</sup>

Judges Robson and Becker did not appreciate this suggestion. In their view, the defendants sought only to delay and eventually thwart the legislation. 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,<sup>294</sup> to present their proposal to the Bar at large. In a letter to Becker, Robson plainly stated, “It is apparent that defendants wish to kick the ball around . . . .”<sup>295</sup> 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>296</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.

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33, Box 16, Folder 4) (nominating himself, Ferguson, and Kohn “to constitute the committee of three plaintiffs’ counsel”).

<sup>290</sup> See Defendants Committee Letter, *supra* note 288, at 1 (writing to inform Judge Robson of the three men’s nominations to represent the defendants).

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* at 1-2.

<sup>293</sup> *Id.* at 2.

<sup>294</sup> See *supra* notes 192-96 and accompanying text.

<sup>295</sup> Letter from Edwin A. Robson, Judge, U.S. Dist. Court for the N. Dist. of Ill., to William H. Becker, Judge, U.S. Dist. Court for the W. Dist. of Mo. 1 (Oct. 21, 1964) (on file at Becker Papers, *supra* note 33, Box 16, Folder 4, File 2).

<sup>296</sup> *Id.*

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>297</sup>

Soon thereafter, Robson wrote to Murrah reaffirming his concerns that the defendants would attempt to block the bill. Referring to the "committee" of lawyers invited to comment, Robson noted,

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>298</sup>

Such a meeting was scheduled. The attorneys for each side submitted memoranda in advance containing remarks on the proposed statute. The plaintiffs expressed "general, but not unanimous, support for enactment of the basic provisions in the Proposed Amendment."<sup>299</sup> The defendants, on the other hand, did not offer specific feedback.<sup>300</sup> Rather, they reaffirmed their view that the legislation should be presented to the entire American Bar Association for reactions from lawyers across a wide range of fields.<sup>301</sup> On November 13, Becker and Robson met with these lawyers in Washington.<sup>302</sup> At the outset, though, the judges explained "that the purpose of this meeting was not to obtain [counsels'] endorsement for the proposal, but to receive and

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<sup>297</sup> Letter from William H. Becker, Judge, U.S. Dist. Court for the W. Dist. of Mo., to Edwin A. Robson, Judge, U.S. Dist. Court for the N. Dist. of Ill. (Oct. 26, 1964) (on file at Becker Papers, *supra* note 33, Box 16, Folder 4, File 1).

<sup>298</sup> Letter from Edwin A. Robson, Judge, U.S. Dist. Court for the N. Dist. of Ill., to Judge Alfred P. Murrah, Chief Judge, U.S. Court of Appeals for the Tenth Circuit (Oct. 28, 1964) (on file at Becker Papers, *supra* note 33, Box 7, Folder 18, Divider 1).

<sup>299</sup> Letter from Charles A. Bane, Att'y; William H. Ferguson, Att'y & Harold E. Kohn, Att'y, to William H. Becker, Judge, U.S. Dist. Court for the W. Dist. of Mo.; George H. Bolt, Judge, U.S. Dist. Court for the W. Dist. of Wash. & Edwin A. Robson, Judge, U.S. Dist. Court for the N. Dist. of Ill. 1 (Nov. 11, 1964) (on file at Becker Papers, *supra* note 33, Box 16, Folder 3, File 13).

<sup>300</sup> *See* Letter from Steven E. Keane, Att'y, Foley, Sammond & Lardner, to Edwin A. Robson, Judge, U.S. Dist. Court for the N. Dist. of Ill. 2 (Nov. 6, 1964) [hereinafter Keane–Robson Nov. 6, 1964 Letter] (on file at Becker Papers, *supra* note 33, Box 16, Folder 3) (reporting that due to "the divergent opinions" of defense attorneys, Keane, McAfee, and Mullinix were "not authorized to, and indeed could not accurately, represent the views of counsel with whom we are associated in the defense of the electrical litigation").

<sup>301</sup> *See id.* at 1-2 (reaffirming their position "that views of the Bar generally should be sought" by the judges).

<sup>302</sup> *See generally* Summary of Meetings Held in Washington, D.C., November 13 and 14, 1964 Re: Proposed Amendment to 28 U.S.C. § 1404 (Nov. 13-14, 1964) [hereinafter D.C. Meetings Re: Proposed Amendment] (on file at Neal Papers, *supra* note 34, Box 7, Folder on C.O.C. Documents) (recounting the attendees and topics of discussion at the meetings).

discuss their suggestions on and criticisms of the draft.”<sup>303</sup> The defense lawyers again urged submission of the proposed statute to relevant members of the Bar Association.<sup>304</sup> It was made clear that this would not be in the offing because of “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>305</sup> Perhaps accurately perceiving the direction of the wind, the plaintiffs expressed strong support for the proposed statute.<sup>306</sup> Their main concern related to whether the choice-of-law rules of the transferor forum would apply in diversity cases once transferred into the MDL court.<sup>307</sup>

In any event, the next day, Judges Robson, Becker, and Boldt, along with Dean Neal, held a meeting with Judge Maris to seek his crucial support.<sup>308</sup> At that meeting, Becker explained that there was an “[e]xtreme need for central management” in multidistrict cases and that the proposed statute was an “[a]lternative to [a] radical *forum non conveniens* statute” providing for complete transfer.<sup>309</sup> Maris expressed skepticism as to whether the statute was necessary in light of the successful cooperation achieved in the electrical cases.<sup>310</sup> Becker responded that voluntary cooperation would not be effective because “[l]itigants would run cases” in direct opposition to the kind of centralized judicial control that was necessary.<sup>311</sup> Further, Becker argued that the transferee judge needed to have the power to grant summary judgment

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<sup>303</sup> *Id.* at 1.

<sup>304</sup> *See id.* at 1-2 (reporting that “the meeting of defense counsel . . . had concluded that . . . reference to a Bar committee consisting of practitioners from relevant areas of law would be more appropriate”).

<sup>305</sup> *Id.* at 2-3.

<sup>306</sup> *See id.* at 2 (“Messrs. Bane, Kohn and Ferguson reported that plaintiffs’ counsel generally favored the proposal.”).

<sup>307</sup> *See id.* (reporting the plaintiffs committee’s suggestion that “further study be undertaken of the proposal’s effects in diversity cases”). For discussion of the myriad choice-of-law problems created by MDL, see generally Bradt, *supra* note 11, discussing why “MDL is a much better fit with choice of law” as compared to other aggregation methods. *See also* Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 680-82 (1984) (arguing that “section 1401(a) created a new species of choice-of-law problem in diversity cases”). Judge Becker eventually adopted the plaintiff lawyers’ preferred view, contending that transferred cases would be governed by the law of the transferor court under the rule of *Van Dusen v. Barrack*. *See* Co-Ordinating Comm. on Multiple Litig., Meeting of the Co-Ordinating Committee for Multiple Litigation, at New Orleans, February 7, 1965, at 2-3 (Feb. 7, 1965) [hereinafter Co-Ordinating Comm. Feb. 7, 1965 Meeting Minutes] (on file at Becker Papers, *supra* note 33, Box 9, Folder 21) (reporting that Becker “pointed out” to the group that *Van Dusen* would apply in MDL cases).

<sup>308</sup> *See generally* Minutes of Meeting Held at Washington D.C., Saturday Morning, November 14, 1964, at 1-4 (Nov. 14, 1964) (on file at Becker Papers, *supra* note 33, Box 8, Folder 19, Divider 3) (listing the attendees of the meeting and recounting their discussion).

<sup>309</sup> *Id.* at 1 (emphasis in original).

<sup>310</sup> *See id.* (recounting that Judge Maris asked whether “temporary venue change” could just “be done by rule”).

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

and award sanctions in order for the statute to work effectively.<sup>312</sup> Maris expressed tentative support for the concept of pretrial transfer,<sup>313</sup> and everyone involved agreed to meet again.<sup>314</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>315</sup> Abandoning the strategy of refusing to comment, the defendants issued a series of objections.<sup>316</sup> In essence, they argued that litigation on the scale of the electrical-equipment cases would be a "rare occurrence" and that adoption of a statute based on experience in the electrical cases would be premature.<sup>317</sup> The defendants also contended that the successful cooperation of judges in the electrical cases demonstrated that a transfer statute was unnecessary.<sup>318</sup> Beyond these general objections, the defendants raised numerous other concerns, mostly regarding the vagueness of the concepts of pretrial proceedings and related litigation concepts.<sup>319</sup>

Maris seemed to find the critique persuasive. In a letter to Murrah, he remarked that he was "much impressed by the points made in the memoranda" and endorsed the wait-and-see approach of the defendants.<sup>320</sup> Maris added that he viewed transfer authority as unnecessary, and that "[f]urther experience along these lines may give us much more light on the shape permanent procedural provisions should take."<sup>321</sup>

Murrah reacted with apparent alarm. Noting that he thought Maris had agreed with the need for legislation in November, Murrah worried that now Maris "would not favor any statutory authority to prescribe by general rules the

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<sup>312</sup> See *id.* (emphasizing the need for "[s]ummary judgements," "'partial'-sanctions," and "discovery denials").

<sup>313</sup> See *id.* at 1-2 (showing Maris's shift over the course of the meeting from questioning the need for a new statute to his proposal of potential provisions to be included in the statute).

<sup>314</sup> See D.C. Meetings Re: Proposed Amendment, *supra* note 302, at 4 ("The discussions concluded with the decision to re-evaluate the proposal and to meet again . . .").

<sup>315</sup> See Letter from John R. Collins, Att'y, Foley, Sammond & Lardner, to Edwin A. Robson, Judge, U.S. Dist. Court for the N. Dist. of Ill. 3-5 (Dec. 7, 1964) (on file at Neal Papers, *supra* note 34, Box 4, Folder XYZ) (listing concerns about the proposed amendments held by the committee of counsel representing the electrical litigation defendants). Collins took over communications from Steven Keane after Keane "became seriously ill and was hospitalized with a hemorrhaging ulcer." *Id.* at 1.

<sup>316</sup> See *id.* at 3-5 (listing the committee's objections and concerns about the proposed amendment).

<sup>317</sup> *Id.* at 3; see also *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>318</sup> *Id.*

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

<sup>320</sup> Letter from Albert B. Maris, Judge, U.S. Court of Appeals for the Third Circuit, to Alfred Murrah, Chief Judge, U.S. Court of Appeals for the Tenth Circuit 1 (Dec. 15, 1964) (on file at Neal Papers, *supra* note 34, Box 4, Folder XYZ).

<sup>321</sup> *Id.* at 2.

method and criteria for transferring multiple district litigation for the sole purpose of pretrial.”<sup>322</sup> Murrah added, “If this is your view, I would beg you to grant us a rehearing . . . .”<sup>323</sup> Murrah also cast aspersions on the motivations of defense counsel, echoing the observations of Robson and Becker earlier in the summer, contending 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>324</sup> Murrah continued, “[T]he 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 which have been followed in the cases.”<sup>325</sup>

Maris responded with skepticism, adhering to the view that specific rules promulgated by the Rules Committee for multiple litigation would be too rigid.<sup>326</sup> Instead, he preferred ad hoc consideration by the Judicial Conference to cases as they arose.<sup>327</sup> But Maris promised that he was “keeping [his] mind completely open on the subject of the legislation” and that he would “await a copy of the redraft with interest.”<sup>328</sup>

Returning to the drawing board in November 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.<sup>329</sup> 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 possible or probable result that lengthy steps will be required before the Court will approve any procedural changes.”<sup>330</sup> As the judges noted, such

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<sup>322</sup> Letter from Alfred P. Murrah, Chief Judge, U.S. Court of Appeals for the Tenth Circuit, to Albert B. Maris, Judge, U.S. Court of Appeals for the Third Circuit 1 (Dec. 24, 1964) (on file at Neal Papers, *supra* note 34, Box 4, Folder XYZ).

<sup>323</sup> *Id.*

<sup>324</sup> *Id.* at 1-2.

<sup>325</sup> *Id.* at 2.

<sup>326</sup> See Letter from Albert B. Maris, Judge, U.S. Court of Appeals for the Third Circuit, to Alfred P. Murrah, Chief Judge, U.S. Court of Appeals for the Tenth Circuit 1 (Dec. 29, 1964) (on file at Becker Papers, *supra* note 33, Box 15, Folder 34) (expressing Maris’s concern that “it should be possible to formulate the necessary legislation in broad general terms” to maintain flexibility).

<sup>327</sup> See *id.* (noting Maris’s desire for “the Judicial Conference [to have] full power to make necessary and appropriate provisions” on a case-by-case basis).

<sup>328</sup> *Id.*

<sup>329</sup> See Perry Goldberg, Two Suggestions on the Draft Venue Statute 1 (Nov. 10, 1964) (on file at Becker Papers, *supra* note 33, Box 16, Folder 1) (“[T]he draft does not provide for any particular rule-making procedures . . .”).

<sup>330</sup> *Id.* at 1-2.

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>331</sup> Maris, through his skepticism of implementing rules, had sparked the idea to cut the Rules Committee out of the implementation of MDL entirely.

To accomplish this, the drafters made three changes to the statute: they (1) added language providing the standard for when cases should be transferred for coordinated pretrial proceedings,<sup>332</sup> (2) provided for creation of the Panel and its appointment by the Chief Justice,<sup>333</sup> 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>334</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>335</sup>

The Coordinating Committee next met in New Orleans in February 1965 to consider this new draft.<sup>336</sup> At the meeting, in response to a request by Judge Roszel Thomsen for clarification of the powers granted to the transferee judge,<sup>337</sup> Judge Becker emphasized that the judge assigned by the panel would, "while assigned," have responsibility over "all matters."<sup>338</sup> For the most

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<sup>331</sup> *Id.* at 1.

<sup>332</sup> See Co-Ordinating Comm. on Multiple Litig., Preliminary Draft of 28 U.S.C. § 1404(e), at 1 (Jan. 11, 1964) (on file at Becker Papers, *supra* note 33, Box 16, Folder 1) (providing that "civil actions involving a common question of fact . . . may be transferred . . . upon [a] determination that such proceedings are required for the just and efficient conduct of such actions").

<sup>333</sup> See *id.* at 3 (establishing that the Panel "shall be constituted by the Chief Justice and shall consist of seven circuit and district judges designated from time to time by the Chief Justice, no two of whom shall be from the same circuit").

<sup>334</sup> See *id.* ("The panel may prescribe rules for the conduct of its business . . .").

<sup>335</sup> Both strategies are implicit in a draft report for submission to the Judicial Conference highlighting the need for "rapid and flexible procedures." Co-Ordinating Comm. on Multiple Litig., Comment on Proposed Title 28 U.S.C. § 1404(e), at 8 (Dec. 28, 1964) (on file at Becker Papers, *supra* note 33, Box 16, Folder 1).

<sup>336</sup> See Co-Ordinating Comm. Feb. 7, 1965 Meeting Minutes, *supra* note 307.

<sup>337</sup> See *id.* at 2 ("Judge Thomsen questioned what authority the local judges would have after transfer.").

<sup>338</sup> *Id.*

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 how the statute would invade the of authority of transferor judges, who would have no say in whether their cases would be transferred.<sup>339</sup> Nevertheless, the drafters presented the draft the following day to Judge Maris, who expressed his support for the new version, “observ[ing] that the draft of the proposed statute was greatly improved.”<sup>340</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>341</sup> Only Becker’s handwritten notes from that February meeting survive, but Ryan is reported as believing it would “not [be] desirable to set up permanent institutions with power to invade [the] jurisdiction of dist[ri]ct c[our]t.”<sup>342</sup> Apparently, as a result of this meeting, new language—later referred to as the “Ryan Amendment”—was inserted into the bill providing that “no action shall be transferred without consent of the District Court in which it is pending.”<sup>343</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.<sup>344</sup> 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>345</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>346</sup> Indeed, the limited nature of pretrial transfer was framed as an “advantage” over use of the class action device because “each

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<sup>339</sup> See *id.* at 1 (proposing “a joint conference of the panel and all the judges before whom related cases are pending before determination to transfer”). Ryan was not in attendance; he expressed his reservations by letter. *Id.*

<sup>340</sup> Legislative Comm., Meeting of Legislative Committee at New Orleans, February 9, 1965, at 1 (Feb. 9, 1965) (on file at Becker Papers, *supra* note 33, Box 9, Folder 21).

<sup>341</sup> See *id.* (noting that “Judges Thomsen, Robson and Becker will consult with Judge Ryan . . . to explain the legislative committee’s actions regarding his suggestions”).

<sup>342</sup> William H. Becker, Judge, U.S. Dist. Court for the W. Dist. of Mo., Notes on Thursday Meeting 2 (Feb. 18, 1965) (on file at Becker Papers, *supra* note 33, Box 17, Folder 39).

<sup>343</sup> Proposed Title 28, U.S.C. § 1407, at 1 (Feb. 10, 1965) (on file at Becker Chronological Files, *supra* note 33, Box 2, Folder 8).

<sup>344</sup> See CO-CORDINATING COMM. ON MULTIPLE LITIG., REPORT OF THE CO-ORDINATING COMM. FOR MULTIPLE LITIG. OF THE UNITED STATES DISTRICT COURTS, A SUB-COMMITTEE OF THE COMMITTEE ON PRE-TRIAL PROCEDURE AND PRACTICE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 13 (Mar. 2, 1965) (on file at Becker Papers, *supra* note 33, Box 16, Folder 1) (suggesting that the “proposed § 1407 and the Comment thereon be considered at the March 18, 1965 meeting”).

<sup>345</sup> *Id.*

<sup>346</sup> *Id.* at 19.

action remains as an individual suit with the litigants retaining control over their separate interests."<sup>347</sup> As a result, the "[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>348</sup> With the support of Judge Maris's committee, and with no dissents recorded, the Judicial Conference approved the statute for submission to the Congress.<sup>349</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. By the summer of 1965, the drafters had reason to be optimistic as they turned their attention to Congress. But there were storm clouds on the horizon. The defense lawyers they had rebuffed were not going to go down without a fight.

#### 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>350</sup> Congressman Emanuel Celler, Chairman of the House Judiciary Committee, subsequently introduced the bill, H.R. 8276, in the House on May 19, 1965.<sup>351</sup> All seemed to be going according to plan.<sup>352</sup> At the June 25 meeting of the Coordinating

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<sup>347</sup> *Id.* at 20.

<sup>348</sup> *Id.* at 21.

<sup>349</sup> See ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES: PROCEEDINGS, MARCH 18-19, 1965, at 12-13 (reporting the introduction of the draft bill and that "[u]pon recommendation of the Committee, the Conference approved the draft bill submitted by the subcommittee").

<sup>350</sup> See Letter from William E. Foley, Deputy Dir., Admin. Office of the U.S. Courts, to Hubert H. Humphrey, President, U.S. Senate (Apr. 12, 1965) (on file at Becker Papers, *supra* note 33, Box 15, Folder 34, Divider 4) (providing the draft bill to the President of the Senate); Letter from William E. Foley, Deputy Dir., Admin. Office of the U.S. Courts, to John W. McCormack, Speaker, U.S. House of Representatives (Apr. 12, 1965) (on file at Becker Papers, *supra* note 33, Box 15, Folder 34, Divider 4) (providing the draft bill to the Speaker of the House).

<sup>351</sup> See H.R. 8276, 89th Cong. (1st Sess. 1965).

<sup>352</sup> See Letter from Edwin A. Robson, Judge, U.S. Dist. Court for the N. Dist. of Ill., to the Coordinating Comm. for Multiple Litig. 1-2 (May 26, 1965) (on file at Becker Papers, *supra* note 33, Box 15, Folder 34) (expressing enthusiasm over the cooperation of Congress so far). Review of Congressman Celler's papers did not reveal anything of note regarding MDL.

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>353</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 (DOJ) could present its views. This was not necessarily cause for worry, as the Congress regularly consulted the DOJ on the Judicial Conference’s statutory recommendations, but it did mean that DOJ support would be vital.<sup>354</sup> Judge Robson, Dean Neal, and Goldberg set up a meeting with Donald Turner, Assistant Attorney General for Antitrust, on August 4, 1964, to discuss the statute.<sup>355</sup> Turner, though, was noncommittal; although he expressed general support for the concept, Turner apparently believed that actions by the government should be exempt in order to avoid having the government’s cases become enmeshed in private actions.<sup>356</sup> Neal acknowledged Turner’s request but hoped the Department would nevertheless “affirmatively support the legislation in principle.”<sup>357</sup> Turner, however, was unwilling to offer a quick endorsement, citing “the pressure of [the] circumstances” and the need to “take some time” to consider the proposal.<sup>358</sup>

Radio silence from the DOJ persisted through the fall of 1965.<sup>359</sup> Concerned about the Department’s ability to derail the legislation, the

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<sup>353</sup> Co-Ordinating Comm. for Multidistrict Litig., Minutes of Meeting of the Co-Ordinating Committee 3 (June 25, 1965, 2:00 PM) (on file at Becker Papers, *supra* note 33, Box 9, Folder 21).

<sup>354</sup> See FISH, *supra* note 93, at 208 (describing how the Judicial Committee “strove to ameliorate conflicts with the Department of Justice” in order to accomplish the Committee’s agenda).

<sup>355</sup> See Letter from Phil C. Neal, Exec. Sec’y, Coordinating Comm. for Multidistrict Litig., to Donald F. Turner, Assistant Att’y Gen., Antitrust Div., Dep’t of Justice 1 (Aug. 5, 1965) (on file at Becker Papers, *supra* note 33, Box 15, Folder 34) (thanking Turner “for the generous amount of time” he spent with the men the previous day discussing § 1407).

<sup>356</sup> See *id.* (“[W]e are hopeful that after further consideration . . . you may see your way to endorsing the proposed Section 1407 without the need for a special exclusion in behalf of the United States.”).

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

<sup>358</sup> Letter from Donald F. Turner, Assistant Att’y Gen., Antitrust Div., Dep’t of Justice to Phil C. Neal, Exec. Sec’y, Co-Ordinating Committee for Multidistrict Litig. 1-2 (Aug. 12, 1965) (on file at Becker Papers, *supra* note 33, Box 15, Jacket 34, Divider 1).

<sup>359</sup> See Co-Ordinating Comm. for Multidistrict Litig., Minutes of the Meeting of the Co-Ordinating Committee 1 (Dec. 9, 1965, 2:00 PM) [hereinafter Co-Ordinating Comm. Dec. 9, 1965 Meeting Minutes] (on file at Becker Papers, *supra* note 33, Box 9, Folder 21) (“Congressional action remains delayed pending the Justice Department’s recommendations. Though repeated efforts have been made to determine the Department’s position, no report has been received.”); see also Co-Ordinating Comm. for Multidistrict Litig., Minutes of Meeting of the Co-Ordinating Committee 1

Committee authorized Murrah "to take all necessary steps to secure action by the Department."<sup>360</sup> Murrah eventually secured a meeting in Washington with Deputy Attorney General Ramsey Clark late in the evening of December 13,<sup>361</sup> at which Murrah agreed to support an amendment exempting any cases brought by the government from the statute's ambit.<sup>362</sup> But Clark also expressed confusion about the Ryan Amendment requiring consent to transfer from the transferor judge.<sup>363</sup> Murrah, who had consented to inclusion of the amendment only to mollify Judge Ryan, made clear to Clark that he would not oppose a DOJ suggestion that the Ryan Amendment be eliminated from the bill in Congress.<sup>364</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>365</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>366</sup> With the amendments, however, Clark enthusiastically endorsed the bill on behalf of the Department.<sup>367</sup>

Having achieved the DOJ's support, the Committee began preparations to report this development to the Judicial Conference at its upcoming March 1966 meeting.<sup>368</sup> This bothered Judge Ryan, who resisted removal of his veto

(Sept. 29, 1965, 10:00 AM) (on file at Becker Papers, *supra* note 33, Box 9, Folder 21) ("Judge Robson reported that Congressional action on proposed Title 28, U.S.C. § 1407 has been deferred pending recommendations from the Justice Department.").

<sup>360</sup> Co-Ordinating Comm. Dec. 9, 1965 Meeting Minutes, *supra* note 359, at 1.

<sup>361</sup> See Letter from Alfred Murrah, Chief Judge, U.S. Court of Appeals for the Tenth Circuit, to Ramsey Clark, Deputy Att'y Gen., Dep't of Justice (Dec. 16, 1965) (on file at Neal Papers, *supra* note 34, 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 we all agree that the legislation is needful.").

<sup>362</sup> See *id.* (assuring Clark that "the judges are perfectly willing to except the Government to the extent [Clark] deem[ed] advisable and feasible").

<sup>363</sup> See Letter from Alfred P. Murrah, Chief Judge, U.S. Court of Appeals for the Tenth Circuit, to Ramsey Clark, Deputy Att'y Gen., Dep't of Justice (Dec. 27, 1965) (on file at Neal Papers, *supra* note 34, Box 4, Folder XYZ) (responding to Clark regarding the provision requiring consent by the transferor court).

<sup>364</sup> See *id.* (stating that "[t]he Committee ha[d] not taken any position on the suggested deletion of the provision" but that "[i]t would be unfortunate, however, if the legislation was so restricted to nullify its intended salutary purposes").

<sup>365</sup> See Letter from Ramsey Clark, Deputy Att'y Gen., Dep't of Justice, to Emanuel Celler, Chairman, House Comm. on the Judiciary (Jan. 7, 1966), reprinted in *Judicial Administration: Hearings Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. 27-28 (1966) [hereinafter House Hearings].

<sup>366</sup> *Id.* at 28.

<sup>367</sup> See *id.* ("The Department of Justice favors its enactment but suggests that it be amended in two respects.").

<sup>368</sup> See Letter from Alfred P. Murrah, Chief Judge, U.S. Court of Appeals for the Tenth Circuit, to William H. Becker, Judge, U.S. Dist. Court for the W. Dist. of Mo. 1 (Feb. 15, 1966) (on

provision.<sup>369</sup> 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 been already introduced."<sup>370</sup> Robson attempted to smooth things over in a subsequent letter to the whole Committee, putting the question of the Clark amendments to a majority vote.<sup>371</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>372</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 opinions on suggested changes."<sup>373</sup> As a result, the judges appearing at any hearings could effectively disown Ryan's veto provision.

Despite the approval of the DOJ and the continuing support of the Judicial Conference, the bill remained bogged down in the House.<sup>374</sup> As the summer of 1966 wore on, the judges agreed to lobby the Senate to hold hearings on the bill first.<sup>375</sup> Becker personally reached out to Senator Edward Long from

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file at Becker Papers, *supra* note 33, Box 15, Folder 34, Divider 1) (expressing doubt over the advisability of going back to the Judicial Conference with the proposed statute given that the statute would later "undergo Congressional scrutiny, and may be further amended there").

<sup>369</sup> See Letter from Sylvester J. Ryan, Chief Judge, U.S. Dist. Ct. for the S. Dist. of N.Y., to Edwin A. Robson, Judge, U.S. Dist. Court for the N. Dist. of Ill. 1-2 (Feb. 16, 1966) (on file at Neal Papers, *supra* note 34, Box 4, Folder XYZ) (registering his "objections to the draft as presently worded" and requesting that his "dissent be recorded as outlined" if the Committee submitted the "report as presently worded").

<sup>370</sup> *Id.* at 1.

<sup>371</sup> See Letter from Edwin A. Robson, Judge, U.S. Dist. Court for the N. Dist. of Ill., to Co-Ordinating Comm. for Multiple Litig. 1 (Feb. 21, 1966) [hereinafter Robson-Co-Ordinating Comm. Feb. 21, 1966 Letter] (on file at Becker Papers, *supra* note 33, Box 15, Folder 34) (enclosing the letter from Ryan and asking the Committee members for their vote on whether or not to delete the provision).

<sup>372</sup> See ADMIN. OFFICE OF THE U.S. COURT, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 25 (Mar. 10-11, 1966) (approving "the concept of the subcommittee's work . . . including the recommendation of appropriate legislation"); see also Robson-Co-Ordinating Comm. Feb. 21, 1966 Letter, *supra* note 371, at 1 ("Judge Robson reported that the . . . Report, which had indicated Chief Judge Ryan's dissent, had been accepted by the Judicial Conference.").

<sup>373</sup> Coordinating Comm. for Multiple Litig., Minutes of Meeting of the Co-Ordinating Committee 2 (Mar. 31, 1966, 2:00 PM) (on file at Becker Papers, *supra* note 33, Box 9, Folder 21).

<sup>374</sup> See Letter from William E. Foley, Deputy Dir., Admin. Office of the U.S. Courts, to Edwin A. Robson, Judge, U.S. Dist. Court for the N. Dist. of Ill. 1 (Apr. 12, 1966) (on file at Becker Papers, *supra* note 33, Box 15, File 34, Divider 1) ("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>375</sup> See, e.g., Letter from William H. Becker, Judge, U.S. Dist. Court for the W. Dist. of Mo., to Edward V. Long, Senator, U.S. Senate 1 (Aug. 1, 1966) (on file at Becker Papers, *supra* note 33,

his home state of Missouri.<sup>376</sup> Long responded, agreeing to move things forward, but also inquiring about the Ryan Amendment,<sup>377</sup> which Becker assertively undermined, claiming, “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 it were adopted in the form suggested by the Attorney General.”<sup>378</sup> With things apparently gaining steam in the Senate, the House Judiciary Committee surprised the judges by scheduling a bill hearing on August 31, 1966.<sup>379</sup> 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 ABA

The ABA had long been an important ally of the Judicial Conference.<sup>380</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>381</sup> At the same time, ABA opposition could be a death knell, even for a proposal supported by the Judicial Conference.<sup>382</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*.<sup>383</sup> 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, as implemented in the electrical-equipment cases, did not turn out to be too beneficial.<sup>384</sup>

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Box 15, Folder 34) (“The bill was introduced in the House but has become bogged down in Congressman Celler’s committee.”).

<sup>376</sup> See *id.* at 1-3 (informing Senator Long of the history of and need for the bill).

<sup>377</sup> See Letter from William H. Becker, Judge, U.S. Dist. Court for the W. Dist. of Mo., to Edward V. Long, Senator, U.S. Senate 1 (Aug. 12, 1966) (on file at Becker Papers, *supra* note 33, Box 15, Folder 34) (responding to Long concerning “both changes” to the bill).

<sup>378</sup> *Id.*; see also *id.* (informing Long that only “[o]ne judge on the drafting committee wished to give the district court from which the action was transferred a veto power”).

<sup>379</sup> See House Hearings, *supra* note 365.

<sup>380</sup> See FISH, *supra* note 93, at 331-32 (noting the ABA’s importance in “congressional enactment of measures important to the federal courts”).

<sup>381</sup> See *id.* at 334-36 (noting that judges “looked to the bar for assistance” on “politically sensitive issue[s]”).

<sup>382</sup> See DEBORAH J. BARROW & THOMAS G. WALKER, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM 256-57 (1988) (noting that opposition from the “organized bar” meant “little chance of legislative success”); see also Baar, *supra* note 96, at 99 (explaining that Congress will refer “[b]ills affecting the administration of the courts . . . to the Administrative Office,” giving the Judicial Conference “the role of [a] veto group” on any proposed legislation).

<sup>383</sup> See *supra* subsection II.A.

<sup>384</sup> See *supra* text accompanying notes 191-96.

When the Committee asked for comments from defense counsel in November 1964, the lawyers' main contention was that the Committee should refer the proposal to the ABA for review.<sup>385</sup> The judges roundly rejected this proposal. Having been rebuffed, some opposing lawyers decided to generate formal ABA opposition through its Antitrust Section, whose executive council contained numerous lawyers for defendants in the electrical cases.<sup>386</sup> At the Section's April 1965 meeting, it was announced that an ad hoc committee had been formed to study the MDL legislation.<sup>387</sup> On April 13, 1966, with the legislation pending in the House Judiciary 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>388</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>389</sup>

The Committee was blindsided. As Robson described in a letter to Becker on August 16, 1966, 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>390</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>391</sup>

Following adoption of its resolution, the ABA drafted a report outlining its opposition.<sup>392</sup> The main thrust of the report was that the statute went too far, too fast, and that the electrical-equipment cases demonstrated that regular

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385 See Keane–Robson Nov. 6, 1964 Letter, *supra* note 300, at 2 (urging that the "views of the Bar generally should be sought and . . . solicited from the appropriate sections or committees of the American Bar Association").

386 See *Executive Session of the Council of the Section of Antitrust Law*, 27 A.B.A. SEC. ANTITRUST L. viii, viii (1965) (listing the present members of the Council of the Section of Antitrust Law).

387 See *id.* at x (reporting that "[t]he Council reviewed the effort . . . to implement Judge Prettyman's proposal" and "the Chairman was authorized to create an *ad hoc* committee").

388 See *Executive Session of the Council of the Section of Antitrust Law*, 30 A.B.A. SEC. ANTITRUST L. i, ix (1966) (reporting that "Stewart Kerr presented the report of the ad hoc committee . . . , which presented a resolution recommending that H.R. 8276 . . . be opposed").

389 See *Proceedings of the House of Delegates: Montreal, Canada, August 8-11, 1966*, 52 A.B.A. J. 967, 976 (1966) (reporting these events, which ended with "the House vot[ing] to adopt the resolution [in opposition to H.R. 8276] without debate"). The ABA further resolved, "[T]he 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*, 91 ANN. REP. A.B.A. 347, 375 (1966).

390 Letter from Edwin A. Robson, Judge, U.S. Dist. Court for the N. Dist. of Ill., to William H. Becker, Chief Judge, U.S. Dist. Court for the W. Dist. of Mo. 1 (Aug. 16, 1966) (on file at Becker Papers, *supra* note 33, Box 15, Folder 34, Divider 1).

391 *Id.*

392 See REPORT OF SECTION OF ANTITRUST LAW TO THE HOUSE OF DELEGATES OF AMERICAN BAR ASSOCIATION ON H.R. 8276, 89TH CONGRESS, *reprinted in* House Hearings, *supra* note 365, at 33-36.

procedures were adequate to meet the demands of a crisis.<sup>393</sup> Becker and Robson did not see a copy of the report until August 30, the night before the House Subcommittee hearing,<sup>394</sup> so they dictated responses to the criticisms in their Washington hotel the night before the hearing.<sup>395</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>396</sup> Robson and Becker appeared on behalf of the Committee, as did Neal.<sup>397</sup> In their testimony, the judges adhered to their established strategy: emphasizing the urgent need for the legislation. Neal went first and described the successes of the electrical-equipment cases,<sup>398</sup> but then turned to “the different theory” underlying the MDL statute.<sup>399</sup> Neal explained that the procedure followed in the electrical cases was “cumbersome” and “fragile . . . because it [was] dependent upon the unanimous agreement of the judges involved for it to work.”<sup>400</sup> Moreover, “perhaps most important, section 1404(a) [was] inadequate because it le[ft] 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>401</sup> The bill would respond by providing “machinery in the Federal judiciary [to] 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>402</sup>

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

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<sup>393</sup> *See id.* at 35 (arguing that it was “too early to assess the relative merits and disadvantages of pretrial proceedings utilized in the electrical cases” and that, either way, “existing statutes and applicable Rules” had allowed for “coordinated pretrial proceedings in those cases”).

<sup>394</sup> *See generally* House Hearings, *supra* note 365.

<sup>395</sup> *See* Letter from William H. Becker, Chief Judge, U.S. Dist. Court for the W. Dist. of Mo., to Edward V. Long, Senator, U.S. Senate 1 (Sept. 6, 1966) [hereinafter Becker–Long Sept. 6, 1966 Letter] (on file at Becker Papers, *supra* note 33, Box 15, Folder 34) (“On August 30 we received a copy of the resolution . . . . It was necessary to dictate a response . . . .”); *see also* *Multidistrict Litigation: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 89th Cong. 24 (1966) [hereinafter Senate Hearings] (statement of William H. Becker, C.J., U.S. Dist. Court for the W. Dist. of Mo.) (“We discovered the existence of this document only the day before we were to appear before the House committee on H.R. 8276.”).

<sup>396</sup> *See* House Hearings, *supra* note 365, at 1 (listing H.R. 3391, H.R. 6703, H.R. 8276, and H.R. 16575 as comprising the subcommittee’s agenda).

<sup>397</sup> *See id.* at 21 (statement of Edwin A. Robson, J., U.S. Dist. Court for the N.D. Ill.) (explaining that the presentation would be divided between himself, Neal, and Becker).

<sup>398</sup> *See id.* at 21 (statement of Phil C. Neal, Executive Secretary, Coordinating Comm. for Multiple Litig.) (offering a brief history of the electrical-equipment cases).

<sup>399</sup> *Id.* at 22.

<sup>400</sup> *Id.*

<sup>401</sup> *Id.* at 23.

<sup>402</sup> *Id.*

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>403</sup>

Becker then endorsed the two amendments suggested by Deputy Attorney General Clark.<sup>404</sup> Becker noted the Committee's endorsement of the first proposed amendment, exempting suits brought on behalf of the government.<sup>405</sup> With respect to the second suggestion, the deletion of the Ryan Amendment allowing for a transferor-court veto, Becker stated, "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>406</sup> Becker closed by again stressing the apparently limited nature of the proposal as 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>407</sup>

Although no witnesses appeared against the bill, the report of the ABA's opposition was entered into the record,<sup>408</sup> as was Becker and Robson's point-by-point refutation of it,<sup>409</sup> dictated in their hotel the night before. The Becker-Robson rejoinder is remarkable for its force. The thrust of the judges' response was that current procedure was plainly inadequate to deal with the massive litigation on the horizon, and that a failure to pass the bill would threaten the

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<sup>403</sup> *Id.* at 26-27 (statement of William H. Becker, C.J., U.S. Dist. Court for the W. Dist. Of Mo.).

<sup>404</sup> *See id.* at 27 (stating that Becker, and the majority of the Committee, supported both amendments).

<sup>405</sup> *See id.* ("This suggested modification is agreeable to the Committee.").

<sup>406</sup> *Id.* Murrah testified even more forcefully along these lines in the Senate hearings, responding to Senator Tydings's question about the veto provision, "I suppose that 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 for me to say that I never did approve the provision which allowed veto power to one judge. My argument was and is that if you do that, you almost completely render the legislation impotent." Senate Hearings, *supra* note 395, at 55-56 (statement of Alfred P. Murrah, C.J., U.S. Court of Appeals for the Tenth Circuit).

<sup>407</sup> House Hearings, *supra* note 365, at 32 (statement of William H. Becker, C.J., U.S. Dist. Court for the W. Dist. of Mo.).

<sup>408</sup> *See supra* note 392 and accompanying text.

<sup>409</sup> *See* House Hearings, *supra* note 365, at 29-32 (recording the memorandum submitted by the Coordinating Committee addressing, in turn, each criticism in the ABA Report by number).

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>410</sup>

#### D. *Shifting Attention to the Senate*

Due to the ABA's opposition in the House, the judges left the House hearings less than confident about the bill's prospects, so they instead turned their attention to lobbying the Senate Judiciary Committee, which eventually agreed to hold a hearing on the bill in October in Chicago.<sup>411</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 Clark's amendments incorporated.<sup>412</sup> That Tydings was the chair was serendipitous. Not only was he exceptionally interested in improving the operations of the federal courts,<sup>413</sup> his mentor both in 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>414</sup>

The hearing was held on October 20-21, 1966.<sup>415</sup> The only Senator in attendance was Tydings,<sup>416</sup> and again only witnesses in favor of the bill

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<sup>410</sup> *Id.* at 32.

<sup>411</sup> See Becker–Long Sept. 6, 1966 Letter, *supra* note 395, at 1 (expressing optimism about the Chicago hearings set for October).

<sup>412</sup> See S. 3815, 89th Cong. (1966). 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 H. Becker, Chief Judge, U.S. Dist. Court for the W. Dist. of Mo., to Edward V. Long, Senator, U.S. Senate 1 (Oct. 17, 1966) (on file at Becker Papers, *supra* note 33, Box 15, Folder 34).

<sup>413</sup> See, e.g., Joseph F. Spaniol, Jr., *The Federal Magistrates Act: History and Development*, 1974 ARIZ. ST. L.J. 565, 567 (noting Tydings's interest in judicial administration).

<sup>414</sup> See Senate Hearings, *supra* note 395, at 3-4 (statement of Senator Joseph D. Tydings, Chairman, Subcomm. on Improvements in Judicial Mach.) ("I am particularly gratified to see my own former mentor . . . Judge Roszel C. Thomsen, 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.").

<sup>415</sup> *Id.* at 1, 41.

<sup>416</sup> See *id.* at 1 (listing Senator Tydings, and no other senators, as present).

testified. But this time, nearly the entire Coordinating Committee attended. As in the House hearing, Robson,<sup>417</sup> Becker,<sup>418</sup> and Neal<sup>419</sup> each testified, trumpeting the success of the electrical-equipment actions, but pressing the need for a case-consolidating machinery in the future that did not rely on the voluntary cooperation of judges. This time, however, they were joined by an additional witness: Charles Bane, the lawyer for Commonwealth Edison, the plaintiff in the electrical litigation, and an advocate for the statute.<sup>420</sup>

Becker and Bane targeted the ABA's opposition, both in process and substance. 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 approved without debate by the House of Delegates.<sup>421</sup> In Becker's view, "the recommendation of the American bar loses a great deal of its value and influence under those circumstances."<sup>422</sup> Becker also implied that his opponents' activities were questionable, 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 that "the Coordinating Committee and lawyers who were supporting this proposal for new section 1407 were never given an opportunity to discuss it."<sup>423</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 reliable information from a person intimately connected with this recommendation . . . that the recommendation opposing H.R. 8276 was never made known to the membership of the Antitrust Section of the American Bar Association.<sup>424</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 . . . . [B]ut at no time

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<sup>417</sup> *See id.* at 4 (introducing the statement of Edwin A. Robson, J., U.S. Dist. Court for the N. Dist. of Ill.).

<sup>418</sup> *See id.* at 15 (introducing the statement of William H. Becker, C.J., U.S. Dist. Court for the W. Dist. of Mo.).

<sup>419</sup> *See id.* at 7 (introducing the statement of Phil C. Neal, Dean, Univ. of Chi. Law Sch.).

<sup>420</sup> *See id.* at 25 (introducing the statement of Charles A. Bane, Esquire, Chi., Ill.).

<sup>421</sup> *See id.* at 24-25 (statement of William H. Becker, C.J., U.S. Dist. Court for the W. Dist. of Mo.) (drawing into question the robustness of the process by which the report was drafted and approved).

<sup>422</sup> *Id.* at 24.

<sup>423</sup> *Id.*

<sup>424</sup> *Id.*

did they abandon the advocacy of their clients' causes."<sup>425</sup> Bane added that he was present at the Montreal ABA meeting and that, even though he was chairing a committee of the Antitrust Section, he "at no time" had "any indication . . . that the council of the antitrust law section was presenting to the house of delegates this type of a resolution."<sup>426</sup> Bane also noted that when the judges in the electrical-equipment cases offered counsel the opportunity to comment on the bill, "the defendants did not comment, but the plaintiffs did," and observed that "plaintiffs' counsel by and large were wholeheartedly in favor of these proposals."<sup>427</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 any future attempt 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—like Bane—represented plaintiffs,<sup>428</sup> and, more surprisingly, Edward R. Johnston, who represented defendant McGraw-Edison Company, and who, at the time, was the senior partner at Raymond, Mayer, Jenner & Block.<sup>429</sup> 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>430</sup>

Johnston also questioned the ABA's process, albeit diplomatically, noting that "[t]here was no debate on any of these resolutions" and that he "therefore [could not] attach too great importance to that resolution."<sup>431</sup> Despite having "the greatest respect for the members" of the council, Johnston speculated that "there were at least one or two members on the council who did not favor this type of pretrial proceeding."<sup>432</sup>

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<sup>425</sup> *Id.* at 38 (statement of Charles A. Bane, Esquire, Chi., Ill.). Bane added his view that defense counsel was opposed to the bill and that they were "quite likely in the future, in the event that 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>426</sup> *Id.* at 38.

<sup>427</sup> *Id.* at 39.

<sup>428</sup> *See id.* at 48 (introducing the statement of Ronald W. Olson, Esquire, Chi., Ill.).

<sup>429</sup> *See id.* at 42 (introducing the statement of Edward R. Johnston, Esquire, Chi., Ill.).

<sup>430</sup> *Id.* at 43.

<sup>431</sup> *Id.* at 47.

<sup>432</sup> *Id.*

Judge Murrah, speaking at the same hearing, anchored the testimony by expressing in stark terms the urgent need for the legislation. He offered, "I think it is 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>433</sup>

The Senate subcommittee scheduled a third day of hearings for January 24, 1967.<sup>434</sup> Unlike the earlier hearings though, this one would feature witnesses testifying in opposition to the bill—including Phillip Price of Dechert, Price & Rhoads in Philadelphia, the firm which had represented defendant I-T-E Circuit Breaker in the electrical cases, and William Simon of Howrey & Simon in Washington, the attorney who had chaired the ABA ad hoc committee which produced the report opposing the bill.<sup>435</sup>

Upon learning that Price would appear before the subcommittee, Becker sought to preemptively cast doubt upon his credibility. On January 12, 1967, 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>436</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 be still clogging the dockets in many districts. Mr. Price's testimony should be evaluated in the light of the actions of his firm in representing I-T-E Circuit Breaker in the electrical equipment litigation.<sup>437</sup>

The hearing commenced on January 24, 1967, again with Tydings as the only senator in attendance.<sup>438</sup> Price did not hold back. Still upset about the

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<sup>433</sup> *Id.* at 54 (statement of Alfred P. Murrah, C.J., U.S. Court of Appeals for the Tenth Circuit).

<sup>434</sup> See Jan. 24, 1967 Senate Hearings, *supra* note 181; see also Co-Ordinating Comm. for Multiple Litig., Minutes of the Meeting of the Co-Ordinating Committee 4 (Jan. 20, 1967) [hereinafter Co-Ordinating Comm. Jan. 20, 1967 Meeting Minutes] (on file at Becker Papers, *supra* note 33, Box 11, Folder 1) ("The Senate Committee on Improvements in Judicial Machinery will hold additional hearings on proposed § 1407 to be held in Washington, D.C. on January 24.").

<sup>435</sup> See Co-Ordinating Comm. Jan. 20, 1967 Meeting Minutes, *supra* note 434 ("Mr. 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>436</sup> Letter from William H. Becker, Chief Judge, U.S. Dist. Court for the W. Dist. of Mo., to George B. Trubow, Deputy Counsel, Subcomm. on Improvements in Judicial Mach., Comm. on the Judiciary, U.S. Senate 2 (Jan. 12, 1967) (on file at Becker Papers, *supra* note 33, Box 15, Folder 34).

<sup>437</sup> *Id.* at 3-4.

<sup>438</sup> See Jan. 24, 1967 Senate Hearings, *supra* note 181, at 101 (listing Senator Tydings as the only senator present at the hearing).

handling of the electrical-equipment cases, Price excoriated both the judges and their bill, arguing that "[i]t would lead to the same kind of abuses which have . . . appeared during the . . . electrical cases."<sup>439</sup> Price got nowhere, however, with his attempt to influence Tydings, who took up Becker's critique that Price's opposition to the bill was motivated by his client's interest in increasing delay as a weapon against plaintiffs.<sup>440</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>441</sup> Tydings took the bait, characterizing the ABA's stance as opposed to the 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 litigants is the most important.<sup>442</sup>

Judge Thomas Clary of Philadelphia attended the hearing on behalf of the Coordinating Committee and reported to his colleagues by letter.<sup>443</sup> Clary felt good about how the hearing went.<sup>444</sup> Clary also reported a conversation he initiated with subcommittee counsel George Trubow after the hearing; Clary learned from Simon's testimony that the ABA Antitrust Section's ad hoc committee had been appointed by the section's chair, Edgar Barton, of the New York firm White & Case, which had represented General Electric in the electrical cases.<sup>445</sup> Expressing views reminiscent of those expressed by Becker, Robson, and Murrah in 1964, Clary also explained that the ABA's position was "to oppose any legislation looking toward improvement in

<sup>439</sup> *Id.* at 107 (statement of Philip Price, Esquire, Dechert, Price & Rhoads).

<sup>440</sup> *See id.* at 115 (statement of Sen. Tydings, Member, S. Comm. on the Judiciary) (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>441</sup> *Id.* at 121 (statement of William Simon, Esquire, Howrey, Simon, Baker & Murchison).

<sup>442</sup> *Id.* at 124 (statement of Sen. Tydings, Member, S. Comm. on the Judiciary).

<sup>443</sup> *See* Letter from Thomas J. Clary, Judge, U.S. Dist. Court for the E. Dist. of Pa., to the Coordinating Comm. on Multiple Litig. 1-5 (Jan. 27, 1967) (on file at Neal Papers, *supra* note 34, Box 4, Folder XYZ) (reporting Clary's observations and thoughts from the January 24, 1967 hearing on "Senate Bill 159, formerly S. 3815").

<sup>444</sup> *See id.* at 5 ("I left the hearing with the feeling that it had gone rather well . . .").

<sup>445</sup> *See id.* at 3 ("[A]t the conclusion of the hearing, I pointed out to Mr. Trubow that the Committee had been appointed by Edgar Barton . . . and most of us will remember his active participation in all proceedings before the Co-Ordinating Committee.").

expediting antitrust cases and supporting vigorously an extension of loopholes which would avoid responsibility for antitrust violation.”<sup>446</sup>

Following the hearings, Judge Becker encouraged other judges to commence a letter-writing campaign to their Senators.<sup>447</sup> The judges participated eagerly.<sup>448</sup> In the meantime, Becker liaised with Senator Tydings’s office to respond to the supplemental statements offered by Price<sup>449</sup> and attorneys from Cravath, Swaine & Moore, the firm that had represented Westinghouse in the electrical cases.<sup>450</sup> Both offered amendments to the bill.<sup>451</sup> Perhaps recognizing Tydings’s commitment to the legislation, Price encouraged several strategic amendments, all of which would make MDL consolidation more difficult.<sup>452</sup> In particular, he proposed an amendment that would only allow transfer based on a showing that there was “a substantial number of civil actions . . . in which common questions of fact and law predominate”<sup>453</sup> and transfer only to “the district most convenient for the parties and witnesses.”<sup>454</sup> The Cravath memorandum to the Committee argued that coordination of multidistrict litigation should occur only under rare circumstances and proposed that only

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<sup>446</sup> *Id.* at 4.

<sup>447</sup> See Letter from William H. Becker, Chief Judge, U.S. Dist. Court for the W. Dist. of Mo., to Judges Before Whom Multi-District Litig. Is or Has Been Pending 2 (Apr. 3, 1967) (on file at Becker Papers, *supra* note 33, Box 15, Folder 34) (“It is suggested that, if you approve the bill, you support its passage by writing members of the Senate who represent your state or whom you know.”).

<sup>448</sup> See Letter from Bailey Brown, Judge, U.S. Dist. Court for the W. Dist. of Ky., to William H. Becker, Chief Judge, U.S. Dist. Court for the W. Dist. of Mo. (Apr. 19, 1967) (on file at Becker Papers, *supra* note 33, Box 15, Folder 34) (“In response to your letter of April 17 I have written to Senator Gore . . .”); Letter from Roy M. Shelbourne, Senior Judge, U.S. Dist. Court for the W. Dist. of Ky., to William H. Becker, Chief Judge, U.S. Dist. Court for the W. Dist. of Mo. (Apr. 19, 1967) (on file at Becker Papers, *supra* note 33, 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.”).

<sup>449</sup> See Phillip Price, Supplemental Statement of Philip Price on Senate Bill 159 [hereinafter Price Supplemental Statement] (on file at Becker Papers, *supra* note 33, Box 15, Folder 34).

<sup>450</sup> See Memorandum from Cravath, Swaine & Moore to the Subcomm. on Improvements in Judicial Mach., Comm. on the Judiciary, U.S. Senate (Feb. 10, 1967) [hereinafter Cravath Memo] (on file at Becker Papers, *supra* note 33, Box 15, Folder 34).

<sup>451</sup> See *id.* at 2-5 (offering amendments to fix what the firm viewed as the “several defects” of the current bill); Price Supplemental Statement, *supra* note 449, at 1-5 (offering his “suggestions for modifications of the language of S.159”). Trubow reached out to Becker for comments on these statements. See Letter from George B. Trubow, Deputy Counsel, Subcomm. on Improvements in Judicial Mach., Comm. on the Judiciary, U.S. Senate, to William H. Becker, Chief Judge, U.S. Dist. Court for the W. Dist. of Mo. 1 (Feb. 10, 1967) (on file at Becker Papers, *supra* note 33, Box 15, Folder 34) (asking for Becker’s comments regarding Price’s suggestions); Letter from George B. Trubow Deputy Counsel, Subcomm. on Improvements in Judicial Mach., Comm. on the Judiciary, U.S. Senate, to William H. Becker, Chief Judge, U.S. Dist. Court for the W. Dist. of Mo. 1 (Feb. 13, 1967) (on file at Becker Papers, *supra* note 33, Box 15, Folder 34) (soliciting Becker’s feedback regarding the Cravath memo).

<sup>452</sup> See Price Supplemental Statement, *supra* note 449, at 1-5.

<sup>453</sup> *Id.* at 1.

<sup>454</sup> *Id.* at 2.

a party should be allowed to move for transfer,<sup>455</sup> that when doing so the party had to provide a list of all related litigation "in that court or elsewhere,"<sup>456</sup> that transfer be for trial as well as pretrial proceedings,<sup>457</sup> and that any transfer orders be immediately appealable to the Supreme Court.<sup>458</sup> The Cravath memo also echoed Price's request for a requirement that common questions of law and fact "predominate."<sup>459</sup>

Becker responded forcefully. He decried the suggestion of a predominance requirement as "undesirable and crippling,"<sup>460</sup> and he objected that requiring common questions of law would preclude use of the procedure in diversity cases, such as products liability, where the law to be applied would be that of multiple states.<sup>461</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 of the Suggestions to its home state. Local counsel . . . objected."<sup>462</sup> Becker summarized, stating simply that the proposed amendments were "calculated to cripple the bill."<sup>463</sup>

With respect to the Cravath memo, Becker rejected the idea that massive litigation or 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 simple mass of litigation."<sup>464</sup> Becker accurately predicted the future of MDL; in fact,

<sup>455</sup> See Cravath Memo, *supra* note 450, at 4 (suggesting that "[u]pon motion of any party to a case" be added to the bill).

<sup>456</sup> *Id.*

<sup>457</sup> See *id.* at 2-3 (arguing against subsequent remand for trial).

<sup>458</sup> See *id.* at 4 ("That determination shall be directly appealable to the Supreme Court . . .").

<sup>459</sup> *Id.*

<sup>460</sup> Memorandum from William H. Becker, Chief Judge, U.S. Dist. Court for the W. Dist. of Mo., to the Subcomm. on Improvements in Judicial Mach., Comm. on the Judiciary, U.S. Senate, Comments on Supplemental Statements of Mr. Phillip Price on Senate Bill 159, at 2 (Mar. 18, 1967) (on file at Becker Papers, *supra* note 33, Box 15, Folder 34).

<sup>461</sup> See *id.* at 3 ("But the words 'of law' should not be 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 might 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>462</sup> *Id.* at 5 (internal citation omitted).

<sup>463</sup> *Id.*

<sup>464</sup> Memorandum from William H. Becker, Chief Judge, U.S. Dist. Court for the W. Dist. of Mo., to the Subcomm. on Improvements in Judicial Mach., Comm. on the Judiciary, U.S. Senate, Comments on Memorandum for Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary of the United States, by Cravath, Swaine and Moore, Dated February 10, 1967, at 1 (Mar. 18, 1967) [hereinafter Becker Response to Cravath Memo] (on file at Becker Papers, *supra* note 33, Box 15, Folder 34).

he accurately predicted a products liability action related to the “injurious side effects of a birth-control pills” and cases in which “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>465</sup> With respect to the rest of Cravath’s suggestions, Becker stated simply that their arguments were “vague and unconvincing” and that the proposed amendments “would render the bill worthless from a judicial standpoint.”<sup>466</sup> Becker also took aim at Cravath’s credibility, 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>467</sup>

On May 25, 1967, the judges received good news. Tydings reported that the Subcommittee was preparing a report of the bill with three amendments intended only to “clarify certain provisions of the bill, but make no substantial changes.”<sup>468</sup> The amendments were limited. Though two addressed some of the objections to the bill, they did not limit the scope of the statutory power to consolidate. The three amendments were: (1) adding “the convenience of parties and witnesses” as a factor in the decision to transfer along with the “just and efficient conduct of such actions,” (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>469</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>470</sup> The short report from the Senate Judiciary Committee highlights all of the judges’ tactics, with particular emphasis on the urgent need for the legislation in light of demands on the federal courts and the unlikelihood of the cooperation seen

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<sup>465</sup> *Id.* at 1-2. For current examples of Becker’s prediction having come to fruition, see *In re Yasmin & Yaz (Drospirenone) Marketing, Sales Practices & Products Liability Litigation*, 692 F. Supp. 2d 1012 (S.D. Ill. 2010) and *In re General Motors Ignition Switch Litigation*, Nos. 14-MD-2543(JMF), 2015 WL 3619584 (S.D.N.Y. June 10, 2015).

<sup>466</sup> Becker Response to Cravath Memo, *supra* note 464, at 8-9.

<sup>467</sup> *Id.* at 10.

<sup>468</sup> Letter from Joseph D. Tydings, Chairman, Subcomm. on Improvements in Judicial Mach., Comm. on the Judiciary, U.S. Senate, to Edwin A. Robson, Chief Judge, U.S. Dist. Court for the W. Dist. of Mo. 1 (May 25, 1967) (on file at Neal Papers, *supra* note 34, Box 4, Folder XYZ).

<sup>469</sup> S. REP. NO. 90-454, at 1-2 (1967). The Report notes that “[t]he 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>470</sup> See 113 CONG. REC. 22,124 (1967) (reporting that the bill “was read the third time, and passed”).

in the electrical cases ever occurring again.<sup>471</sup> The Senate Report does not even mention the ABA's opposition to the bill.<sup>472</sup>

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

Despite securing 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.<sup>473</sup> In August 1967, Robson and Becker met to determine how to proceed.<sup>474</sup> By then, the demands arising from his work on the Coordinating Committee had begun to take a toll on Judge Becker. Due to the end of the electrical-equipment litigation, the Committee no longer had any source of funding.<sup>475</sup> Nevertheless, the Committee 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>476</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.<sup>477</sup> The judges would attempt to lobby the key lawyers behind the ABA opposition directly:

Judge Murrah described a discussion which he recently had with a Washington lawyer, Leonard J. Emmerglick, Esquire, 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.

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<sup>471</sup> See, e.g., S. REP. NO. 90-454, at 7 (concluding that "[t]he demands being put upon the Federal courts are greater now than ever" and that the legislation was "necessary to improved judicial administration").

<sup>472</sup> See S. REP. NO. 90-454, at 3-7 (offering a history of the bill that does not mention the ABA opposition).

<sup>473</sup> See *supra* text accompanying note 374.

<sup>474</sup> See August 21, 1967 Meeting of Judges Becker and Robson, Kansas City: Important Topics for Discussion (Aug. 21, 1967) (on file at Becker Papers, *supra* note 33, Box 18, File 1) (listing "how to proceed to gather support for passage of § 1407 in the House" as an "Important Topic[]" for Discussion").

<sup>475</sup> See *supra* note 200 and accompanying text.

<sup>476</sup> See Co-Ordinating Committee Nov. 3, 1967 Meeting Minutes, *supra* note 199.

<sup>477</sup> See Minutes of the Steering Committee, September 8, 1967, Chicago, Illinois (Sept. 8, 1967) (on file at Becker Chronological Files, *supra* note 33, Box 11, Folder 7); see also Letter from William H. Becker, Judge, U.S. Dist. Court for the W. Dist. of Mo., to Alfred P. Murrah, Chief Judge, U.S. Court of Appeals for the Tenth Circuit 1 (Oct. 3, 1967) [hereinafter Becker–Murrah Oct. 3, 1967 Letter] (on file at Becker Papers, *supra* note 33, Box 11, Folder 7) (noting that the meeting minutes "were marked personal and confidential").

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>478</sup>

Murrah seemed to recognize the sensitive nature of this strategy, as he, upon receipt of the minutes, 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>479</sup>

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>480</sup>

Shortly thereafter, Murrah reported that a meeting with these New York antitrust lawyers had been scheduled for October 19-20, 1967, at the Bar Association of New York City.<sup>481</sup> 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, attended the meeting.<sup>482</sup> Attendees included, among others, Whitney North Seymour, the managing partner of Simpson, Thacher & Bartlett, Bethuel Webster, a prominent New

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<sup>478</sup> *Id.* at 2-3.

<sup>479</sup> Letter from Alfred P. Murrah, Chief Judge, U.S. Court of Appeals for the Tenth Circuit, to William G. Levi, Law Clerk to William H. Becker, Judge, U.S. Dist. Court for the W. Dist. of Mo. 1 (Sept. 27, 1967) (on file at Becker Papers, *supra* note 33, Box 11, Folder 7).

<sup>480</sup> Becker-Murrah Oct. 3, 1967 Letter, *supra* note 477.

<sup>481</sup> See Letter from Alfred P. Murrah, Chief Judge, U.S. Court of Appeals for the Tenth Circuit, to Co-Ordinating Comm. on Multiple Litig. 1 (Oct. 3, 1967) (on file at Becker Chronological Files, *supra* note 33, Box 16, Folder 1) ("[I]t is proposed to meet with Mr. Emmerglick and other designated members of the bar on October 19 and 20 at the offices of the Bar Association of New York City . . ."); Letter from Alfred P. Murrah, Chief Judge, U.S. Court of Appeals for the Tenth Circuit, to Members of the Joint Comm. on Problems Related to the Proof of Sci. & Econ. Fact - & Related Matters 1 (Oct. 11, 1967) (on file at Becker Chronological Files, *supra* note 33, Box 12, Folder 10) (enclosing the agreed-upon agenda for his meeting with Emmerglick scheduled for October 19-20).

<sup>482</sup> See William H. Becker, Handwritten Notes on Meeting, Thursday October 19, at 1 (Oct. 19, 1967) (on file at Becker Papers, *supra* note 33, Box 12, Folder 1) (listing the attendees of the meeting).

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>483</sup>

Becker's handwritten notes of the meeting survive.<sup>484</sup> Judge Ryan, who had apparently recovered from having his amendment to the statute be unceremoniously disowned, took the lead in explaining to the lawyers the need for the legislation in cases other than antitrust, such as products liability, securities, and patents.<sup>485</sup> 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."<sup>486</sup> Ryan therefore expressed his hope that the ABA would recognize the need for the bill, but he also made clear that "If [the] Bar doesn't agree [the] judges owe it to Courts to push [the] bill as it is."<sup>487</sup> Whitney North Seymour responded that the situation had gotten "off track" but believed that, after further consultation with the Bar, an agreement might be reached.<sup>488</sup> The notes—albeit somewhat sparse—suggest that, at the judges' urging, the Antitrust Section agreed to take a second look at the legislation.<sup>489</sup>

In the meantime, the judges stepped up their correspondence campaign with Congressmen.<sup>490</sup> For the time being though, the bill remained held up in the House due to ABA opposition.<sup>491</sup> Becker's pleas for relief from his workload became stronger; he claimed he was "barely able to keep the work of the Co-Ordinating Committee from coming to a complete halt."<sup>492</sup> He continued,

It would be very detrimental to the effort of the judiciary of the United States to meet the increasing burdens of the litigation explosion if the efforts of this

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<sup>483</sup> *See id.*

<sup>484</sup> *See id.* at 1-9.

<sup>485</sup> *See id.* at 3-4 (offering Becker's notes on Ryan's opening remarks to the lawyers).

<sup>486</sup> *Id.* at 4.

<sup>487</sup> *Id.* at 5.

<sup>488</sup> *Id.* at 6.

<sup>489</sup> *See id.* at 5 (recording the comments of Webster, a "member of [the] subcommittee of section on Antitrust").

<sup>490</sup> *See* Co-Ordinating Committee Nov. 3, 1967 Meeting Minutes, *supra* note 199, at 2 ("It was agreed that the Co-Ordinating Committee should urge the judges . . . to write members of Congress requesting their support of the passage . . . of S. 159 . . .").

<sup>491</sup> Robson had reached out to Congressman Robert McClory of Illinois, who, in turn, reached out to Congressman Celler. *See* Letter from Robert McClory, Congressman, U.S. House of Representatives, to Edwin A. Robson, Judge, U.S. Dist. Court for the N. Dist. of Ill. 1 (Nov. 8, 1967) (on file at Neal Papers, *supra* note 34, Box 4, Folder XYZ) ("I brought up the subject of S. 159 at the meeting of Subcommittee #5 . . .").

<sup>492</sup> Letter from William H. Becker, Judge, U.S. Dist. Court for the W. Dist. of Mo., to Alfred P. Murrah, Chief Judge, U.S. Court of Appeals for the Tenth Circuit 1 (Nov. 20, 1967) (on file at Becker Chronological Files, *supra* note 33, Box 16, Folder 1).

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>493</sup>

#### F. *The Dam Breaks*

The dam finally broke in January 1968, when the ABA suddenly reversed 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>494</sup> McLaren noted, "The basic reasons for this change in position are the changes in the bill itself, the assurances contained in the Senate Report and, most particularly, the need for the legislation demonstrated by the representatives of the Judicial Conference."<sup>495</sup> Referring to the October meeting, McLaren added,

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 cleared.<sup>496</sup>

The ABA's new report, which was to be submitted to its upcoming House of Delegates meeting in February in Chicago, cited the amendments to the bill and the assurances in the Senate Report that the transfer procedure would be used only in exceptional cases.<sup>497</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>498</sup> Soon after the ABA issued its report,

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<sup>493</sup> *Id.*

<sup>494</sup> See Letter from Richard W. McLaren, Am. Bar Ass'n, to Alfred P. Murrah, Chief Judge, U.S. Court of Appeals for the Tenth Circuit 1 (Jan. 11, 1968) [hereinafter McLaren-Murrah Jan. 11, 1968 Letter] (on file at Neal Papers, *supra* note 34, Box 4, Folder XYZ) ("[T]he Ad Hoc Committee of this Section has reviewed the developments since its original report in opposition to H.R. 8276 and has now submitted a report with the recommendation that the American Bar Association support S. 159, as amended . . .").

<sup>495</sup> *Id.*

<sup>496</sup> *Id.* at 1-2.

<sup>497</sup> See RICHARD W. MCLAREN, CHAIRMAN, SECTION OF ANTITRUST LAW, REPORT OF SECTION OF ANTITRUST LAW TO THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION ON S. 159, 90th Congress 5 (Jan. 19, 1968) (on file at Neal Papers, *supra* note 34, Box 7, Folder on C.O.C. Documents) ("[O]nly in the 'few exceptional cases' which 'share unusually complex questions of fact' or in the situation of 'many complex cases' which 'share a few questions of fact,' will consolidation be ordered in the absence of *many* cases with *many* common issues of fact.").

<sup>498</sup> *Id.* at 7.

on February 20, 1968, the ABA House of Delegates adopted a resolution in support of the bill.<sup>499</sup>

It is not entirely clear why the ABA made this 180-degree turn. One could take McLaren at his word—that the Antitrust Section had been persuaded by the amendments and convinced of the need for the legislation. This is possible, but seems unlikely in light of the ABA’s prior vociferous opposition to the legislation 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 the Panel’s orders only by extraordinary writ<sup>500</sup>—were marginal and only barely responsive to the ABA’s 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 recognized the potential benefits of the bill to their clients and concluded that their clients had not come out so badly in the electrical-equipment cases. After all, their clients had been able to settle the entire litigation quite promptly and move on.<sup>501</sup> One of the great benefits of consolidated litigation for defendants is the opportunity to achieve closure through a global settlement.<sup>502</sup> It is possible that the defendants, with the dust having settled, realized that the coordinated proceedings had worked in their favor.

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,<sup>503</sup> 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 pressured the lawyers, claiming that they would push the bill with or without their support.<sup>504</sup> 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 also 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*

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<sup>499</sup> See *Proceedings of the House of Delegates: Chicago, Illinois, February 19-20, 1968*, 54 A.B.A. J. 510, 521 (1968) (“Be it resolved, That the American Bar Association recommends to the House of Representatives . . . that it pass S.159 . . .”).

<sup>500</sup> S. REP. NO. 90-454, at 1-2 (1967).

<sup>501</sup> See *supra* notes 179 and 189.

<sup>502</sup> See *supra* note 17; see also Silver & Miller, *supra* note 25, at 123 (arguing that MDL generally favors defendants in mass-tort cases because “MDL judges cannot try cases,” which “declaws plaintiffs . . . by depriving them” of “the threat of forcing an exchange at a price set by a jury”).

<sup>503</sup> See *supra* text accompanying note 496.

<sup>504</sup> See *supra* text accompanying note 487.

and *Multidistrict Litigation* (the *Manual*).<sup>505</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 had complained of in the electrical-equipment cases.<sup>506</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 McLaren’s letter informing Judge Murrah of the ABA’s change of heart, McLaren mentions the *Manual* specifically, noting, “I am concerned that a new misunderstanding might be abuilding.”<sup>507</sup> McLaren asks for a seat at the table, seeking the opportunity to formally comment on the draft *Manual*, suggesting, “I believe that the path will be much smoother 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>508</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.<sup>509</sup> A transcript of this meeting survives in Judge Becker’s papers.<sup>510</sup> At the meeting, lawyer Cyrus Anderson of Pittsburgh Plate & Glass—the Chair of the ABA Antitrust Section at the time the 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.<sup>511</sup> Anderson highlighted the meetings Judge Murrah had set up “between the Judicial Conference Coordinating Committee and our ABA anti-trust section group.”<sup>512</sup> Anderson continued,

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<sup>505</sup> See Arthur R. Miller, *In Memoriam: Judge William H. Becker*, 807 F. Supp. LXXII (W.D. Mo. 1992) [hereinafter Miller, *In Memoriam*] (“[I]t 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, 294 n.26 (2013) (“The motor force behind the drafting of the *Manual* was the leadership of William H. Becker . . .”).

<sup>506</sup> See Miller, *In Memoriam*, *supra* note 505.

<sup>507</sup> McLaren–Murrah Jan. 11, 1968 Letter, *supra* note 494, at 2.

<sup>508</sup> *Id.*

<sup>509</sup> See Transcript of Proceedings of United States Judicial Conference Coordinating Committee on Complex and Multi-District Litigation (June 4, 1968) (on file at Becker Chronological Files, *supra* note 33, Box 13, Folder 2).

<sup>510</sup> See *id.*

<sup>511</sup> See *id.* at 4 (statement of Cyrus V. Anderson, Co-Chairman, ABA Special Comm. on Complex & Multi-Dist. Litig.) (offering the first statements of the meeting).

<sup>512</sup> *Id.* at 4-5.

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 S-159 in the 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 then formed.<sup>513</sup>

At the meeting, Anderson, joined by several others who had attended the New York meeting, and McLaren, who wrote the report endorsing the MDL statute, gave a “preliminary identification of our problem areas”—primarily the commanding tone of the suggestions in the *Manual* that judges take rigid control of discovery and move as quickly as possible.<sup>514</sup> There were several additional meetings between the Coordinating Committee and the ABA Committee throughout 1968,<sup>515</sup> and the *Manual* ultimately did reflect the lawyers’ desire that it be written as a set of flexible suggestions.<sup>516</sup>

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.<sup>517</sup> At a meeting of the Coordinating Committee in Philadelphia on January 18, the judges discussed the need to capitalize on the ABA’s new

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<sup>513</sup> *Id.* at 5-6.

<sup>514</sup> *Id.* at 9 (statement of Richard McLaren, Chairman, Section of Antitrust Law); *see also id.* (statement of Leonard J. Emmerglick, Att’y, Antitrust Section) (“The values of flexibility cannot be adequately built into the Manual by an introductory paragraph . . . .”). McLaren also opined, “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 re-established and more than pleased that we were able to change our position on the new S-159 to see it go through, and I am delighted also that we are working on this very worthwhile project.” *Id.* at 15-16.

<sup>515</sup> For instance, these same lawyers met with the Coordinating Committee in San Francisco on July 24, 1968. *See* Transcript of Special Meeting re: ABA Special Committee Recommended Changes in the Proposed Manual for Complex and Multiple Litigation 2-4 (July 24, 1968, 2:00 PM) (on file at Becker Chronological Files, *supra* note 33, Box 13, Folder 2) (listing the attendees of the San Francisco meeting). 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. 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. *See id.* at 31-32 (statement of Leonard J. Emmerglick, Att’y, Antitrust Section) (“[T]hese problems will disappear if affirmatively there is built in to the main text of the Manual a clear notion that flexibility is an ingredient of primary value . . . .”).

<sup>516</sup> *See generally* MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION (1st ed. 1969).

<sup>517</sup> *See supra* note 32 and accompanying text.

position.<sup>518</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>519</sup> The minutes note that, “action upon S. 159 by the House could provide an additional alternative for obtaining staff assistance in the future since, as Mr. Foley pointed out, funds could be released from the Administrative Office if S. 159 were to be passed and became a law.”<sup>520</sup>

There was little debate from then on in the Congress. The House Judiciary Committee reported the bill on February 28, 1968.<sup>521</sup> According to Representative 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>522</sup> The bill then passed on March 4, 1968, with no dissent.<sup>523</sup> President Johnson signed the bill on April 29, and Chief Justice Warren appointed the first Judicial Panel on Multidistrict Litigation on May 29.<sup>524</sup> Unsurprisingly, its membership included Judges Murrah, Becker, and Robson.<sup>525</sup> Three years after it was introduced in the House and Senate, the Multidistrict Litigation Act became 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

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<sup>518</sup> See Co-Ordinating Comm. on Multiple Litig., Minutes of Special Preliminary Meeting of the Co-Ordinating Committee 1 (Jan. 18, 1968) (on file at Becker Papers, *supra* note 33, Box 11, Folder 6) (“The purpose of this meeting was to discuss the future of the Committee’s work.”).

<sup>519</sup> *Id.* at 2-3.

<sup>520</sup> *Id.* at 6.

<sup>521</sup> See H.R. REP. NO. 90-1130 (1968).

<sup>522</sup> 90 CONG. REC. H4927-28 (daily ed. 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 H4927.

<sup>523</sup> See *id.* at H4928 (“[T]he bill, as amended, was passed.”). The House later corrected three typographical errors in the bill; Tydings had to return to the Senate floor on April 10, 1968 to amend it. See 90 CONG. REC. S9448 (daily ed. April 10, 1968) (statement of Sen. Tydings) (offering amendments to insert the words “the” and “an” into various parts of the statute and to correct the spelling of “transfer”).

<sup>524</sup> See Multidistrict Litigation Act of 1968, Pub. L. No. 90-296, § 1, 82 Stat. 109 (1968); see also DAVID F. HERR, MULTIDISTRICT LITIGATION 321 (1986) (listing the initial membership of the Panel).

<sup>525</sup> See Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001, 1005 n.20 (1974) (describing the membership of the original Panel).

basically similar court suits."<sup>526</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 and an important moment in the development of modern procedure. 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 the litigation world that 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>527</sup> Here, a small group of judges engineered a transfer of power in large litigations from the parties and district judges in individual cases around the country to themselves and the other members of the newly formed Judicial Panel on Multidistrict Litigation. 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>528</sup> As believers in judicial control of cases, they believed that litigants, particularly defendants who enjoyed war-of-attrition-like advantages from delay (and whom they believed had an interest in showing the judicial system could not handle massive litigation), and uncooperative judges who were not believers in active case management simply could not be in charge. Instead, 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.

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<sup>526</sup> *Congress Passes Bill to Speed Up Handling of Similar Civil Suits*, WALL ST. J., Mar. 20, 1968, at 12.

<sup>527</sup> Burbank, *Procedure and Power*, *supra* note 44, at 513.

<sup>528</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 (discussing how judges sought to minimize the number of claims litigated); *see also* Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1890 (2008) (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'" to advance "a broad range of legislative and judicial reform measures designed to drive plaintiffs from the courts").

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>529</sup> Whether MDL is preferable to other available alternatives is an open question, subject to dynamic and ongoing debate.<sup>530</sup> But what the history should lay to rest is any perception that the ambitions of the statute and its creators were modest. To the contrary, their aims were to profoundly change the way the courts process what they believed would be the lion's share of federal civil cases—and their ambitions were fulfilled. In a sense, then, the story of MDL is a microcosm of the story of modern procedure, in which judicially managed aggregate litigation is the norm.<sup>531</sup>

Moreover, the judges were willing to go to great lengths to achieve this expansive vision. Although they were ultimately successful, some of their tactical maneuvers should nevertheless give us pause. The fact that the judges entered the legislative fray is not itself a problem: judges' participation in lawmaking is inevitable.<sup>532</sup> And it can be particularly beneficial when it comes to matters of procedure, in which judges have particular expertise and a stake in the outcome.<sup>533</sup> In fact, 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 without the necessary

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<sup>529</sup> See, e.g., COFFEE, JR., *supra* note 4, at 98 (noting courts' "determination to find a solution (indeed any solution) to the 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 (2009) (noting the benefits of aggregate settlements).

<sup>530</sup> See Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 *B.U. L. REV.* 1155, 1167 (2006) ("How best to aggregate related cases for adjudication is a hotly debated question in procedure circles these days."); cf. *Cimino v. Raymark Indus.*, 751 *F. Supp.* 649, 651-52 (E.D. Tex. 1990) (emphasizing that if every defendant insisted on an individual trial in mass-tort cases, that would mean, practically speaking, "these cases will never be tried").

<sup>531</sup> See J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 *N.Y.U. L. REV.* 1713, 1722-24 (2012) (noting that "federal civil trial's decline was probably aided by Supreme Court rulings that provide for more robust judicial intervention at various procedural steps"); Resnik, *From "Cases" to "Litigation," supra* note 2, at 21-22 (discussing how "[m]ulti-party, multi-claim litigations are . . . increasingly viewed as fixtures of [the modern litigation] landscape").

<sup>532</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, 1168-69 (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 federal court operations.").

<sup>533</sup> See 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"); see also CHRISTOPHER E. SMITH, *JUDICIAL SELF INTEREST: FEDERAL JUDGES AND COURT ADMINISTRATION* 8-9 (1995) (noting judges' significant influence in matters of procedure).

resource allocations.<sup>534</sup> Such dialogue also enhances interbranch relations and may lead to better procedural law.<sup>535</sup> More generally, to criticize judges for lobbying Congress ignores the reality that judges regularly lobby Congress.<sup>536</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>537</sup> Anyone shocked by the judges' tactics in this case might also be shocked to learn that there was gambling going on at Rick's Café Américain.<sup>538</sup>

But that does not mean that some of the judges' actions did not cross the line of acceptable judicial lobbying. Even if one embraces judicial involvement in legislation, one must still recognize when judges do step into the political thicket, they put themselves in, as Charles Geyh describes it, a "precarious position."<sup>539</sup> When they lobby Congress, judges shed their role of neutral arbiter and act as an interest group.<sup>540</sup> And if they are lobbying for legislation

<sup>534</sup> See Robert A. Katzmann, *The Underlying Concerns*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 7, 8 (Robert A. Katzmann ed., 1988) (describing the dynamic of congressional actions increasing court activity without additional appropriations); see also 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 (2014) ("The very nature of legislative and executive processes necessitates and rewards active, and sometimes aggressive . . . [j]udicial lobbying . . . to secure needed resources . . .").

<sup>535</sup> See Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. L.J. 909, 911 (2007) [hereinafter Burbank, *Judicial Independence*] ("[P]olitics 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, 279 (1991) (arguing for "systematic dialogue between those who make and those who interpret legislation").

<sup>536</sup> See Russell R. Wheeler & Robert A. Katzmann, *A Primer on Interbranch Relations*, 95 GEO. L.J. 1155, 1160 (2007) ("As Congress legislates about the courts, the judiciary tries to affect the legislative product. The judiciary defends requests for funds. It proposes, and comments on, bills to alter its organization, operations, and workload."); John W. Winkle III, *Interbranch Politics: The Administrative Office of the U.S. Courts as Liaison*, 24 JUST. SYS. J. 43, 48 (2003) ("One senator, for example, commented that 'mutual communication is a necessity' and, in his view 'judges have a responsibility to come to [us] . . . . The judiciary, it seems, appreciates and perhaps fears the prerogatives of Congress and, as a result, strives to cultivate harmonious work relationships.' (internal citation omitted)).

<sup>537</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) [hereinafter Resnik, *The Programmatic Judiciary*] ("[T]he 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>538</sup> CASABLANCA (Warner Bros. 1942).

<sup>539</sup> Geyh, *supra* note 532, at 1170; see also Burbank, *Judicial Independence*, *supra* note 535, at 917 (noting judges' "dilemma . . . of participating in a political system without becoming the victim of politics"); Resnik, *The Programmatic Judiciary*, *supra* note 537, at 289 (referring to judicial involvement in legislation "an act of redefining the identity of the Third Branch").

<sup>540</sup> See FISH, *supra* note 93, at 433 ("To obtain favorable legislative action, . . . judges, behaving like interest groups, generally must take the initiative."); SMITH, *supra* note 533, at 18-19 ("[D]ependence upon legislative action forces [judges] to engage in the kinds of political strategies, such as lobbying and persuasion, that other interested parties employ when seeking beneficial legislation.").

that enhances their own power at the expense of litigants or that reduces their caseload, they run the risk of sacrificing their legitimacy and independence, which relies in part on the perception that they remain above the fray, even when their interests overlap with the public's.<sup>541</sup>

Here, the judges were very much in the fray, and rather aggressively so. Some of their activities, such as drafting legislation,<sup>542</sup> testifying in congressional hearings,<sup>543</sup> and engaging in a letter-writing campaign<sup>544</sup> are wholly unobjectionable.<sup>545</sup> But trumpeting extensive cooperation with lawyers when it barely happened,<sup>546</sup> undermining lawyers' credibility in private memoranda to Senate committees,<sup>547</sup> and strong-arming lawyers who would likely appear before them face-to-face<sup>548</sup> are all actions that might rightly make us queasy.<sup>549</sup> Judge Becker's papers reveal that the judges were willing to throw sharp elbows to succeed. 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.

Yet, one should be hesitant to extrapolate from the judges' conduct lessons for today, as the landscape of procedural lawmaking is quite different now. The judges launched MDL at a moment when Judicial Conference influence was at its height<sup>550</sup> and when Congress was willing to empower private litigants to enforce the substantive law.<sup>551</sup> The advent of MDL also came while procedure

<sup>541</sup> See Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rules: Comment on Macey*, 23 J. LEGAL STUD. 647, 654 (1994) (explaining ways in which judges' self-interest can converge with the public's interest); Christopher E. Smith, *Judicial Lobbying and Court Reform: U.S. Magistrate Judges and the Judicial Improvements Act of 1990*, 14 U. ARK. LITTLE ROCK L.J. 163, 173-74 (1991) (explaining how "strategic political activity by judges aimed at influencing legislation" can negatively impact the public's opinion of the judiciary).

<sup>542</sup> See *supra* Section III.

<sup>543</sup> See *supra* subsection IV.C.

<sup>544</sup> See *supra* notes 447-48 and accompanying text.

<sup>545</sup> Cf. Geyh, *supra* note 532, 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>546</sup> See *supra* text accompanying note 345.

<sup>547</sup> See *supra* text accompanying note 462.

<sup>548</sup> See *supra* text accompanying note 487.

<sup>549</sup> See, e.g., Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 L. & CONTEMP. PROBS. 229, 240 (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>550</sup> See Russell Wheeler, *Empirical Research and the Politics of Judicial Administration: Creating the Federal Judicial Center*, 51 L. & CONTEMP. PROBS. 31, 53 (1988) (describing the creation of the Federal Judicial Center as "an exception to [the general] rule" of judicial independence); see also FISH, *supra* note 93, at 301 ("Increasingly [Congress] looked to the Conference for cues, for authoritative pronouncements of the judiciary's legislative program.").

<sup>551</sup> See Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1547 (2014) (describing the "unmistakable explosion of private lawsuits to enforce

could masquerade as mere “adjective” law, or as the “handmaiden” of the substantive law.<sup>552</sup> Beginning with the clash over the Federal Rules of Evidence in 1973 and the unexpected proliferation of class actions, that myth was exploded.<sup>553</sup> It is fair to say that Congress is now well aware of the power of procedure—and even its political salience.<sup>554</sup> Today, efforts at so-called litigation reform are now “political footballs” providing point-scoring opportunities.<sup>555</sup> But, in the 1960s, the judges’ actions—important as they were—could still generally fly under the radar.

Notably, the process of procedural lawmaking is now much more open than the 1960s. The political world in which MDL, and the original 1938 Federal Rules for that matter, were born, in which a small insider group of academics and lawyers could create a new procedural system behind closed doors,<sup>556</sup> is a thing of the past. So, too, is the relative homogeneity of demography and interest among federal judges and the federal-court bar.<sup>557</sup> Leading up to the MDL statute, federal judges and the lawyers who appeared before them were remarkably philosophically aligned, but the fight over MDL portended 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>558</sup>

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federal statutes” as resulting from “self-conscious choices of statutory design by . . . Congress seeking to mobilize private enforcers”); *see also* SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 234 (2010) (noting “Congress’s proactive inclusion” of “economic incentives for private enforcement” when drafting new federal statutes); ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 47 (2001) (describing the increase in federal statutes that rely on private enforcement).

<sup>552</sup> *See* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 *GEO. L.J.* 887, 894 (1999) (describing how “proponents of court rulemaking” viewed procedure as “merely a means to the end of finding the facts and applying the substantive law”).

<sup>553</sup> *See* Geyh, *supra* note 532, at 1187 (describing the “imbroglio” over the Rules of Evidence in 1973 and the subsequent response by Congress to assert its exclusive power over substantive lawmaking).

<sup>554</sup> *See* Stephen B. Burbank, *Procedure, Politics, and Power: The Role of Congress*, 79 *NOTRE DAME L. REV.* 1677, 1704 (2004) [hereinafter Burbank, *Procedure, Politics, and Power*] (describing “dramatic changes in Congress’s attitudes toward procedural lawmaking” after 1973).

<sup>555</sup> *See, e.g.*, Burbank, *Procedure and Power*, *supra* note 44, at 516 (observing that by the 1990s “civil justice reform” was a “political football”).

<sup>556</sup> *See* Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 *BROOK. L. REV.* 659, 667 (1993) (describing how “the original drafting of the Federal Rules during the 1930s was a much more closed affair. A handful of prominent white male lawyers drawn largely from the Northeastern states was selected and deliberated in relative anonymity before producing a fully developed code of civil procedure.”).

<sup>557</sup> *See* Burbank, *Procedure, Politics, and Power*, *supra* note 554, at 1722 (describing the breakdown between the federal judiciary and the bar following the judiciary’s use of “rulemaking strategies that either empowered [judges] at the expense of lawyers and their clients . . . or that simply disempowered lawyers”).

<sup>558</sup> *See* Burbank & Farhang, *supra* note 551, at 1588 (describing Chief Justice Burger’s “antipathy toward the ‘litigation explosion’ of the 1970s” and his “counteroffensive against notice pleading and broad discovery”).

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>559</sup> And, as the flood of comments on the recent amendments to the discovery rules demonstrates, changes in procedural law now attract the attention and resources of those affected on both sides of the proverbial “v.”<sup>560</sup> Although one might lament the challenges associated with the new world of procedural lawmaking, “politicization” is not an epithet.<sup>561</sup> Open participation of potentially impacted groups is a necessary corollary to the recognition of the power of procedure.<sup>562</sup> And the 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>563</sup> The story of MDL is therefore an artifact from a different world—but is representative of a shift in the way we make procedural law, for better or for worse.

While the circumstances surrounding the passage of MDL may belong to a different time, MDL of course exists in the present. 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.<sup>564</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 statute’s history demonstrates that the judges who developed the statute did not intend for 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 as mass torts became the grist of the federal-litigation mill;<sup>565</sup> that was one reason Judge Becker opposed amendments to the statute that would restrict

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<sup>559</sup> See *id.* at 1594 (describing the “open meetings” and extension of the “minimum period before proposed Federal Rules . . . can become effective” that Congress now requires).

<sup>560</sup> See Richard Marcus, *How to Steer an Ocean Liner*, 18 LEWIS & CLARK L. REV. 615, 616 (2014) (noting that the proposed 2013 amendments “attracted about 2,300 public comments and also produced three oversubscribed public hearings”).

<sup>561</sup> See Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1334 (2006) (defining “politicization” as “returning foundational normative choices of social policy to those who are representative of and accountable to the electorate”).

<sup>562</sup> See *id.* at 1305 (describing the supposed dichotomy between procedure and substance as “political nonsense”); see also Bone, *supra* note 552, at 903 (describing the increased interest-group activity in all stages of rulemaking post-1973).

<sup>563</sup> Burbank, *Procedure, Politics, and Power*, *supra* note 554, at 1678.

<sup>564</sup> See *supra* notes 26–28 and accompanying text.

<sup>565</sup> See *supra* text accompanying notes 204–06 and 403.

its use.<sup>566</sup> Nor was MDL exclusively about discovery, as the judges insisted from the beginning that the MDL court must have the power to grant dispositive motions.<sup>567</sup> MDL was designed to give judges 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 judges assigned to MDL cases.<sup>568</sup> Though one can debate whether judges are using the power created by the MDL statute in a beneficial way, or whether the MDL statute is consistent with principles of due process, one cannot deny that judges are using the statute as its drafters intended.

It is also clear that the drafters acutely anticipated how aggregation could 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>569</sup> The damages class action—and its later use in the service of global settlement—has proven to be too blunt a tool, at least according to the Supreme Court.<sup>570</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>571</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 undisturbed by due-process attack.<sup>572</sup>

The question of what makes MDL work—and in what respects it does not—is fertile ground for future theoretical and empirical research. 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 the traditional American litigation

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<sup>566</sup> See *supra* note 406 and accompanying text.

<sup>567</sup> See *supra* text accompanying note 248.

<sup>568</sup> See *supra* text accompanying note 335.

<sup>569</sup> See Burbank, *CAFA in Historical Context*, *supra* note 4, at 1484 (detailing “the most critical dilemma of modern procedure, that is, how to provide sufficient access to court in a society that depends heavily upon 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>570</sup> See COFFEE, JR., *supra* note 4, at 114 (describing the Supreme Court’s “basic message . . . that ‘sprawling’ classes could not be certified”); Sherman, *The MDL Model*, *supra* note 19, at 2212 (contending that “[t]he class action settlement had bitten off too much”); see also Klonoff, *supra* note 65, at 747-48 (noting that “courts have become increasingly skeptical in reviewing” class certification decisions).

<sup>571</sup> See COFFEE, JR., *supra* note 4, at 2 (arguing that the class action’s “dismantling appears to be the major procedural project of the conservative majority of the contemporary Supreme Court in the twenty-first century”).

<sup>572</sup> See, e.g., Redish & Karaba, *supra* note 20, at 115 (“The sweeping deprivations of an individual’s ability to protect his legal rights brought about by MDL cannot be justified by naked concerns of pragmatism if the concept of the process is to mean anything.”).

norms of individual and decentralized control.<sup>573</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.<sup>574</sup> 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>575</sup> And, perhaps most importantly, there is the prospect (however slim) of return to the original forum for trial, something a party may always demand.<sup>576</sup> All of this notwithstanding, MDL looks 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.<sup>577</sup> 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.<sup>578</sup> 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>579</sup> Indeed, large MDLs are so much like class actions that judges have taken to referring to them as quasi-class-actions.<sup>580</sup>

Yet, unlike mass-tort 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>581</sup> But another reason is that MDL's incorporation of traditional norms of individual control

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<sup>573</sup> See YEAZELL, *supra* note 31, at 268 (“The roots of the difficulty [with group litigation] lie in a tension basic to modern legal and political thought: a belief in individual autonomy and a desire to achieve forms of political and economic organization incompatible with strong individual autonomy.”); 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.”).

<sup>574</sup> See *supra* text accompanying note 78.

<sup>575</sup> See Bradt, *supra* note 11, at 762 (describing how cases within MDL “retain their individual identities”); Grabill, *supra* note 26, at 457 (noting that “MDL consolidation of related lawsuits does not merge the suits into one massive case”); see also Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918, 933 (1995) (describing the “ongoing rhetorical commitment to individual processing” in MDL).

<sup>576</sup> See *supra* note 52 and accompanying text.

<sup>577</sup> See *supra* note 79 and accompanying text.

<sup>578</sup> See *supra* note 83 and accompanying text.

<sup>579</sup> See Issacharoff, *supra* note 24, at 218 (“Individual claimants remained free to reject the proposed deal but . . . would have to find other counsel to handle their claims.”).

<sup>580</sup> See Mullenix, *Dubious Doctrines*, *supra* note 20, at 389 (“[T]he term ‘quasi-class action’ has been appearing with increasing, uncritical frequency in a spate of federal court decisions.”).

<sup>581</sup> See *id.* at 421 (describing how “the interests of the plaintiff and defense bars (and the judiciary) converged to encourage development” of MDL as an alternative to class actions).

insulate the structure from the kinds of due process attacks that plagued the class action.<sup>582</sup> And it is these features of individual control that facilitate the aggressive consolidation that the statute provides. In a world in which trials are increasingly rare and pretrial procedure is dominant,<sup>583</sup> a consolidation mechanism whose legitimacy is based on costly trials unlikely to ever occur, MDL is the poster child for twenty-first-century procedure.

One contribution of this Article 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 that complete transfer of cases would face "massive resistance" from both lawyers and judges.<sup>584</sup> 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 just enough to give cover to the centralization of control they thought necessary. Taken alone, that centralization of control troubles critics because the statute seems to provide no 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 for modern commentators to applaud or criticize what the drafters created, but they 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 for 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. But this Article 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

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<sup>582</sup> See R. Marcus, *Cure-All*, *supra* note 13, at 2248 (noting that MDL has "not caused the sort of controversy the class action produced" (internal citation omitted)).

<sup>583</sup> See Galanter & Frozena, *supra* note 12, at 116 (citing the "long, steady decline in the percentage of cases that reach trial").

<sup>584</sup> See *supra* text accompanying note 254.

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 nationwide litigation from the hands of litigants and dispersed 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 from 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>585</sup> He added,

From a perspective it seems to me that the most significant and least noted event of 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 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>586</sup>

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

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<sup>585</sup> William H. Becker, *Modern Pretrial Practice in Complex Cases*, 41 ANTITRUST L.J. 581, 584 (1972).

<sup>586</sup> *Id.* at 583-84.