Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power

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Since World War II, the American economy has coalesced so that mass production and distribution account for a much larger proportion of the goods and services Americans receive. During the same period, various legal theories—particularly products liability and consumer rights—have broadened the grounds on which producers of goods or services could be sued. Together, these developments have led to increasingly frequent dispersed litigation. During the same period, the Judicial Panel on Multidistrict Litigation has repeatedly used its transfer authority to combine dispersed cases raising common issues, often leading to combined resolutions or settlements of such litigation. This Article reviews the evolution and orientation of the Panel's consolidation activities against the background of modern procedure's preference for expansive combination of related claims and break from traditional procedure's "minimalist" attitude toward litigation combination. It explores the extent to which the Panel has adopted a "maximalist" attitude toward such combination and identifies some prudential concerns about pushing further toward a maximalist attitude.

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We live in an era of mass culture. Aldous Huxley foresaw this possibility in 1932 in *Brave New World*,[1] and David Riesman famously catalogued its sociological roots in *The Lonely Crowd*, which appeared in 1950.[2] The huge growth of the Internet over the past two decades reinforces this trend.[3] Whether or not one embraces these visions of social change, it certainly seems that there has been a related change in the nature of litigation. Largely as a result of the increased mass distribution of goods and products, the phenomenon of dispersed litigation became a hallmark of the second half of the twentieth century.[4] With the advent of commercial activity utilizing the Internet and the globalization of commerce, it seems reasonable to expect this trend will continue.

Litigation developments of this sort prompt procedural responses. Often these procedural responses take turns that procedural reformers did not foresee, or foresaw and hoped to avoid. The class action

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1. ALDOUS HUXLEY, BRAVE NEW WORLD 230-39 (Perennial Classics 1998) (1932) (describing a future society in which almost all activity was under the direction of an omnipresent state that exercised a benevolent despotism).

2. DAVID RIESMAN, THE LONELY CROWD 20-23 (Yale Univ. Press 2001) (1950) (describing the evolution from a society bound by tradition, to a society led by inner-directed individuals who break with tradition, to an outer-directed attitude that emerged particularly after World War II).

3. *See, e.g.*, JAMES E. CÔTÉ, ARRESTED ADULTHOOD: THE CHANGING NATURE OF MATURITY AND IDENTITY 155-59 (2000) (describing how technological advancements have brought society closer to Huxley's *Brave New World*).

4. A classic statement of this trend came a generation ago from Judge Spencer Williams:

> The latter half of the twentieth century has witnessed a virtual explosion in the frequency and number of lawsuits filed to redress injuries caused by a single product manufactured for use on a national level. Indeed, certain products have achieved such national notoriety due to their tremendous impact on the consuming public, that the mere mention of their names—Agent Orange, Asbestos, DES, MER/29, Dalkon Shield—conjure images of massive litigation, corporate stonewalling, and infrequent yet prevalent, "big money" punitive damage awards.
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> In a complex society such as ours, the phenomenon of numerous persons suffering the same or similar injuries as a result of a single pattern of misconduct on the part of a defendant is becoming increasingly frequent.

In re N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 892 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982).

provides a vivid example. When the revisions of Rule 23 of the Federal Rules of Civil Procedure were being considered in the mid-1960s, the drafters clearly foresaw certain forms of mass tort class actions and clearly sought to avoid the use of amended Rule 23 to facilitate them.[5] Relatively equally clearly, events outstripped their seeming intentions. As the United States Supreme Court noted in its 1997 decision in *Amchem*:

> The Advisory Committee for the 1966 revision of Rule 23, it is true, noted that "mass accident" cases are likely to present "significant questions, not only of damages but of liability and defenses of liability, . . . affecting the individuals in different ways." And the Committee advised that such cases are "ordinarily not appropriate" for class treatment. But the text of the Rule does not categorically exclude mass tort cases from class certification, and District Courts, since the late 1970's, have been certifying such cases in increasing number.[6]

As Professor Resnik noted in 1991, class actions have received uneven press and excited much antagonism.[7] Perhaps as a result, the class action has had a roller-coaster history, going from periods of great vigor through episodes when it was pronounced moribund.[8] In 2005, Congress itself responded to concerns about class actions with

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5. For a careful chronicle of this reform effort, see John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. C. L. REV. 323, 333-45 (2005) (recounting the debates in the Advisory Committee on Civil Rules regarding methods to limit or prevent mass tort class actions).

6. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997) (internal citation omitted).

7. *See* Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5, 25-36 (1991) (contrasting the reception of class actions and multidistrict litigation).

8. *See, e.g.*, John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1019-21 (1991) (reporting that in the 1980s class actions had declined in significance as methods for obtaining relief in court for employment discrimination); Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 665-68 (1979) (describing a reaction against class actions following the initial burst of enthusiasm that attended the 1966 amendment for Rule 23); Douglas Martin, *The Rise and Fall of the Class-Action Lawsuit*, N.Y. TIMES, Jan. 8, 1988, at B7 (reporting the apparent demise of the class action).

But the tocsin for the class action was premature. In 1997, the Chair of the Advisory Committee on Civil Rules testified in Congress that the class action is "'transforming the litigation landscape'" and that class actions "'are involving a substantial [number], if not a majority, of all American citizens.'" *See Senate Subcommittee Holds Hearing on Class Action Litigation Reform*, 66 U.S.L.W. 2289, 2294 (1997) (alteration in original) (quoting Judge Paul V. Niemeyer); *see also* Benjamine Reid & Chris S. Coutroulis, *Checkmate in Class Actions: Defensive Strategy in the Initial Moves*, 28 LITIG. 21, 21 (2002) ("The class action device has changed from the more or less rare case fought out by titans of the bar in the top financial centers of the nation to the veritable bread and butter of firms of all shapes and sizes across the country.").

the Class Action Fairness Act (CAFA).[9] The remedy Congress created was to enable defendants in class actions to remove the cases to federal court.[10]

The federal judicial system's procedural response to dispersed litigation also originated in the 1960s with the creation of the Judicial Panel on Multidistrict Litigation (Panel).[11] The courts had already focused on the sorts of problems that this procedural innovation could solve. As the United States Court of Appeals for the Third Circuit noted in 1941:

> The economic waste involved in duplicating litigation is obvious. Equally important is its adverse effect upon the prompt and efficient administration of justice. In view of the constant increase in judicial business in the federal courts and the continual necessity of adding to the number of judges, at the expense of the taxpayers, public policy requires us to seek actively to avoid the waste of judicial time and energy. Courts already heavily burdened with litigation with which they must of necessity deal should therefore not be called upon to duplicate each other's work in cases involving the same issues and the same parties.[12]

In 1968, Congress provided the means of avoiding such seemingly wasteful burdens by adopting 28 U.S.C. § 1407.

The Panel's activities have generally not caused the sort of controversy[13] the class action produced.[14] To the contrary, it has served as a model for further reform proposals. In 1994, the American Law Institute (ALI) began its proposals for dealing with dispersed litigation by noting that "consolidation by means of the Judicial Panel on Multidistrict Litigation has proved very successful."[15] The ALI therefore concluded that "the experience under Section 1407 establishes a foundation on which to construct future improvements" and offered a set of proposals that "follows the general approach taken in Section 1407."[16] Responding to the proposed adoption of CAFA—

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9. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

10. 28 U.S.C. § 1453 (2000 & Supp. V 2005).

11. *See* 28 U.S.C. § 1407 (2000).

12. Crosley Corp. v. Hazeltine Corp., 122 F.2d 925, 930 (3d Cir. 1941).

13. For discussion of objections to some of the Panel's work, see *infra* notes 128-133 and accompanying text.

14. *See* Resnik, *supra* note 7, at 49 (noting that the 1968 MDL statute was better received then the 1966 class action rules).

15. AM. LAW INST., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS 19 (1994).

16. *Id.* at 36-37.

which gives defendants the unilateral ability to remove cases to federal court—one scholar favored, instead, leaving such decisions to a similar panel.[17] And Judge Weinstein has famously urged in the *Zyprexa* litigation that Congress consider amending CAFA itself to foster use of the Panel to aggregate claims:

> It may be useful for Congress to consider expanding the Class Action Fairness Act from class actions to at least some national MDL, non-Rule 23, aggregate actions. As use of the class action device to aggregate claims has become more difficult, MDL consolidation has increased in importance as a means of achieving final, global resolution of mass national disputes. Much the same concerns which animated CAFA's preference for a single, federal forum apply to national MDL aggregate actions.[18]

This signal success can be explained on many grounds. One is that the Panel has done an exemplary job. Another might be that "[c]onsolidation holds out a bland, somewhat technocratic, uncontroversial face to the world."[19] But even a success deserves scrutiny upon occasion. This Symposium provides an opportunity for that scrutiny. One way of evaluating the Panel's use of its transfer power is to ask whether it uses a "minimalist" approach—transferring only to the extent necessary to avoid duplicative discovery—or a "maximalist" approach—employing the power to transfer as vigorously as possible in order to facilitate consolidated litigation and combined resolution of cases. Clearly Judge Weinstein now favors facilitating the more aggressive use of the power.[20] Equally clearly,

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17. *See* Alan B. Morrison, *Removing Class Actions to Federal Court: A Better Way To Handle the Problem of Overlapping Class Actions*, 57 STAN. L. REV. 1521, 1523 (2005). Morrison remarked:

> [T]he question of whether it is appropriate to relax current jurisdictional requirements cannot be properly answered by mechanical formulas, but is inherently discretionary, much like the decision as to whether similar pending cases in the federal system should be transferred to a single judge for pretrial matters under 28 U.S.C. § 1407. Therefore, I propose a statute . . . under which class action removals would be based on a series of factors that are designed to test the necessity for removal and consolidation, and under which the decision would be made by a body such as the Panel on Multidistrict Litigation, rather than unilaterally by the defendant.

Id.

18. *In re* Zyprexa Prods. Liab. Litig., 238 F.R.D. 539, 542 (E.D.N.Y. 2006) (internal citation omitted).

19. Richard L. Marcus, *Confronting the Consolidation Conundrum*, 1995 BYU L. REV. 879, 887.

20. When the ALI proposal for expansion of the Panel came up for a vote, he was less enthusiastic and urged an amendment that would limit the new procedure to situations involving at least 5000 claimants. *See infra* note 97 and accompanying text.

some academics are unnerved by such aggressive use of the transfer power.[21]

I will begin by considering the enduring tensions caused by any aggregation of claims or issues for combined resolution to show that uneasiness about aggressive use of the Panel's transfer power is only part of a spectrum of judgments about litigation combination in which we have moved far from the minimalist views of the common law era.[22] We have long since set our sights on something much more like a maximalist use of aggregation. Turning to the Panel's emergence as a beacon of hope for an era of dispersed litigation, I examine its origins and early operations, during which most of the tensions that have persisted to this day emerged, and find that it began to use its transfer powers early for purposes that went beyond minimalistic regulation of overlapping discovery.[23] I will then consider the role of more general developments in judicial administration that reinforce more active use of the Panel's transfer power,[24] and conclude by noting some potential sticking points that cause me to be uneasy about a wholesale embrace of this cure-all.[25] Despite those sticking points, I will conclude that the tangible benefits of the Panel's work over the past four decades far outweigh the theoretical misgivings one might indulge about those efforts.[26]

I. THE AGGREGATION TENSION

Aggregation is the current term for a collection of issues that have been around for centuries. It can be explored at great length and with impressive particularity; indeed, the American Law Institute is presently embarked on an effort to devise *Principles of the Law of Aggregate Litigation*.[27] This presentation cannot delve into similar detail.

But we can begin by conceiving aggregation on a continuum from a minimalist to a maximalist view of litigation combination. The "single issue" fetish of the common law courts pushed toward the

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21. *See, e.g.*, Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1167-69 (2006) (discussing reasons for preferring class actions to other forms of aggregation).

22. *See infra* Part I.

23. *See infra* Part II.

24. *See infra* Part III.

25. *See infra* Part IV.

26. *See infra* Part V.

27. *See* AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (Discussion Draft No. 2 2007).

minimalist end of this spectrum.[28] Thus, only claims of the same legal type could be combined in a given case due to the writ system, which required a plaintiff to select the correct writ to seek relief at law.[29] If the facts showed that a different writ would be the right choice, the plaintiff would often have to start over by filing a new proceeding under that writ. Party joinder was similarly constrained; only plaintiffs holding "joint" rights, and only defendants against whom "joint" liabilities were asserted, could be joined. The results of this preoccupation with simplicity and precision were to produce outcomes that struck many as nonsensical. If, for example, the plaintiff was struck by the defendant's carriage, the plaintiff would have to decide whether to assert that the injury was the result of the defendant's purposeful act (making proper an action for "trespass") or a result of the defendant's negligence (making proper an action "on the case"). And, if the plaintiff's spouse were also injured in the same event, the spouse would have to initiate a separate action because the rights asserted were not "joint."

Modern procedure has moved far away from these stringent beginnings, and "aggregation" can be understood to include a multitude of familiar and uncontroversial concepts. We no longer require plaintiffs to guess at the correct legal theory and instead permit them to combine claims on all legal theories, and perhaps all matters—whether or not related—when they file suit.[30] If plaintiffs overlook—or only later learn about—additional related claims, we usually allow them to amend their pleadings to add those claims even if the statute of limitations has run on asserting the claims in an independent action.[31] We similarly allow plaintiffs to assert supplemental claims as part of the same case even though they arise from events occurring after the case was filed.[32] Our rules of claim preclusion generally forbid a second suit asserting claims arising out of the same event or transaction after a final judgment has been entered in an earlier suit making claims arising out of that event.[33] Our rules of party joinder

28. *See generally* FLEMING JAMES, JR., ET AL., CIVIL PROCEDURE § 9.2, at 546-48 (5th ed. 2001) (describing the limiting features of common law joinder). The text following this citation summarizes the points made in this treatise.

29. *See id.* § 9.2, at 546-47.

30. *See* FED. R. CIV. P. 18(a) (permitting a party to join all claims it has against an opposing party).

31. *See id.* R. 15(a), (c) (permitting pretrial amendments and relation back of those amendments).

32. *See id.* R. 15(d) (permitting supplementation regarding events occurring after the original pleading was filed).

33. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982).

generally allow parties to join together to assert claims arising out of the same occurrence or transaction, or to combine claims against multiple defendants arising out of the same occurrence or transaction.[34] Although compulsory joinder rules ordinarily do not require combination,[35] our rules of issue preclusion may encourage it.[36] And once a plaintiff asserts a claim against a defendant, our compulsory-counterclaim rule precludes the later assertion of any claim the defendant has against the plaintiff arising from the same transaction in another later-filed suit.[37]

Even if the plaintiff does not initially opt to cast the litigation net wide, the defendant can do so in similar fashion. If the defendant asserts a counterclaim against the plaintiff, it may join any others against whom it has a claim arising out of the same transaction.[38] If there are multiple defendants, one may assert a claim arising out of the same transaction against another and join additional parties under the same standard.[39] Even without such a claim against an existing party, a defendant may implead a third-party defendant, which may assert claims against the current and additional parties.[40]

Obviously these rules are written in terms that are relatively elastic. Thus, the "same transaction" term that governs joinder of parties under Rule 20 and claim preclusion under the Restatement of Judgments has been interpreted quite flexibly.[41] As the Supreme Court

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34. *See* FED. R. CIV. P. 20(a) (allowing joinder of plaintiffs and/or defendants with regard to claims arising out of the same transaction or occurrence).

35. *See, e.g.*, Temple v. Synthes Corp., 498 U.S. 5, 8 (1990) (per curiam) (holding that potential joint tortfeasors are not necessary parties who should be joined under Rule 19(a)).

36. *See, e.g.*, Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 330-34, 350 (1971) (holding that defensive use of nonmutual collateral estoppel should be allowed against a plaintiff who lost on a similar patent infringement claim against another defendant in an earlier suit).

37. *See* FED. R. CIV. P. 13(a).

38. *See id.* R. 13(h).

39. *See id.* R. 13(g), (h).

40. *See id.* R. 14(a).

41. For example, the RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. b (1982) offers the following highly flexible advice on how to decide if a later claim arises from the same transaction as an earlier one:

> Among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes. Though no single factor is determinative, the relevance of trial convenience makes it appropriate to ask how far the witnesses or proofs in the second action would tend to overlap the witnesses or proofs relevant to the first. If there is a substantial overlap, the second action should ordinarily be held precluded. But the opposite does not hold true; even when there is not a substantial

has written on a related topic, "[u]nder the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."[42] With this orientation, then, one could regard modern procedure as generally embracing a maximalist use of aggregation.

Yet courts do not always uphold such joinder even when it might seem plausible.[43] To take a simple example, consider a 2004 case involving three plaintiffs who claimed that the defendant doctor and hospital had committed medical malpractice in performing a Roux-en-Y bypass operation on each of the plaintiffs.[44] Defendants moved to sever the claims of the plaintiffs.[45] The three plaintiffs were not related to each other, and their surgeries were performed at different times over a fifteen-month period.[46] But the plaintiffs emphasized that the doctor performed the surgeries to the same specifications and that therefore the claims should be regarded to be parts of the same series of occurrences or transactions.[47] The court nevertheless granted the motion to sever, pointing out that each plaintiff had a unique medical history.[48] "Although each trial will involve some overlap of expert testimony, the facts and circumstances of each plaintiff's claim vary so substantially that the Court concludes that they fail to satisfy the requirements of Rule 20."[49]

As we shall see, dispersed litigation involves a combination of cases much more different than these three malpractice actions.[50] The

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overlap, the second action may be precluded if it stems from the same transaction or series.

Id. This direction threatens to become circular—not only is no one factor determinative, even if there is not a "substantial overlap" preclusion may be appropriate because the claims arise from the same transaction.

Joinder questions under Rule 20 are less threatening in the sense that preclusion forbids the later assertion of a claim while denial of joinder merely requires the assertion of separate claims. *See* FED. R. CIV. P. 21. Perhaps as a result, the Rule 20 standards are interpreted to require a case-by-case approach. *See* 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1653 (3d ed. 2001).

42. United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724 (1966) (discussing pendent jurisdiction).

43. *See infra* notes 44-49 and accompanying text.

44. Grant v. Salem, 226 F.R.D. 1, 1 (D.D.C. 2004) (mem.).

45. *Id.*

46. *Id.* at 2.

47. *Id.*

48. *Id.*

49. *Id.*

50. *See infra* notes 134-143 and accompanying text describing the *In re Aviation Products Liability Litigation* case.

question, then, is to determine how much to emphasize the similarities or the differences of the various claims in deciding what combination should be upheld. That determination inevitably involves some difficult judgments.

The normal considerations are well known. One is judicial efficiency, the concern in avoiding dispersed, overlapping litigation.[51] Whenever multiple litigations can be avoided, there may seem to be an efficiency gain. But as Professor Brunet has shown, the joinder of many parties may overload the court and actually lead to a decline in the quality of the resulting decision.[52] In his view, the determination how to achieve such efficiency is intensely practical and personal: "The achievement of maximum efficiency in litigation depends on the court's freedom to rule on joinder motions consistent with the variations in optimal input which will necessarily exist in a system of numerous decisionmakers. Each decisionmaker has a different optimal point of informational input . . . ."[53]

So a given level of joinder might be efficient for Judge A, but not for Judge B.[54] And even if efficiency is clearly served by joinder, one can, of course, dispute the importance of litigation efficiency. Professor Gross has done so,[55] and in this Symposium Professor Lahav explores misgivings about undue preoccupation with efficiency.[56]

Another objective is consistency; whenever the same or a closely related issue is presented in separate cases, there is a possibility that it will be determined differently. Arguably issue preclusion should reduce that risk, but issue preclusion probably won't apply if the common party wins the first case because ordinarily a party not involved in the earlier litigation cannot be precluded from relitigating a common issue.[57] And the ability of litigants later to argue that the issue presented in their cases are sufficiently different to permit relitigation

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51. *See supra* note 12 and accompanying text.

52. *See* Edward J. Brunet, *A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria*, 12 GA. L. REV. 701, 713-18 (1978).

53. *Id.* at 718.

54. Below, I discuss ways in which these individual differences likely affect the Panel's selection of transferee judges. *See infra* Part IV.A.

55. *See* Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734, 748-56 (1987).

56. *See* Alexandra Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369 (2008).

57. *See, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard."). For an argument that there should be greater flexibility in precluding nonparties, see Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 236-88 (1992).

provides a considerable additional degree of uncertainty about preclusion avoiding the inefficiency of relitigation or the embarrassment of inconsistent results. Indeed, the existence of inconsistent verdicts is a fairness factor arguing against issue preclusion even as to the same party.[58] The willingness of litigants to invest in litigation may also explain seemingly inconsistent results; even without preclusive effect, earlier litigation results must often cast a shadow over continued pursuit of rejected positions, and one who proceeds may often be relying in part on a different strategy or additional proof.[59] Those differences may be urged to cut against giving preclusive effect to the earlier litigation outcome.

Fairness is, of course, the great competing consideration; to the extent important fairness concerns would be undermined, one may resist the siren song of efficiency. Fairness may take many guises in addition to the risk that a later court would be called on to pick or choose between seemingly conflicting results to decide whether to permit a party to contest points already addressed in earlier cases.[60] The fact of joinder may itself produce fairness concerns. With multiple defendants, for example in criminal cases, joinder may increase the likelihood that a jury will find a given defendant guilty.[61]

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58. *See Parklane*, 439 U.S. at 330 (recognizing that "[a]llowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant").

59. *But see* Elinor P. Schroeder, *Relitigation of Common Issues: The Failure of Nonparty Preclusion and an Alternative Proposal*, 67 IOWA L. REV. 917, 954-56 (1982) (arguing that nonparty preclusion is insufficient to prevent relitigation of common issues).

60. For an example of this situation, see State Farm Fire & Cas. Co. v. Century Home Components, Inc., 550 P.2d 1185, 1194 (Or. 1976) (declining to preclude on the basis of some decisions regarding responsibility for a fire where there were conflicting results even though the proponent of preclusion argued that the one on which it relied was the best tried and therefore most reliable outcome).

61. *See* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE § 21.04(c), at 569 (4th ed. 2000). The authors suggest several reasons why prejudice may result from joinder:

> [S]uch joinder can often be extremely prejudicial, in a number of ways. For example: (1) a co-defendant's confession which implicates the defendant as well as the co-defendant might be introduced despite the defendant's inability to challenge it effectively, because the co-defendant refuses to take the stand under the Fifth Amendment; (2) also for Fifth Amendment reasons, a co-defendant's testimony tending to *exculpate* the defendant may *not* be introduced; (3) the factfinder may convict merely out of the confusion or disgust created by conflicting defense strategies (e.g., the defendants accuse one another of the crime); or (4) the factfinder may convict merely because the defendant is associated with other clearly guilty defendants.

Id. § 21.04(c), at 568-69 (footnotes omitted).

Similar concerns must exist in some civil cases; if Defendant number 1 is clearly a brute or a racist, that is likely to affect the jury's attitude toward Defendant number 2. But in civil cases, the more common battleground for such issues involves the combination of multiple plaintiffs, which may suggest to a jury that it should adopt a "where there's smoke, there's fire" attitude toward a defendant's liability.

Yet another fairness consideration is the degree of personal control that a litigant loses when her claim is combined with the claims of others.[62] The point just made about fairness of joinder to defendants also suggests the extent to which a jury presented with the claims of numerous plaintiffs may focus less carefully on any given plaintiff. An early objection to the Panel summarized this view: "[T]he burgeoning of consolidated multi-party, multi-district litigation is depersonalizing the profession of advocacy and rendering increasingly difficult effective communication by parties with the courts in which their rights are adjudicated."[63]

The importance we attach to such personal involvement may be debatable, however. For one thing, it can depend on the nature of the claims asserted; lost profits claims by large businesses might easily seem less pressing on this consideration than personal injury claims.[64] But even with personal injury plaintiffs, there is reason to doubt that personal control of the case is the norm.[65] Indeed, a lawyer involved in the *Zyprexa* litigation urged that these considerations actually can be furthered by Panel procedures:

But this does not mean that aggregation is always a disadvantage for the defense in criminal cases. For discussion of this point, see Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CAL. L. REV. 383, 400-04 (2007). Professor Garrett argues that aggregation should be used to combine criminal cases together asserting "persistent, recurring problems in our criminal system," such as routinely falsified laboratory results from a given lab or other "gross deficiencies [that] would be likely across entire localities and states." *Id.* at 401-02. He notes that "while in civil cases the Federal Rules of Civil Procedure set out requirements for various types of aggregation to protect the due process rights of parties bound; in criminal cases, however, the procedural requirements for aggregation remain murky and untested." *Id.* at 411.

62. *See generally* Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69 (emphasizing loss of control of litigation due to aggregation).

63. Miles G. Seeley, *Procedures for Coordinated Multi-District Litigation: A Nineteenth Century Mind Views with Alarm*, 14 ANTITRUST BULL. 91, 91 (1969).

64. *See, e.g.*, Trangsrud, *supra* note 62, at 70-76 (arguing that the right to control one's own personal injury case should be a basic commitment of the judicial system).

65. *See* Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 92-95 (citing empirical studies showing that many personal injury plaintiffs believe they have little control over their lawyers).

> While it might seem that the interests of the various *Zyprexa* plaintiffs in controlling their own destinies received short shrift from the Panel, the seeming paradox is that the practical ability of individual litigants, and their counsel, to individually control the prosecution of their claims has *increased* within both multidistrict consolidation and class action mechanisms. Counsel for individual plaintiffs have played an ever-increasing role in decisionmaking, discovery, prosecution, and settlement of mass tort litigation, whether such litigation is organized as a formal class action or as a consolidation of separate cases, and a strong argument can be made that aggregation has been enhancing this role.[66]

Moreover, there may be a sense in which combination can provide plaintiffs with important advantages. Thus, a defense lawyer lamented that multidistrict coordination in the *Electrical Equipment* cases was harmful to defendants because the "opposition consisted of experienced members of the antitrust bar rather than being opposed 'in a relatively remote section of the country by a lawyer not experienced in the field.'"[67]

In sum, as this quick sketch points out, our conventional contemporary attitude permitting broad joinder already has assumed away many of the objections often made to consolidation. But an additional point must be made regarding consolidation, as compared to the joinder alternatives already discussed—it depends on a judicial decision and is not available due to unilateral litigant initiative. True, a judicial decision can override a unilateral litigant decision and fracture joinder resulting either from a plaintiff's or defendant's use of the joinder possibilities the rules provide.[68] But anyone who has to get a judge's approval to obtain a result (either severance or consolidation)

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66. Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1497 (2005).

67. CHARLES A. BANE, THE ELECTRICAL EQUIPMENT CONSPIRACIES: THE TREBLE DAMAGE ACTIONS 131 (1973) (quoting John Logan O'Donnell, *Pretrial Discovery in Multiple Litigation from the Defendants' Standpoint*, 32 ANTITRUST L.J. 133, 138 (1966)). The O'Donnell article goes on to point out that "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." O'Donnell, *supra*, at 139. Even without involvement of the Panel, this sort of effect had emerged as important by the 1960s. *Id.* Thus, a plaintiff lawyer describing dispersed state-court litigation brought by users of a pharmaceutical product that was handled through informal consolidation reported that "consolidation or concerted action by the plaintiffs would also facilitate the plaintiffs' discovery, lend strength through union to the plaintiffs' Group, and probably improve many plaintiffs' cases." Paul D. Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CAL. L. REV. 116, 125 (1968).

68. *See* FED. R. CIV. P. 21.

faces to some extent an uphill battle.[69] The *only* way to consolidate cases is to persuade a judge to do so.[70] And with the Panel, it is a panel of judges experienced in determining whether to combine who must be persuaded. So although the tensions canvassed above inevitably are in the background when the Panel acts, it acts against a presumption that our legal system has moved much of the way from the common law minimalist attitude toward joinder to a maximalist view.

II. THE EVOLUTION OF MULTIDISTRICT LITIGATION AND THE ROLE OF THE PANEL—TOWARD MAXIMALIST USE

Although one can see the actual evolution of the class action as contradicting or confounding its creators' expectations,[71] for the Panel the operative notion might be "as the twig is bent, so grows the tree," or at least that the evolution of its practice flowed from the issues that attended its creation and emerged in the first few years of its operation. Throughout, there has been a tension between what one might call minimalism and maximalism in use of this gathering tool.

The initial emergence of dispersed litigation has been traced as far back as 1940.[72] Until the 1960s, there was no striking concern with this phenomenon, however. Academic attention began to focus on these issues at the beginning of that decade, but the customary reaction of the federal judicial system was to leave the resolution of these issues to individual judges.[73] Even in situations in which the same litigants had filed duplicative suits, the cure was for the individual judges to use their powers to stay or enjoin litigation to avoid wasteful activity.[74] The

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69. *Cf.* FED. R. CIV. P. 15(a) (distinguishing between amendment of pleadings as of right and amendments that require a court order or opposing party approval).

70. 28 U.S.C. § 1407 (2000).

71. *See supra* note 6 and accompanying text.

72. *See* F.J. Nyhan, Comment, *A Survey of Federal Multidistrict Litigation—28 U.S.C. § 1407*, 15 VILL. L. REV. 916, 918 (1970) ("The first collection of multidistrict cases having common issues of fact and law stemmed from the government's prosecution of five major motion picture industry producers, distributors and exhibitors for violations of the Sherman Act. The Government commenced its prosecution in 1940, and during the sixteen years that litigation against those defendants was pending, 800 separate actions were filed against the defendants and their subsidiaries." (footnotes omitted)).

73. *See, e.g.*, Allan D. Vestal, *Reactive Litigation*, 47 IOWA L. REV. 11, 11-13 (1961) (discussing judicial treatment of reactive litigation); Allan D. Vestal, *Repetitive Litigation*, 45 IOWA L. REV. 525, 525 (1960) (describing the history of multiple litigation and how the courts have dealt with the problem).

74. *See, e.g.*, William Gluckin & Co. v. Int'l Playtex Corp., 407 F.2d 177, 180 (2d Cir. 1969) (affirming a preliminary injunction restraining Playtex from prosecuting a patent infringement suit against a customer of Gluckin for selling allegedly infringing items manufactured by Gluckin in favor of proceeding with Gluckin's later action seeking a declaration of noninfringement of the same patent); Mattel, Inc. v. Louis Marx & Co., 353

idea was that "sound judicial administration" ordinarily preferred allowing the first-filed suit to go forward in such situations.[75] The problem of handling individual situations was left to the discretion of the district judges involved.[76]

This preference for individual judicial administration reflects a distinctive feature of the American judicial attitude. As Professor Damaška has written, one may classify judicial systems as emphasizing either a hierarchical or coordinate ideal.[77] In the former, one expects to encounter an emphasis on lifetime training for judicial roles, bureaucratic judicial organization with relatively intrusive and easily available review of interlocutory decisions by higher levels of the judicial hierarchy, and limited or no deference to first instance decision makers.[78] In the latter, the coordinate arrangement "envisages a wide distribution of authority," creating the risk that "decision makers situated in parallel can easily frustrate or nullify the fruits of one another's efforts."[79] But higher judicial authorities do not have the authority to countermand such directives in the customary American experience. In the alternative hierarchical arrangement,

> the reviewing stage is conceived not as an extraordinary event but as a sequel to original adjudication to be expected in the normal run of events.... [R]eview is not only regular, it is also comprehensive. There are few aspects of lower authority's decision making that are accorded immunity from supervision ....[80]

America has derived great benefits from its independent judiciary consisting of individual judges selected by a relatively political process and acting on their own, with very limited intrusion from above. But with dispersed litigation, this institutional arrangement—and the independent orientation of judges from very different backgrounds rather than a common judicial bureaucracy—means that the risk increases that one judge's handling of a problem may frustrate another judge's efforts.

F.2d 421, 424 (2d Cir. 1965) (reversing the grant of a stay to allow the first of two actions filed between the same parties involving the same controversy to proceed).

75. *Mattel*, 353 F.2d. at 423.

76. *See, e.g.*, Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183-84 (1952) (stating that balancing the conveniences should be left to the sound discretion of the district court).

77. *See* MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 16-70 (1986).

78. *Id.* at 19-20.

79. *Id.* at 25.

80. *Id.* at 48-49.

The *Electrical Equipment* cases presented a nationwide version of this sort of problem. In 1961, a total of 441 antitrust cases were filed in U.S. courts, and in 1963, 457 such cases were filed.[81] Of the 1961 cases, 37 were *Electrical Equipment* cases, as were 97 of the cases in 1963.[82] In 1962, 2079 antitrust cases were filed, of which all but 340 were *Electrical Equipment* cases.[83] The plaintiffs in these cases were mostly utilities or other enterprises that purchased large pieces of electrical equipment, and they tended to file suit in their home jurisdictions.[84] The same, relatively limited number of officials of the defendants would likely be the witnesses in most or all of the cases.[85] It takes little reflection to recognize that competing orders on a variety of subjects by multiple U.S. district judges handling these cases could rapidly lead to chaos. Even from the minimalist perspective, this situation cried out for action of the sort now undertaken by the Panel.

Actually, the Judicial Conference had foreseen the risks that would be created by this avalanche of litigation before it hit the clerks' offices. In 1961, it authorized the creation of a special subcommittee to deal with the resulting discovery problems.[86] In January 1962, Chief Justice Warren appointed the Coordinating Committee for Multiple Litigation of the United States District Courts (Ad Hoc Committee), and it promptly got to work even before most of the cases had been filed.[87]

The work of the Ad Hoc Committee provides a striking model for what might be viewed as a maximalist attitude toward use of judicial administration to handle at least the extraordinary outburst of dispersed litigation that was hitting the federal courts at the time. Thus, in February 1962, the committee "decided to direct its initial

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81. *See* Phil C. Neal & Perry Goldberg, *The* Electrical Equipment *Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621, 621 (1964).

82. *Id.*

83. *Id.* Dean Neal and Mr. Goldberg contrasted the motion picture antitrust litigation, *see* discussion *supra* note 72 and accompanying text:

> The only other group of private antitrust cases comparable in magnitude to the electrical equipment litigation were the motion picture cases. The total number of those cases cannot be ascertained accurately, but it may be estimated that between 700 and 1,000 were filed during the period 1946-1959. . . .
>
> Thus, the motion picture cases were fewer, aggregating one-third to one-half the number of electrical equipment suits, and they were filed comparatively evenly over a longer period of time, producing a much smaller load on the courts.

Neal & Goldberg, *supra* note 81, at 622.

84. *See* Bane, *supra* note 67, at 80-81.

85. Neal & Goldberg, *supra* note 81, at 623.

86. *Id.*

87. *Id.*

efforts toward developing a program for co-ordinating the pretrial stages of the cases" and identified three measures it could take: (1) facilitating communication among the judges, (2) recommending that each court assume control of pretrial matters, and (3) developing uniform pretrial procedures to avoid repetitious and overlapping discovery.[88] Of particular note, one goal was recognition that "[g]eneral acceptance of the principle of court-controlled discovery was essential if the courts were to have an opportunity to co-ordinate discovery procedures."[89]

With this plan in hand, the Ad Hoc Committee called a meeting of all the judges with *Electrical Equipment* cases, and twenty-five judges attended.[90] Although many of these judges were "frankly skeptical that a program of co-ordination could be carried out successfully,"[91] they adopted a resolution calling for coordinated and directed action:

> [I]t [is] the sense of this meeting that a plan for co-ordinating discovery procedure and expediting rulings on key legal questions, as well as a means for disseminating information, be devised and submitted to the trial judges involved at the earliest practicable time; and that in the meantime, procedures leading toward the securing of information needed for ultimate disposition of the litigation be followed, as nearly as practicable, by each individual judge.[92]

As a result, the Ad Hoc Committee functioned in part as a kind of executive committee for the judges assigned to the *Electrical Equipment* cases.[93]

It should be apparent that this model much more closely resembles the hierarchical one sketched by Professor Damaška than the ideal of coordinate officialdom that lies at the heart of the American judicial system.[94] And the Ad Hoc Committee did not stop with the *Electrical Equipment* cases; instead, it commenced work on other multidistrict litigation situations.[95] Writing in 1970, two observers saw the incipient changes as revolutionary: "In less than ten

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88. *Id.*
89. *Id.*; *see also infra* Part III.A (regarding the rise of managerial judging).
90. Neal & Goldberg, *supra* note 81, at 623.
91. *Id.*
92. *Id.*
93. *Id.*
94. *See supra* text accompanying notes 77-80.
95. Colvin A. Peterson, Jr. & John T. McDermott, *Multidistrict Litigation: New Forms of Judicial Administration*, 56 A.B.A. J. 737, 739-40 (1970) (describing other case clusters that the Ad Hoc Committee addressed).

years' time the procedures for processing protracted and complex litigation have been revolutionized by the federal judiciary in co-operation with Congress and interested attorneys."[96]

Had the Panel taken a minimalist view of its transfer power, it might have been very circumspect about using that authority, limiting it to situations involving litigation of the dimensions of the *Electrical Equipment* cases. When the ALI was giving final consideration to its 1994 proposal for expanded Panel authority, Judge Weinstein moved to amend the proposal to limit its operation to situations involving at least 5000 claimants.[97] That motion was defeated.[98] From the outset, the Panel did not limit transfers to situations involving thousands of cases.[99]

Whether Congress wanted to endorse a revolution is not clear.[100] Notably, it did not explicitly authorize the Panel to provide the kind of ongoing and substantive direction for the conduct of the litigation that the Ad Hoc Committee did.[101] That Committee, after all, took a role in developing coordinated discovery methods and methods of addressing at least threshold substantive issues raised in the underlying cases. The Panel, on the other hand, was not to be given authority to provide such direction for the conduct of transferred cases.[102]

And the authority of the transferee judge might have been quite limited as well. One view in Congress was that the transferee judge could only handle and coordinate discovery.[103] But merely as a matter of discovery supervision, a narrow grant of authority would be insufficient. The scope and topics of discovery could not easily be separated from the question whether certain claims could withstand scrutiny on a motion to dismiss; if not, discovery about them would not be warranted. And discovery might well be limited or tailored by rulings on summary judgment. Similarly, motions to amend or add

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96. *Id.* at 737.

97. *See* Bureau of Nat'l Affairs, Inc., *ALI Finishes Complex Litigation Project, Makes Progress on Various Restatements*, 61 U.S.L.W. 2709, 2710 (1993) (reporting on the Weinstein motion).

98. *Id.*

99. *See* Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001, 1011 (1974) (describing decisions by the Panel to transfer when there were only a few cases involved).

100. *See* Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 805-08 (1985) (describing the different interpretations courts and commentators have given to the legislative history of § 1407).

101. *See* 28 U.S.C. § 1407 (2000).

102. *See id.*

103. *See* Trangsrud, *supra* note 100, at 806-07.

parties bear on discovery. As a result, the statute as enacted authorizes the transferee to conduct all "pretrial proceedings."[104] At the end of those proceedings, the Panel was to send the cases back where they came from.[105]

There was always a structural difficulty in this arrangement if most cases actually went back to the original forum. What should be the attitude of the transferor judge toward the rulings of the transferee? In any case, when there is a change of judges there is a possibility of different judicial attitude toward important matters. Under the "law of the case" doctrine, the second judge ought to be restrained in disregarding the other judge's orders, but that doctrine does not deprive the second judge of the power to do so.[106] An example is provided by a case in which one district judge imposed a sanction on defendants due to their failure to respond to the plaintiff's expert discovery, forbidding them from offering expert testimony at trial.[107] Later the case was shifted to another district judge who allowed defendants to call an expert rebuttal witness at trial.[108] Maybe that was consistent with the first judge's order, but the United States Court of Appeals for the Ninth Circuit concluded that any inconsistencies resulted from differing judicial attitudes that would not warrant appellate intervention:

> We are confronted here with the delicate problem of two district court judges exercising their "broad discretion" over evidentiary rulings in different phases of the same case and reaching contradictory results. [The first judge] exercised his discretion in sanctioning defendants' discovery violations by prohibiting defendants from introducing expert testimony. The propriety of that decision is uncontested here. [The second judge] exercised her discretion to allow rebuttal testimony by the excluded defense expert.[109]

Given the latitude afforded the trial judge to modify pretrial orders, the court of appeals found no error.[110]

In multidistrict litigation, however, the law of the case doctrine would seem to fall far short of what is needed.[111] There, the transferee

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104. 28 U.S.C. § 1407(a).

105. *See* Trangsrud, *supra* note 100, at 806.

106. *See* Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 605 (1987) (stating that the law of the case doctrine "is not ironclad in precluding reconsideration of judges' rulings").

107. Amarel v. Connell, 102 F.3d 1494, 1515-16 (9th Cir. 1997).

108. *Id.*

109. *Id.* at 1515 (internal citation omitted).

110. *Id.* at 1516.

judge would be hamstrung by having to adhere to all discovery and related rulings entered before transfer.[112] The transferee judge had to be free to fashion consistent orders for all the cases without regard to divergent pretransfer directives.[113] Then, if the cases were remanded, the question would arise how the transferor judge would view the transferee judge's orders. Judge Weigel, an original member of the Panel, directly addressed this issue and opined that the transferee judge's orders must be respected by the transferor judge:

> [I]t would be improper to permit a transferor judge to overturn orders of a transferee judge even though error in the latter might result in reversal of the final judgment of the transferor court. If transferor judges were permitted to upset rulings of transferee judges, the result would be an undermining of the purpose and usefulness of transfer under Section 1407 for coordinated or consolidated pretrial proceedings because those proceedings would then lack the finality (at the trial court level) requisite to the convenience of witnesses and parties and to efficient conduct of actions.[114]

There is considerable reason to conclude that Congress expected that most cases would be returned to their original districts after

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111. For a careful examination of these issues, see Steinman, *supra* note 106, at 665-706.

112. *Id.* at 666-67.

113. *See, e.g.*, *In re* Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig., 664 F.2d 114 (6th Cir. 1981). In *Upjohn*, various protective orders had been entered before transfer. *Id.* at 115. The transferee judge vacated them, and entered an order allowing plaintiffs to share discovery with other litigants in the multidistrict litigation and with litigants with cases pending in state court. *Id.* at 116. Upjohn argued that this provision for sharing outside the multidistrict litigation was improper, and that the transferee judge should not have altered the existing protective orders that were entered before transfer. *Id.* at 117. The United States Court of Appeals for the Sixth Circuit recognized that Upjohn's argument had some force:

> There is, at first blush at least, some arguable merit in the claim that it is really none of the transferee court's business that the transferor court has earlier prohibited access to the discovery information by parties outside the multidistrict litigation. After all, the Panel's interest in consolidating discovery is to assist the parties to the cases so transferred. . . . [T]he transferor court must ultimately be responsible for the final resolution of the dispute upon remand, and might seem to be better positioned to foresee and thus avoid the possible abuse of the discovery by its dissemination to outsiders. It can also be said that there is something unseemly in allowing plaintiffs to relitigate an issue which has already been fairly and fully heard in another court.

Id. But ultimately the Court of Appeals concluded that "the transferee judge must necessarily have the final word" because "[t]he presence of protective orders in some of the cases, while not in others, would inevitably create conflicts which the transferee court would have to resolve." *Id.* at 119.

114. Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 577 (1978).

completing their multidistrict pretrial preparation. But that never happened. By 1974, a note in the *Harvard Law Review* reported that "the great majority of cases transferred by the Panel under section 1407 have been disposed of by transferee courts and not remanded to their original districts."[115] Four years later, Judge Weigel reported that "[i]n point of fact, slightly less than five percent of the actions transferred by the Panel have been remanded."[116]

Almost from the outset of the Panel's operation, some commentators urged that transfer for trial be added to the Panel's authority.[117] Even without such a statutory change, transferee judges hit on 28 U.S.C. § 1404(a) as a tool they could use to transfer cases to themselves for all purposes. The Panel itself rather quickly embraced § 1404(a) transfer by rule.[118] When the Supreme Court held in 1997 that the statutory requirement of remand could not be circumvented in this manner, alternative means of achieving disposition without remand quickly emerged.[119]

The foregoing might be taken to represent overreaching by the Panel, but it seems to me an aspect of an inherent tension in the split authority arrangement Congress built into the statute. Almost inevitably, transferee judges are likely to feel that they have some responsibility to attempt to resolve the cases they have gotten—"The other judges are relying on me to finish this job." It seems highly improbable, for example, that a transferor judge would somehow be offended by a transferee judge's modification of her orders.[120] Although it is not clear how many multidistrict cases were actually transferred pursuant to § 1404(a) and then tried, it seems likely that the

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115. Note, *supra* note 99, at 1001-02.

116. Weigel, *supra* note 114, at 583.

117. *See, e.g.*, Comment, *Consolidation of Pretrial Proceedings Under Proposed Section 1407 of the Judicial Code: Unanswered Questions of Transfer and Review*, 33 U. CHI. L. REV. 558, 562 (1966) (urging that a transferee judge should be able to transfer for trial); Comment, *Observations on the Manual for Complex and Multidistrict Litigation*, 68 MICH. L. REV. 303, 333 (1970) (pointing out the problems created when transfer is not for trial as well as pretrial purposes).

118. *See* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 32 (1998) ("[T]he Panel has itself sanctioned such assignments in a rule issued in reliance on its rulemaking authority under 28 U.S.C. § 1407(f).").

119. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132, at 223 (2004). Various methods are suggested by which the transferor judge can avoid the need for a remand, including conducting a bellwether trial of an action it can try, encouraging plaintiffs to dismiss and refile in the transferee district, seeking intercircuit or intracircuit assignment, or reliance of the transferor judge to transfer under § 1404(a) after return of the case. *Id.* § 20.132, at 223-24.

120. *See* discussion *supra* note 113.

great majority of cases that never came back were not tried in the transferee district, so that giving the Panel the power to transfer for trial might not greatly reduce the number of remands.[121]

What these statistics really show is that the operation of § 1407 has tended in a maximalist direction. One ingredient in that thrust has been the understandable—indeed, applaudable—tendency of transferee judges to take seriously their responsibility to resolve the cases they have received from the Panel.[122] Others flow from the Panel's approach to its job, one that emerged (like the Panel rule on § 1404(a) transfers) early in its operation. As the leading commentator on the Panel recognizes, "[m]any of the guidelines followed by the Panel were enunciated in decisions made by the Panel during its first two years of operation."[123]

The tenor of the Panel's early decisions reinforces the impression left by the statistics. Its emphasis on judicial efficiency bespoke an impulse toward combination. As a *Harvard Law Review* study concluded in 1974, "[w]here the Panel finds that consolidation will promote judicial efficiency, arguments [against transfer] based on the third finding required by section 1407—that consolidation be for the convenience of the parties and witnesses—are unlikely to succeed."[124] By way of contrast, § 1404(a) decisions place considerable weight on litigant convenience considerations. Often the issue raised by § 1404(a) motions is whether one side or the other will be favored in terms of the location of the forum, and the court grants a transfer only if the conveniences for the moving party strongly outweigh the conveniences to the opposing party of keeping the case in the original location. Lawyers with this approach to transfer motions in mind may frame their transfer arguments to the Panel in a like manner. "Many briefs filed with the Panel advance solely parochial viewpoints of individual litigants . . . ."[125] Not surprisingly, the Panel is unmoved; in

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121. I further discuss the problem of transfer for trial below, suggesting that a key question is whether having the authority to try cases would significantly affect the transferee judge's ability to manage (and resolve) cases effectively before trial. *See supra* Part IV.B.

122. Some see this tendency as undesirable. One commentator objected, for example, that "[t]ransferee judges are prone to subverting legitimate concerns of individual parties in the interest of expediency. They have been more willing to grant § 1404(a) transfers than transferor judges." Blake M. Rhodes, Comment, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. PA. L. REV. 711, 745 (1992). Since 1997, of course, transferee judges have not been able to grant such motions. But their interest in "expediency" likely remains.

123. DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL § 2.5, at 13 (2005).

124. Note, *supra* note 99, at 1008.

125. HERR, *supra* note 123, § 4.13, at 54.

what a critic of the Panel's inclination denounced as a "colorful twinge of pique,"[126] Judge Wisdom in an early Panel decision characterized such an argument as a "worm's eye view of Section 1407."[127] Perhaps a different phrase would have been more politic; litigants are likely to bridle at being compared to worms.

For the most part, the objection that the Panel gives insufficient attention to litigant interests comes from the plaintiff side. Thus, in a leading plea for heeding the worm's eye view, a plaintiff lawyer specializing in air disaster litigation argued that combining the resulting lawsuits led to a catalogue of disadvantages for some plaintiffs such as delays in getting to trial, additional expense in coping with proceedings or discovery that would not occur in an individual case, curtailed opportunities for collaboration among plaintiffs' attorneys in separate cases to exploit the opportunity to obtain discovery repeatedly rather than just once, and possibly conflicting interests.[128] From the defense side, objections are sometimes made about increased costs driving small defendants to settle, but for the most part combination tends to be the order of the day.[129] Plaintiffs are likely to sue a large number of defendants under the broad joinder provisions of Rule 20, so the defense side finds itself yoked to others even if plaintiffs' cases proceed separately.

The Panel's impatience with this sort of argument is fully understandable. Consider, for example, the objection of this Panel critic about the plaintiffs' loss of discovery opportunities:

> The practical advantage of such mutual self-help among the plaintiffs might be objectionable as "double-teaming" from the viewpoint of a defendant and can even be argued as a reason for eliminating the possibility of conflicting discovery rulings from different courts. Nevertheless, it is an important practical tool. Consolidated discovery, supervised by only one court, has eliminated the chance, through cooperation, for more than one "bite at the apple."[130]

Much as such opportunities may be attractive to lawyers, it hardly seems that the Panel should tarry long over them. To the contrary,

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126. John H. McElhaney, *A Plea for the Preservation of the "Worm's Eye View" in Multidistrict Aviation Litigation*, 37 J. AIR. L. & COM. 49, 49 (1971).

127. *In re* Library Editions of Children's Books, 297 F. Supp. 385, 386 (J.P.M.L. 1968).

128. *See* McElhaney, *supra* note 126, at 51.

129. *See, e.g.*, Seeley, *supra* note 63, at 94.

130. McElhaney, *supra* note 126, at 59-60.

eliminating multiple bites at the apple lies at the heart of even a minimalist attitude toward the Panel's function.

In reality, individual lawyers' resistance to the combination of cases seems to stem from a rejection of the litigation consequences of the mass society that produces such litigation.[131] American lawyers are, in many ways, lone wolves, particularly on the plaintiff side. They bridle at having to heed the judgment of others, and want to do things their own way.[132] Those are the sorts of individual opportunities that tend to be constricted in the mass society. As a defense lawyer who said he approached the problem with a "nineteenth century mind" put it: "[I]n the excitement of creating super-litigation for super-cases, there has been too little thought given to the heart and soul of our judicial system, which are more precious than its forms and rituals."[133] Frankly, it is hard to resist the Panel's implicit assumption that those nineteenth-century attitudes must give way to twenty-first-century litigation realities.

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131. *See supra* text accompanying notes 1-4.

132. Consider the following views of an experienced antitrust lawyer:

> Even where the court does not formally appoint liaison counsel or lead counsel, everything in an antitrust class action is handled by committee, anyway. Those of you who have participated in meetings of counsel in such cases know that your experience in the courtroom does you precious little good; what you would need, ideally, is experience in a state legislature. In fact, it is often the best trial lawyers who have the hardest time adapting to what have become the accepted procedures for handling antitrust class actions. A good trial lawyer's tenacious pursuit of his own theory of the case and his unwillingness to compromise his own client's interests in the slightest respect for the good of the majority are almost immediately taken as signs of pigheadedness on the part of his fellow counsel. The result is that he is quickly ostracized from the decision-making inner circle of lawyers on his side of the case, thereby further diminishing his ability to influence the course of the proceedings.

Dando B. Cellini, *An Overview of Antitrust Class Actions*, 49 ANTITRUST L.J. 1501, 1505 (1980).

In the same vein, consider the following views of a defense lawyer:

> I have traveled, at considerable expense to my client, to hearings where I found myself one of a courtroom full of lawyers, for the most part strangers to one another, mandated to organize themselves, to elect a lead spokesman and to divide perhaps, at most, one hour of argument among themselves. Since my client was not one of the larger or most frequently named defendants in those cases, and its position was not in all respects common with those of such defendants, I was obliged to choose between silence and five minutes of what I felt was a futile effort to focus the panel's attention on what my client deemed most important to its interests.

Seeley, *supra* note 63, at 92-93.

133. Seeley, *supra* note 63, at 95.

Yet the Panel's willingness to combine cases, and its confidence that combination will be for the advantage of the litigants as well as serve judicial economy, is sometimes striking. Consider, for example, a 1972 decision involving a series of suits filed around the country due to alleged malfunctions in helicopter engines.[134] Helicopters produced by two different manufacturers—Bell Helicopter Company and Fairchild-Hiller Corporation—were involved in these incidents.[135] Some of the cases involved crashes or emergency landings of helicopters.[136] Others involved damages to businesses that owned the helicopters due to downtime resulting from engine malfunctions.[137] But all the helicopters had engines manufactured by a division of General Motors (GM).[138] GM, and counsel for the plaintiffs in twelve of the actions, favored transfer for combined discovery proceedings.[139] All the other defendants opposed transfer, as did all parties (including GM) in other cases added to the transfer order on the Panel's own motion.[140] The various cases involved alleged failings of different components of the engines.[141]

The Panel nevertheless ordered transfer, finding persuasive the argument that "although the specific defects alleged in each separate case may not be identical they are all interwoven so as to cover the engine's general condition and airworthiness."[142] Absent combination, some GM witnesses would be subject to more than one deposition, and "[f]or the convenience of the parties and witnesses it is highly desirable that witnesses relevant to the common issues be deposed but once."[143] Compare this situation to the severance of the medical malpractice claims mentioned above where all three plaintiffs had the same operation performed by the same doctor in the same hospital.[144] It is clear that the Panel is using a much broader notion of what is subject to combination under § 1407 than is customarily employed under the (admittedly different) provisions of Rule 20.

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134. *In re* Aviation Prods. Liab. Litig., 347 F. Supp. 1401, 1402 (J.P.M.L. 1972) (per curiam).
135. *Id.* at 1402 n.1.
136. *Id.* at 1402.
137. *Id.*
138. *Id.*
139. *Id.* at 1402-03.
140. *Id.* at 1403.
141. *Id.* at 1402.
142. *Id.*
143. *Id.* at 1403.
144. *See supra* text accompanying notes 44-49.

The Panel's view of its role sometimes goes beyond an aggressive use of transfer to avoid duplicative or possibly overlapping discovery; in at least some instances transfer is designed to achieve what might be called a "substantive" objective. An early and recurrent example is class action litigation. From the outset, the Panel has transferred whenever there is a prospect of overlapping classes.[145] Although this is surely an understandable use of the transfer power, it equally surely goes beyond avoiding overlapping discovery. Overlapping class actions present serious problems of judicial administration,[146] and the Panel has used its ability to transfer to avoid those problems.[147] Similarly, in a set of breach of contract cases against Westinghouse when it gave notice that it could not fulfill its contractual obligations to deliver uranium and that it would therefore deliver approximately nineteen percent of the contract amount to each customer, the Panel transferred to "eliminate the possibility of colliding pretrial rulings by courts of coordinate jurisdiction, and avoid potentially conflicting preliminary injunctive demands on Westinghouse with respect to its delivery of uranium."[148] The same attitude explained the transfer of numerous suits by book publishers to enjoin the Post Office's revision of fourth class postage regulations, which also involved conflicting preliminary injunctions. The Panel explained:

> While there is nothing strikingly novel about inconsistent decisions in United States District Courts, the interests of justice are not ordinarily served by such disparities. This consideration has been recognized as a basis for ordering cases to be transferred under 28 U.S.C. § 1404(a). Similarly, during the course of multidistrict litigation, § 1407 is an appropriate means of avoiding injury to like parties caused by inconsistent judicial treatment.[149]

The point of these examples is that the Panel has long since moved well beyond minimizing overlapping discovery as a ground for transfer and thus toward a maximalist use of the transfer power. But as

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145. *See* Note, *supra* note 99, at 1010 & n.41 (asserting that as of 1974 the Panel had transferred all cases involving potentially overlapping classes); *see also In re* Piper Aircraft Distrib. Sys. Antitrust Litig., 405 F. Supp. 1402, 1403-04 (J.P.M.L. 1975) (per curiam) (affirming that "matters concerning class action certification should be "included in the coordinated or consolidated pretrial proceedings . . . .").

146. *See* Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 463 (2000) (discussing difficulties arising from overlapping class actions).

147. *See* sources cited *supra* note 145.

148. *In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 405 F. Supp. 316, 319 (J.P.M.L. 1975).

149. *In re* Fourth Class Postage Regulations, 298 F. Supp. 1326, 1327 (J.P.M.L. 1969) (internal citations omitted).

Judge Weinstein suggested, the transfer power can be used even more aggressively to foster combined resolution of litigation, particularly in mass tort litigation.[150]

The cardinal example of that more aggressive use is the Panel's 1991 decision to transfer all 30,000 federal court personal injury asbestos actions.[151] Already by 1991, the Panel had declined five times to transfer asbestos cases on the ground that even under its aggressive attitude favoring discovery savings, transfer was not warranted.[152] But those reasons for denying transfer no longer applied due to the "'critical dimensions'"[153] of the asbestos problem, which "'threatens to overwhelm the courts and deprive all litigants, in asbestos suits as well as other civil cases, of meaningful resolution of their claims.'"[154] In light of these circumstances, "'[t]he heyday of individual adjudication of asbestos mass tort lawsuits has long passed.'"[155] Moreover, transfer would avoid leaving some plaintiffs without remedies if those who had sued in less-congested districts could obtain and enforce judgments before those in overburdened districts could get to trial, thus depleting the assets available to pay later judgments.[156]

In taking this action, the Panel responded to a variety of concerns about contemporary mass tort litigation by adopting a maximalist attitude toward the transfer power.[157] To drive home the point, the Panel listed various developments that might follow transfer—a single national class action trial or other types of consolidated trials on product defects, the establishment of case deferral programs for exposed plaintiffs not yet ill, limitations on plaintiffs' contingent fees, measures to guard against depletion of defendants' insurance assets, measures to speed up case disposition and purge meritless claims, or efforts to achieve a global settlement.[158] The Panel emphasized that it "has neither the power nor the disposition to direct the transferee court in the exercise of its powers and discretion in pretrial proceedings," but

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150. *See supra* note 18 and accompanying text.

151. *In re* Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415, 424 (J.P.M.L. 1991).

152. *Id.* at 417 n.4.

153. *Id.* at 418 (quoting a report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation).

154. *Id.* at 419 (quoting *In re* Joint E. & S. Dist. Asbestos Litig. 129 B.R. 710, 750 (E.D.N.Y. 1991)).

155. *Id.* (quoting *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 743).

156. *Id.* at 422.

157. For an explanation of how these concerns also prompted aggressive use of class action procedures, see Richard L. Marcus, *They Can't Do That, Can They? Tort Reform via Rule 23*, 80 CORNELL L. REV. 858, 859-66 (1995).

158. *See In re Asbestos*, 771 F. Supp. at 420-21.

also that these are "the types of pretrial matters that need to be addressed by a single transferee court."[159] Moreover, if techniques adopted by transferee Judge Charles R. Weiner made it valuable to provide additional judicial personnel, perhaps to try cases, the Panel's ability to request intercircuit assignment could come in handy.[160] "We emphasize our intention to do everything within our power to provide such assistance in this docket."[161] *This* was maximalism in use of the Panel's transfer power.

The upshot of this action was a momentous change in the handling of asbestos litigation in federal court;[162] the Panel had used the power to transfer to facilitate or make possible many actions by the transferee judge because all the litigation was "centralized" before him.[163] The Panel clearly regarded its job as facilitating the use of those various techniques for handling the litigation and stood ready to take further measures to enhance the transferee judge's authority to respond to the challenges of this litigation. And although asbestos litigation was in many ways an unparalleled challenge to American courts, the Panel has taken similar action on other occasions. Consider, for example, the *In re Diet Drugs* litigation, in which the Panel transferred over 18,000 individual personal injury actions and more than 100 potentially overlapping class actions.[164] Only with that transfer could order be produced out of the chaos that could engulf dispersed litigation, and only after that transfer did a global settlement result in *In re Diet Drugs*.[165]

Consistent with the maximalist orientation, the Panel seems over the years actually to have taken an interest in what happened with transferred cases after transfer even while disavowing an interest in

159. *Id.* at 421.

160. *Id.* at 423 (expressing the Panel's willingness to assist the transferee judge by appointing additional transferee judges if necessary).

161. *Id.* at 423.

162. Indeed, it was followed with a forceful effort at a comprehensive nationwide class action settlement that the Supreme Court eventually ruled improper in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). As it did so, the Court noted that "[i]t is basic to comprehension of this proceeding to notice that no transferred case is included in the settlement at issue, and no case covered by the settlement existed as a civil action at the time of the MDL Panel transfer." *Id.* at 601 n.3.

163. *See In re Asbestos*, 771 F. Supp. at 418-22 (describing "centralization" of all cases before Judge Weiner).

164. 282 F.3d 220, 225 (3d Cir. 2002) (describing the evolution of litigation).

165. *Id.*

influencing the activities of the transferee judge.[166] In the words of an early critic:

> The statute, as drafted, granted the Panel no substantive power. . . . However, the Panel has assumed a role far beyond that contemplated by section 1407. As the Panel itself modestly stated in a recent report: "Although it lacks explicit statutory authority to supervise discovery, the Panel retains an active interest in and responsibility for insuring that the transferred litigation is processed efficiently, expeditiously and economically." The Panel has demonstrated its "responsibility" by maintaining a constant and often direct supervision of cases transferred. Not only has it offered advice to transferee judges, but the Panel's staff has, on occasion, been present and taken part in the consolidated pretrial proceedings. It has required status reports from the transferee judges concerning the progress of the litigation, and has held conferences for them, offering advice and suggestions on how to handle the cases.[167]

Other early commentators concurred in this general judgment.[168]

Actually, this continuing attention seems consistent with the Panel's authority under the statute. The Panel has an ongoing

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166. *See supra* note 159 and accompanying text (regarding the Panel's claimed lack of power to affect how transferee judges handled asbestos litigation).

167. Stanley J. Levy, *Complex Multidistrict Litigation and the Federal Courts*, 40 FORDHAM L. REV. 41, 59-60 (1971) (footnotes omitted).

168. *See, e.g.*, Note, *supra* note 99, at 1026.

> The Panel's input to the *Manual* and its extensive contacts with transferee judges demonstrate that it maintains a continuing interest in the administration of transferred cases. Parties and transferee courts have turned to the Panel for direct assistance in planning the disposition of litigation when administrative problems have become acute.

Id. (footnotes omitted); *see also* John F. Cooney, Comment, *The Experience of Transferee Courts Under the Multidistrict Litigation Act*, 39 U. CHI. L. REV. 588, 598 (1972) ("[T]he Judicial Panel keeps informed of the progress of pretrial proceedings. The Panel does not serve as a court of appeals for decisions of the transferee courts, but does exercise some supervision over the handling of pretrial proceedings to insure that they are carried out justly and efficiently." (footnote omitted)).

Indeed, the Panel's interest in the actions does not cease even after it has returned them to the transferor district, if that happens. Thus the Panel's longtime clerk explained as follows:

> The district courts evidently feel that with the termination and/or remand of all actions transferred under Section 1407, the Panel's interest in the litigation as a whole will cease. This is not true. The Panel is interested in the litigation until the very last action is disposed of whether it was transferred by the Panel under Section 1407, transferred by another district under another transfer statute, or originally filed in the transferee district. The Panel's interest is in the litigation as a whole.

Patricia D. Howard, *A Guide to Multidistrict Litigation*, 75 F.R.D. 577, 582-83 (1977).

responsibility to determine whether and/or when to retransfer to the district of origin.[169] And it could, if necessary, order a further § 1407 transfer to accomplish the statute's goals.[170] The Panel selects the transferee judge, after all, and therefore has some responsibility for being aware of what the judge is doing with the cases. But this ongoing attention also dovetails nicely with the maximalist attitude toward the transfer power because it incorporates consideration of the multiple ways in which transfer can further resolution of the case—as in the 1991 asbestos transfer decision. Whether to feel uneasy about "judicial" power being wielded by this body that acts outside the normal judicial apparatus will be considered below.[171]

III. MORE GENERAL DEVELOPMENTS IN JUDICIAL ADMINISTRATION THAT REINFORCE THE PANEL'S MAXIMALIST ORIENTATION

The Panel has not been an island, untouched by the more general trends of judicial administration over the last forty years. To the contrary, two of the most important trends relate directly to its maximalist orientation regarding the transfer power, whether or not they were on the mind of Congress when it adopted the statute.

A. Judicial Management

The nineteenth-century view was that the lawyers controlled the pace and content of litigation, and that the judge took little interest in either.[172] Whether or not that attitude should continue to prevail after American procedural innovation in the mid-twentieth century relaxed pleading and introduced very broad discovery can be debated, the reality has been that judicial practices have changed.[173] Beginning in the 1960s, growing in the 1970s, and embodied in the Federal Rules in the 1980s, the managerial orientation of federal judges has become pervasive.[174] Some academics seem to applaud this development or at

169. 28 U.S.C. § 1407(a) (2000).

170. *Id.*

171. *See infra* Part IV.A.

172. *See* Richard L. Marcus, *Reining in the American Litigator: The New Role of American Judges*, 27 HASTINGS INT'L & COMP. L. REV. 3, 10 (2003).

173. *Id.* at 16-20 (arguing that American judges expanded their managerial role in part to curtail the otherwise untrammeled discretion of lawyers).

174. For a review of these developments, see Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770, 770-73 (1981).

least to want to expand it.[175] But the prevailing academic attitude has been critical.[176] Some even say that the growth of management reflects a judicial "shift to the right."[177]

This is not the place to revisit this debate, but to recognize that although dispersed litigation did not cause managerial judging to emerge, the challenges of dispersed litigation did tend to reinforce the trend. As two commentators put it with regard to the *Electrical Equipment* litigation in 1964, "[g]eneral acceptance of the principle of court-controlled discovery was essential if the courts were to have an opportunity to co-ordinate discovery procedures."[178] Put differently, it is inherent in effective judicial handling of multiple consolidated cases that some centralized direction control the course of the proceedings, and likely that this control will emanate from the judge. So consolidation of dispersed litigation and case management have a synergistic effect on one another.

The reality of such centralized control is not only that lawyer latitude is reduced but also that judicial attention focuses on the case earlier in the litigation. And that reality may contribute to the additional reality that most cases transferred by the Panel do not return to their original districts because they are resolved before completion of the pretrial phase.[179] Besides settlement, summary judgment is a way in which the transferee judge may resolve cases.[180] The Supreme Court's 1986 trilogy of summary judgment cases may have contributed to the rise in frequency of summary judgments,[181] but Professor Miller sees case management as being a reason as well:

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175. *See* Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1591 (2005) (arguing that judges should become more managerial in criminal cases as well in order to gather evidence on whether the accused is really guilty and ensure greater accuracy in criminal litigation). Citing the silicone gel breast implant litigation, Professor Brown argues that American judges should adopt an "inquisitorial" attitude: "Especially in the context of mass tort litigation, judges have used this power [to gather evidence] aggressively to impanel experts whose views are effectively dispositive for large groups of cases." *Id.* at 1633.

176. For the leading example, see Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 419-31 (1982).

177. Sandra F. Gavin, *Managerial Justice in a Post-*Daubert *World: A Reliability Paradigm*, 234 F.R.D. 196, 196 (2006).

178. Neal & Goldberg, *supra* note 81, at 623.

179. *See supra* note 115 and accompanying text.

180. *See infra* Part III.B for discussion of settlement.

181. *See* Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1348 (2005) (arguing that one reason for the decline in trial rates in federal courts is that summary judgment has become more accessible under the revised standards announced by the Supreme Court in 1986); *see also* Adam N. Steinman, *The Irrepressible Myth of* Celotex*: Reconsidering Summary Judgment Burdens*

> Regardless of whether case management accomplishes its stated goals, its aggressive use clearly facilitates pretrial disposition. Rule 16 conferences, for example, often clarify what factual or legal issues may be in dispute, thus permitting focused discovery and identification of claims and defenses suitable for summary resolution. In addition, a judge who actively participates throughout the pretrial phase and is familiar with the dispute's facts and theories may be more inclined to believe that having the same evidence presented at trial is unnecessary and to resolve the case on summary judgment.[182]

Even for cases not resolved in the transferee forum, the growth of case management can magnify the importance of that court's rulings because the dividing line between "pretrial" and "trial" has shifted or blurred. For example, in the sprawling *Blood Products* MDL litigation, Judge Grady entered an order in all 190 cases pending before him that defendants collectively designate 24 common-issue expert witnesses in place of the 137 they had initially designated; therefore, the undesignated witnesses could not testify at trial.[183] The judge was responding to plaintiffs' understandable argument in the MDL proceedings that they could not depose all 137 experts, and that it would be unfair to permit defendants then to call undeposed experts as witnesses at trial.[184] Defendants urged that as transferee judge, Judge Grady could not under § 1407 enter such an order because it was not "pretrial."[185] The judge rejected defendants' argument:

> The pretrial and the trial are not, as defendants imply, two unrelated phases of the case. Rather, they are part of a continuum that results in

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Twenty Years After the Trilogy, 63 WASH. & LEE L. REV. 81, 87 (2006) ("Federal courts cite *Matsushita*, *Anderson*, and *Celotex* more than any decisions ever issued by a federal tribunal.").

Nonetheless, there are reasons for caution in connecting doctrinal changes with increases in the rate of summary judgment grants. Professor Burbank's examination of court files, rather than reported decisions, found that "the law in the books is not a reliable guide to the law in action." Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 604 (2004). Professor Burbank discounted the conclusion that the Supreme Court's 1986 trilogy of decisions had a significant impact on the rate of summary judgment motions or granting of those motions, while noting also that the rates seem to have been on the increase since 1960. *Id.* at 594-95.

182. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1006 (2003) (footnotes omitted).

183. *In re* Factor VIII or IX Concentrate Blood Prods. Litig., 169 F.R.D. 632, 642-43 (N.D. Ill. 1996).

184. *Id.* at 636. Note that defendants had a response to this argument: this designation was for 190 cases, and if all 190 went to trial 137 expert witnesses might well be needed. *Id.*

185. *Id.* at 636-37.

> resolution of the case, and the relationship between them is intimate. "Pretrial" proceedings are conducted to prepare for trial. A judge who has no power to impose limits as to what will happen at trial is obviously a judge who has little ability to manage pretrial proceedings in a meaningful way, since there would be no assurance that the judge's efforts are directed toward what is likely to happen at trial.[186]

Because it is "essential for the 'pretrial' judge to have the authority to enter orders that will be binding as to the conduct of the trial,"[187] Rule 16 explicitly recognizes such power.[188]

In sum, whatever Congress may have foreseen when it adopted § 1407 in 1968, the case management movement has meant that transferee judges, like all federal judges, are able and expected to take a more active role in the conduct of the cases transferred to them by the Panel. Congress itself endorsed case management in passing the Civil Justice Reform Act in 1990, and case management can therefore contribute to a maximalist use of the Panel's transfer power.[189]

B. Encouraging Settlement

Although some view settlement as "a capitulation to the conditions of mass society,"[190] today "[s]ettlements dominate the landscape of class actions"[191] and multidistrict cases also. The existence of a scholarly debate about settlement promotion is understandable. "The most controversial of all judicial management tools—the judicial settlement conference—is the one that strays furthest from the judiciary's traditional adjudicative role."[192] In part, this uneasiness responds to a judicial attitude that seems to regard litigated outcomes as suspect, for this attitude seems to detach the

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186. *Id.* at 636.

187. *Id.*

188. *See, e.g.*, FED. R. CIV. P. 16(c)(2)(D) (regarding unnecessary or cumulative evidence at trial); *id.* R. 16(c)(2)(G) (regarding identifying trial witnesses and the exchange of pretrial briefs); *id.* R. 16(c)(2)(J) (regarding the content of the pretrial order); *id.* R. 16(c)(2)(M) (regarding ordering a separate trial under Rule 42(b)); *id.* R. 16(c)(2)(N) (regarding ordering the presentation of evidence early in the trial); *id.* R. 16(c)(2)(O) (regarding a limit on the time allowed to present evidence at trial).

189. *See* Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089. The legislative history invoked the "benefits of enhanced case management" because "greater and earlier judicial control over civil cases yields faster rates of disposition." S. REP. NO. 101-416, at 16 (1990).

190. Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

191. Samuel Issacharoff & Richard A. Nagareda, *Class Action Settlements Under Attack*, 156 U. PA. L. REV. (forthcoming 2008).

192. Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 43 (2003).

judge from the moorings that should confine judicial behavior.[193] At the same time, settlement conferences have become a central feature of judicial case management:

> [S]ettlement conferences allow courts to *manage* their dockets efficiently. At these conferences, courts receive important information from the parties concerning the status of cases. Relying on this information, courts then plan ahead, scheduling trials, hearings, and other necessary matters. . . . [S]ettlement conferences, like all pretrial conferences, benefit courts by providing them an opportunity to gather information they need to manage the judicial process efficiently.[194]

Settlement conferences are therefore among the devices used by transferee judges to handle the cases they have received from the Panel, just as they use them to handle their other cases. More than summary judgment, settlement is the explanation for the reality that most cases the Panel transfers do not return. Whether global settlement should uniformly be a goal of transferee judges is a topic for debate,[195] but one cannot overlook the reality that settlement promotion is an important element of the maximalist use of the Panel's transfer power, for the transferee judge wields considerable power:

> The essential, unvarnished fact is this: The lawyers know—and the judge knows that the lawyers know—that the judge is in a position to make many decisions of vital concern to them and their clients in the future, both in this case and in subsequent cases in which they will appear before that judge. Many of these decisions entail the exercise of some judicial discretion. Some, like the pace and nature of discovery, the time of trial, and the admissibility of expert testimony, are almost wholly discretionary. Especially in a complex case, even those decisions that are in principle not discretionary are often not appealable as a legal or practical matter. . . . Rightly or wrongly, lawyers believe that these decisions are more likely to be favorable, at least at the margin, if the judge regards the lawyers as reasonable and cooperative. It would be astonishing, under these circumstances, if lawyers did not

193. A generation ago, Judge Tone gave voice to this attitude: "Optimal justice is usually found somewhere between the polar positions of the litigants. Trial is likely to produce a polar solution, and often the jury or the judge has no choice except all or nothing. Settlement is usually the avenue that allows a more just result than trial." Philip W. Tone, *The Role of the Judge in the Settlement Process*, *in* SEMINARS FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES 57, 60 (1975).

194. *In re* Novak, 932 F.2d 1397, 1404 (11th Cir. 1991) (citations omitted).

195. *See infra* Part IV.A.

> seek to present themselves as conciliatory actors who are anxious to please the court.[196]

Particularly given the extension of the concept of "pretrial" decisions,[197] this force serves to magnify the persuasive ability of the transferee judge in support of a settlement.

IV. POSSIBLE MISGIVINGS ABOUT MULTIDISTRICT MAXIMALISM

There thus seems to be considerable justification for believing that multidistrict litigation could serve to take up whatever slack results from the impediments class actions now encounter in resolving dispersed litigation. But there is also room for misgivings about pushing multidistrict solutions too vigorously. My concerns fall into two distinct categories, which can be labeled prudential concerns and statutory concerns.

A. Prudential Concerns

1. The Uniqueness of the Panel

Shortly after the Panel was created, a commentator described it as a "radically new procedure."[198] As the leading commentator on the Panel has noted, "[t]he Panel is unlike any other part of the federal judicial system."[199] He notes as well that "the Panel is not a 'supercourt'"[200] and that its "function is fundamentally one of case management, not adjudication."[201] Of course, Article III judges often undertake tasks that are not part of their adjudicatory functions. Judges serving as members of rules committees, or the Sentencing Commission, or of any number of other bodies undertake functions that produce results important to the adjudication of cases in the courts.[202] Yet in doing those tasks, these judges do not take actions that

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196. Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 358 (1986) (footnote omitted).

197. *See supra* notes 184-187 and accompanying text.

198. John W. Beatty, *The Impact of Consolidated Multidistrict Proceedings on Plaintiffs in Mass-Disaster Litigation*, 38 J. AIR L. & COM. 183, 184 (1972).

199. HERR, *supra* note 123, § 1, at 6.

200. *Id.* § 1, at 3.

201. *Id.* § 1, at 4.

202. For a consideration of the constitutional issues raised by such service, consider *Mistretta v. United States*, in which the Court upheld the creation of the Sentencing Commission, its placement within the Third Branch, and the role of Article III judges on the Commission. 488 U.S. 361, 374 (1989). The Court acknowledged that the Commission "unquestionably is a peculiar institution," in part because although a part of the Judicial Branch it "does not exercise judicial power." *Id.* at 384-85. Nonetheless, it noted that judges

directly control the conduct of pending cases. Ordinarily those adjudicatory actions should be performed only by courts that are part of the federal court structure, including an opportunity for review of their actions.

The Panel's only role is to make decisions that control the conduct of pending cases. In that sense, its actions make it look like a court. Thus, a recent article about the Panel begins as follows:

> Imagine you are minding your own business and litigating a case in federal court. Opening your mail one day, you find an order—from a court you have never heard of—declaring your case a "tag-along" action and transferring it to another federal court clear across the country for pretrial proceedings. Welcome to the world of multidistrict litigation.
>
> Who is this court? How and why can it transfer tens of thousands of perfectly well-situated federal lawsuits to new districts?[203]

And a recent Chair of the Panel noted as follows regarding the work of the Panel:

> It is totally different, of course, from anything I do or any other district judge does. I think the comparison would probably be to work on the committees of the Judicial Conference of the United States, but it is really totally different from any experience I ever had. We do carry out an adjudicative function and make decisions concerning the transfer of cases, as you know, from one district to another. That differs from committee work but otherwise it is similar in the sense that we travel and sit together and discharge our responsibility as members of the panel.[204]

Perhaps only an academic would worry about such a semantic detail as whether the Panel is a "court" or not. In much of the world, "courts" have bureaucratic structures and perform a variety of functions, often not limited by the "case or controversy" strictures that

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can serve in such capacities, in which they "do not exercise judicial power in the constitutional sense of deciding cases and controversies . . . ." *Id.* at 389. It found these circumstances sufficient to support the constitutionality of the Commission: "Whatever constitutional problems might arise if the powers of the Commission were vested in a court, the Commission is not a court, does not exercise judicial power, and is not controlled by or accountable to members of the Judicial Branch." *Id.* at 393. The Panel, of course, does make important decisions about pending cases and controversies. The point made in the text, however, is a prudential rather than a constitutional one; it focuses on whether further expansions would be appropriate, not whether they could constitutionally be made.

203. Gregory Hansel, *Extreme Litigation: An Interview With Judge Wm. Terrell Hodges, Chairman of the Judicial Panel on Multidistrict Litigation*, 19 ME. BAR J. 16, 16 (2004).

204. *Id.* at 20 (quoting an interview with Judge William Terrell Hodges).

apply to our federal courts.[205] Yet when performing judicial functions, federal judges are part of a longstanding structure that relies principally on the coordinate exercise of judicial power by trial court judges, but includes provisions for review by higher courts, albeit hemmed in by the final judgment rule and the deference that flows from the application of the abuse of discretion review standard to many trial court decisions.

The problem with the Panel—and part of the reason why it abjures involvement in the handling of cases after transfer[206]—is that it exists outside that court structure. The makeup of the Panel creates a puzzle for arranging review of its decisions; it consists of seven circuit and district judges, no two from the same circuit.[207] With this configuration, it would be odd for review of the Panel's decisions to lie with a three-judge panel of a court of appeals. Instead, the statute attempts to insulate the actions of the Panel against any review.[208] Contrast decisions to certify a class, for which immediate discretionary appeal is now available.[209] Given the potentially comparable importance of decisions to transfer, an argument for some form of review might be made, although the question of standards for that review would be perplexing. Actions of the transferee judge, meanwhile, are reviewed by the appropriate court of appeals under normal standards.[210]

Some have suggested that the Panel's role should be expanded. A generation ago, one commentator suggested that, given the great

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205. *See, e.g.*, DAMAŠKA, *supra* note 77, at 84.

206. Judge Hodges, while he was Chair of the Panel, explained its attitude as follows:

> We're traffic cops in effect, ... we are sending cases here and there, deciding whether they should be sent in the first instance, and if so, where they go. Settlement techniques and the relative strength of the claims or defenses or litigation tactics—all of those things are within the purview of the transferee judges and not the panel. We don't make any substantive decisions at all, we don't engage in the settlements. We don't even offer suggestions to transferee judges on how they should manage cases or what they ought to do.

Hansel, *supra* note 203, at 21. But sometimes the Panel does seem to be doing more than it says it does. Thus, in its asbestos transfer order, it announced that it "has neither the power nor the disposition to direct the transferee court in the exercise of its powers and discretion in pretrial proceedings," but also offered its chosen transferee judge a menu of methods for dealing with the cases. *In re* Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415, 421-22 (J.P.M.L. 1991).

207. 28 U.S.C. § 1407(d) (2000).

208. *See id.* § 1407(e) (permitting review of actions by the Panel in a court of appeals, but only by extraordinary writ pursuant to 28 U.S.C. § 1651).

209. *See* FED. R. CIV. P. 23(f).

210. *See, e.g.*, *In re* Multi-Piece Rim Prods. Liab. Litig., 653 F.2d 671, 679 (D.C. Cir. 1981) (applying the normal abuse of discretion standard of review for trial court decisions).

importance of ordinarily unreviewable interlocutory orders of the transferee judge in multidistrict litigation, those rulings should be immediately reviewable by the Panel.[211] More recently, another commentator (writing before the Supreme Court's 1997 decision disallowing transfer under § 1404(a) by transferee judges) urged that the Panel, rather than the transferee judge, should make the later decision whether cases should be transferred for trial as well as pretrial purposes because the Panel consists of "the nation's 'specialists' in multidistrict litigation" and "is uniquely situated to evaluate the merits of consolidated trial from a neutral viewpoint."[212] Since then, of course, there have been proposals in Congress to amend the statute to permit the Panel to transfer for trial.[213]

Although expanding the Panel's role in the conduct of multidistrict litigation has many attractive aspects—particularly with regard to transfer for trial—there is also reason for caution in assigning what would ordinarily be adjudicatory functions to a body sitting essentially outside the ordinary judicial superstructure. Decisions like transfer for trial closely resemble transfer for pretrial purposes, but to the extent that they come later in the litigation, they may evolve into de facto opportunities for the Panel to "review" the transferee judge's handling of the case. Of course, the Panel's existing power to retransfer cases permits a similar intervention by it, but its practice of doing so only on recommendation of the transferee judge contains the potential for

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211. John T. McDermott, *A Modest Proposal for Expanding the Authority of the Judicial Panel on Multidistrict Litigation*, 38 J. AIR L. & COM. 171, 179 (1972). Mr. McDermott was Executive Attorney for the Panel from 1968 to 1971. *Id.* at 171. His "modest proposal" cited the difficulty of obtaining review of discovery and other orders under ordinary circumstances, and was prompted by the experience that mandamus petitions for review of such orders had already delayed multidistrict proceedings. *Id.* at 178. He had a solution:

> If its authority were expanded the Judicial Panel on Multidistrict Litigation would be able to provide a prompt and expeditious review of non-appealable orders of transferee judges. The Panel is composed of judges who have had substantial experience in multidistrict litigation and who have a basic awareness of the problems involved. Since the Panel has virtually no "backlog" it could probably hear oral argument on appeals from decisions of transferee judges within thirty days or less. In addition, the review of all pretrial orders by the Panel regardless of the location of the transferee district would provide a greater degree of consistency and uniformity than does the present procedure. Finally, the present procedure may permit the litigants to "forum shop" for the most favorable court of appeals since the district selected as the transferee court determines the court of appeals to have appellate jurisdiction over the litigation.

Id. at 179 (footnote omitted).

212. Rhodes, *supra* note 122, at 745-46.

213. *See infra* Part IV.B.

intruding too far into the existing federal judicial apparatus. So one nebulous constraint on vigorous pursuit of maximal use of multidistrict procedures would be respect for that structure.

2. Issues of Bias

A second concern is even more touchy—issues of bias. As the United States Court of Appeals for the Second Circuit recently observed in a different context, "[f]or better or worse, many lawsuits have become exercises in mass aggregation, and judges must confront new issues relating to the propriety of their participation in such cases as they come before them."[214] By bias, I do not mean the sort of things for which judges must recuse themselves; presumably those same provisions apply to members of the Panel as they participate in its decisions.[215] And I do not refer to the sort of tactical considerations that unavoidably will motivate counsel. A decade ago, for example, a leading defense lawyer wrote about the various considerations that defendants sued repeatedly in many federal courts might have in mind in deciding whether to seek consolidation from the Panel.[216] For lawyers, there is reason to ponder such things as buying time by seeking transfer,[217] hurrying up strong cases and delaying weak ones,[218] freeing up resources for broader discovery,[219] and creating a "leader"

214. *In re* Literary Works in Elec. Databases Copyright Litig., 509 F.3d 136, 138-39 (2d Cir. 2007) (holding that recusal of members of the appellate panel reviewing approval of a class settlement was not required even though they were technically members of the plaintiff class because the judges learned of this circumstance after the time to make a class claim had elapsed and were ineligible to participate in any recovery, and they also renounced any interest they might have in the recovery).

215. *See, e.g.*, 28 U.S.C. § 455 (2000).

216. *See* Mark Herrmann, *To MDL or Not To MDL? A Defense Perspective*, 24 LITIG. 43, 43 (1998).

217. *See id.* at 44 ("[I]f the weight of litigation threatens your client's destruction in the very short term, filing a motion with the MDL Panel for coordinated proceedings may buy the time needed to organize a defense, negotiate a global settlement, or file a bankruptcy proceeding.").

218. *Id.* ("When cases are scattered throughout the federal system, counsel may be able to speed the disposition of select cases and postpone the disposition of other cases. This can be a strategic advantage.").

219. *Id.* at 46.

> [C]lients must be advised that an MDL proceeding will dramatically reduce the burden on corporate officers and directors because they will not be deposed repeatedly for cases in the federal system. The MDL proceeding, however, is likely to disrupt the lives of suppliers, distributors, researchers, and others who may be dragged into the fray. The cost saving in the discovery process may be negligible. Although defense counsel will not spend their time responding to duplicative discovery, they will spend their time addressing discovery in new areas of controversy. Ultimately, there is no guarantee of any financial saving at all.

for the federal litigation whom state court judges handling related cases can be urged to follow.[220] These sorts of considerations are inherent in the choice between combined and separate litigation.

This concern goes, rather, to attitudinal matters that can bulk large. In particular, there are three categories of concern: (a) selection bias that leaves the decision whether to transfer, and the handling of transferred cases, in the hands of judges who may be particularly enthusiastic about multidistrict treatment; (b) settlement bias, which may shift cases to judges unusually favorable to "global" settlements; and (c) a possible appearance of substantive bias. In raising these issues, I emphasize that we owe a great debt of gratitude to the judges who have served on the Panel. These judges all have full-time judicial jobs without regard to their service on the Panel, and that service is a significant additional burden.[221]

a. Selection Bias

It has been an article of faith in the federal judicial system that litigants have no right to choose their own judges. It is also a given that judges are different from one another; the abuse of discretion standard of review recognizes (for a variety of reasons) that individual judges may properly make different choices in similar situations. Indeed, the nonbureaucratic method of selecting judges may be viewed as one of the strengths of the American judicial system. Most district courts have some sort of random method for assigning cases to individual judges upon filing, and—subject to reassignment because the cases are "related" to cases already pending before another judge—under the prevailing single assignment system those assigned judges are responsible for the case until final judgment is entered.[222]

Things are quite different once a party seeks the Panel's assistance, a difference that operates at two levels. The first has to do with the composition of the Panel. The members of the Panel are not selected randomly from the federal judiciary at large. Instead, they are chosen by the Chief Justice;[223] in the abstract that could be cause for

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Id.

220. *Id.* ("Without an MDL proceeding, there is no obvious leader among the federal judges handling federal cases. It can thus be very difficult to convince state court judges to follow the lead of any one particular federal judge.").

221. *See* Hansel, *supra* note 203, at 20 (quoting the former Chair of the Panel, who reports that before each of the Panel's bimonthly meetings, "I receive about six linear feet of pleadings with motions and briefs seeking or opposing transfer, etc.").

222. *See* Marcus, *supra* note 172, at 18.

223. 28 U.S.C. § 1407(d) (2000).

concern. As Professor Ruger has written in a different context, "given the attitudinal heterogeneity of the lower federal judiciary, the Chief Justice might use the appointment power to advance particular policy ends through the selection of an ideologically uniform group of lower court judges."[224] But he found, in the context on which he was focusing, no reason to conclude that ideology had played a significant role.[225]

Concerns about "ideology" are frequently raised, and the exact meaning of the term is often debatable. One would expect that Panel members would be selected because of some expertise or interest in complex and multidistrict litigation, often probably because of their success in handling such litigation as transferee judges. As one commentator put it, they are "the nation's 'specialists' in multidistrict litigation."[226] Because considerable additional efforts may be expected of these judges, one might well want to choose people who have exhibited an interest, and it would be odd to select judges who are antagonistic to the general idea of multidistrict centralization of litigation. Maybe that is "ideology," but it hardly seems a threat. At the same time, it is hard to believe that along with their expertise they are not tempted to develop some enthusiasm for handling cases en masse.

The second stage has to do with selection of the transferee judge. The Panel does not only decide which district should be the transferee district, it also chooses the judge who is to preside over the transferred cases.[227] Indeed, the statute even allows the Panel to ask that a judge from another district be assigned to the transferee district for the purpose of handling these cases.[228] The Panel obviously does not randomly choose the transferee judge. Sometimes it makes it clear that the choice reflects confidence in the transferee judge's experience and expertise.[229] And lawyers are surely glad that the Panel does so.[230]

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224. Theodore W. Ruger, *Chief Justice Rehnquist's Appointments to the FISA Court: An Empirical Perspective*, 101 NW. U. L. REV. 239, 241 (2007).

225. *See id.* at 257. For further discussion of such points, see also 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, 1615-20 (2006); Theodore W. Ruger, *The Chief Justice's Special Authority and the Norms of Judicial Power*, 154 U. PA. L. REV. 1551, 1562-68 (2006).

226. Rhodes, *supra* note 122, at 745.

227. 28 U.S.C. § 1407(b).

228. *See id.*

229. *See, e.g.*, *In re* Bextra & Celebrex Mktg., Sales Practices & Prods. Liab. Litig., 391 F. Supp. 2d 1377, 1379 (J.P.M.L. 2005). In this case, the Panel decided to consolidate

All of this is exactly as it should be. As Professor Brunet has pointed out, different judges have different optimal points of information input.[231] Similarly, it would be bizarre to select for the Panel judges who are antagonistic toward—or even skeptical about—its objectives. But it also cuts against the normal attitude of the federal courts toward assignment of cases. In the California state courts, for example, many metropolitan county superior courts have "complex litigation" departments, to which judges who specialize in such litigation are assigned.[232] Unlike the customary "master calendar" treatment of civil litigation in those courts, cases assigned to these judges remain with them, and counsel and the courts are assured of steady and expert handling of those cases.[233] Providing a parallel treatment for federal multidistrict litigation has much to recommend it, but may also affect outcomes. For example, an early study of

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litigation involving two different drugs even though there was no geographical focal point of the litigation. Instead, it looked for a judge it regarded as well-suited to handling the task:

> Given the geographic dispersal of constituent actions and potential tag-along actions, no district stands out as the geographic focal point for this nationwide docket. Thus we have searched for a transferee judge with the time and experience to steer this complex litigation on a prudent course. By centralizing this litigation in the Northern District of California before Judge Charles R. Breyer, we are assigning this litigation to a jurist experienced in complex multidistrict litigation and sitting in a district with the capacity to handle this litigation.

Id.

230. In his partially joking advice to young lawyers, Mark Herrmann, an experienced litigator, offers the following:

> Law schools also do not warn you about the arguments that are true, but forbidden to be made. In the context of a motion for change of venue, for example, one possible transferee judge may have had a long and distinguished career in private practice and since become an immensely well-respected judge. Another possible transferee judge may have had a short career as a dog-catcher before being elected to the bench last month because his surname rhymed with that of a local football hero.
>
> In that situation, you may be tempted to explain, accurately, that the former judge would have the capacity to understand and handle your case appropriately, while the latter judge is a train wreck waiting to happen. Don't you dare! Courts cling mightily to the legal fiction that all judges are created equal. These are the true words that you may not speak in court: Some judges are better than others.

MARK HERRMANN, THE CURMUDGEON'S GUIDE TO PRACTICING LAW 33 (2006).

At least with the Panel, it may be that arguments somewhat of the sort forbidden in general may be made in favor of assignment to one judge rather than another. Even if these arguments are not made, the lawyers are likely reassured that the Panel is focusing on the qualities of the transferee judge in deciding who should be handling the transferred cases.

231. *See supra* note 53 and accompanying text.

232. *See* Lynn Jokela & David F. Herr, *Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool*, 31 WM. MITCHELL L. REV. 1299, 1322-23 (2005).

233. *See id.*

multidistrict practice noted that there was a variation in the granting of § 1404(a) transfer motions between transferee judges and transferor judges.[234] When coupled with concerns about the orientation of judges discussed below, this seeming slant is worth mentioning.

It is important to emphasize, however, that the Panel is no rubber stamp endorsing transfer whenever a litigant seeks its aid. To the contrary, as Professor Hensler's research showed a few years ago, it has never granted all motions.[235] Over the years, it has denied about one-third of the motions brought before it, and its rate of granting motions seems to vary by case type.[236] So if there is some bias in favor of combination it is surely true that the Panel is nonetheless discerning.[237] And it should also be emphasized that the judges on the Panel have to do a lot of work to reach these individualized decisions about whether to transfer. For them, this work comes on top of the heavy burdens they already bear in their primary judicial posts. Once a month they meet and confront about six linear feet of papers regarding pending transfer motions.[238] Although we are all indebted to these judges for their service, the reality that these decisions depend substantially on multifactor judgments by Panel members also reinforces concerns about decisions of this nature being made by a body outside the ordinary system of judicial review and about the possibility of some systemic inclination of the Panel to favor combined treatment.[239]

b. Settlement Bias

We have already seen that the Panel's activities jibe with the independent and much broader growth of enthusiasm for settlement promotion among federal judges (perhaps all American judges).[240] That enthusiasm does not necessarily address the dimensions of such settlements, and multidistrict treatment can magnify their dimensions considerably.

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234. *See* Note, *supra* note 99, at 1020.

235. *See* Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883, 898 tbl. 2 (2001).

236. *Id.*; *see also* Note, *supra* note 99, at 1004 tbl. A (detailing the Panel's rate of granting transfers during the period up to 1974).

237. Members of the Panel who participated in the Tulane Symposium on February 15-16, 2008, confirmed that they appreciate the burdens that transfer can impose on parties; they are *not* presently zealots for combining cases.

238. *See* Hansel, *supra* note 203, at 20.

239. *See supra* Part IV.A.

240. *See supra* Part III.B.

Chief Judge Frank Easterbrook has recently denounced what he perceives as the "model of the central planner" underlying attitudes toward certification and settlement of national class actions.[241] Other judges appear more sympathetic. In the *In re Diet Drugs* litigation, for example, the Third Circuit noted that "[i]t is in the nature of complex litigation that the parties often seek complicated, comprehensive settlements to resolve as many claims as possible in one proceeding."[242] Given the differences federal judges may have about "global" settlements, the intervention of the Panel could be very important in furthering such settlements. Indeed, that seems to be what Judge Weinstein has in mind.[243] And the Panel's new description of its orders as "centralizing" the litigations suggests that it has a "central planner" orientation.[244]

Some, at least, sense that judges experienced in multidistrict litigation may be more inclined than most to favor such solutions. The defense lawyer who recounted the tactical considerations bearing on whether to seek MDL treatment referred also to a common judicial attitude that where there are many claims there has been a tort and observed:

> Unfortunately, this attitude may be particularly ingrained in judges who routinely handle mass tort litigation. Many such judges view their role as "getting the parties to a claims process"—a settlement—as quickly as possible. Confronted with such a judge, the client can no longer hope to prevail simply because it has done nothing wrong.

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241. *In re* Bridgestone/Firestone, Inc., Tire Prods. Liab. Litig., 288 F.3d 1012, 1020 (7th Cir. 2002), *aff'd in part*, 333 F.3d 763 (7th Cir. 2003).

242. *In re* Diet Drugs, 282 F.3d 220, 236 (3d Cir. 2002). In the same vein, the Second Circuit in *In re Baldwin-United Corp.*, 770 F.2d 328, 337 (2d Cir. 1985), upheld an injunction against filing of actions by state attorneys general unsatisfied with a proposed settlement of a multidistrict proceeding eventually handled as a class action. The court explained:

> The success of any federal settlement was dependent on the parties' ability to agree to the release of any and all related civil claims the plaintiffs had against the settling defendants based on the same facts. If states or others could derivatively assert the same claims on behalf of the same class or members of it, there could be no [certainty] about the finality of any federal settlement. Any substantial risk of this prospect would threaten all of the settlement efforts by the district court and *destroy the utility of the multidistrict forum otherwise ideally suited to resolving such broad claims.*

Id. (emphasis added). The appellate court therefore found that the district court judge's injunction was in aid of its jurisdiction within the All Writs Act, 28 U.S.C. § 1651(a) (2000).

243. *See supra* note 18 and accompanying text.

244. *See supra* notes 157-161 and accompanying text (discussing the Panel's asbestos transfer order).

> Rather, the MDL process serves only as a mechanism for reaching a settlement.[245]

Obviously I am not suggesting that MDL judges treat settlement in an inappropriate way, and I am confident that they are alert to the need to verify that claims are legitimate before urging large money settlements on defendants. Nonetheless, given the selection bias previously mentioned, there is at least some reason for institutional uneasiness about more aggressive use of MDL procedures to maximize the judicial system's ability to achieve the most comprehensive settlements.

c. Possible Substantive Bias

There is no reason to think that judges who serve on the Panel, or who are selected to be transferee judges by the Panel, have any particular attitude toward the issues presented in multidistrict litigation. But the fact that there have been suggestions that the process could slant the results is at least worth noting.

A starting point is that sometimes the existence of multidistrict procedures may produce something of a pro-plaintiff bias. As the RAND study of class actions observed, "any change in court processes that provides more efficient means of litigating is likely to enable more litigation. Greater efficiency can lower the costs of bringing lawsuits, making it more attractive for litigants to sue and for lawyers to take their cases."[246] This point can apply to multidistrict litigation as well. As the defense lawyer quoted above puts it, "[o]nce an MDL is in place, plaintiffs will inevitably file many new complaints. In an MDL, as in the *Field of Dreams*: 'If you build it, they will come.'"[247] Indeed, he asserts that this can result in a reverse selection process for cases, as plaintiff lawyers file their strong, high-value cases in state court and push those cases to trial, and file their weak cases in federal court, where they are lost among the multitude. "It has become almost axiomatic among plaintiffs' counsel to put the good cases in state court and put the 'dogs' in the MDL."[248]

The same lawyer argues that a form of acquaintance bias might exist in MDL proceedings:

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245. Herrmann, *supra* note 216, at 45.

246. DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 49 (2000).

247. Herrmann, *supra* note 216, at 45.

248. *Id.*

> Particularly in mass tort MDLs, there are certain prominent lawyers who are named repeatedly to the plaintiffs' steering committees. Some defense counsel believe that these repeat players in the mass tort business develop a familiarity with the usual mass tort judges, who are also repeat players in the field. This is not to suggest impropriety, but simply that plaintiffs' counsel may be familiar with the presiding judge (and the judge familiar with counsel) to the disadvantage of the relative newcomer appearing for the defense.[249]

Undoubtedly each side in hard-fought litigation like mass tort litigation is unduly prone to perceive unfair advantages for the opposing side. But it's worth noting that at least one observer sees the advantage running in the defense direction:

> Mass tort lawyers on both the defense and plaintiffs sides used to debate whether the MDL process helped or hurt defendants. Transferring all federal cases to a single judge reduced the chaos of mass tort litigation and lifted the defense burden of fighting the same discovery and motions battles in multiple courtrooms. But MDLs also permitted plaintiffs lawyers to pool resources, spreading the expense of working up the litigation to several firms—and spreading damning documents turned up in discovery across the country. Moreover, when a case was deemed an MDL, the litigation gained credibility in the plaintiffs bar. The MDL panel's imprimatur was a signal that a case was officially a mass tort, so MDLs attracted additional filings, thus magnifying the risk to defendants of adverse rulings by the MDL judge.
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> The debate should now be over: The MDL process has proved to be more of a boon to defendants than plaintiffs, thanks to several rulings by MDL judges aggressively policing the mass torts transferred to their courtrooms.[250]

The point here is not to argue that any of these perceptions is correct, but only that their existence should give pause to one urging more vigorous use of multidistrict procedures. One cogent counterargument to this concern is that class action procedures produce the same sort of stakes and concerns about skewed outcomes. To the extent multidistrict procedures are supplanting class action procedures, the result will be that the same pressures are refocused.

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249. *Id.* at 47.

250. Alison Frankel, *It's Over: Tort Reformers, Business Interests, and Plaintiffs Lawyers Themselves Have Helped Kill the Mass Torts Bonanza—And It's Not Coming Back*, AM. LAWYER, Dec. 2006, at 78, 108.

B. Statutory Concerns

The statutory concerns address the question whether, without an amendment to § 1407, the Panel can fully perform a maximalist role.

1. The Problem of Trial

To some extent, a judge who cannot try a case is limited in her ability to manage it. As noted above, almost from the outset there were calls for the statute to be amended to authorize the Panel to transfer for trial,[251] and the Panel's embrace of § 1404(a) transfer for trial by the transferee judge shortly followed.[252] The Supreme Court's 1998 ruling that § 1404(a) transfer for trial was beyond the power of the transferee judge produced a variety of techniques for enabling the transferee nonetheless to resolve all transferred cases.[253] Since 1998, bills to add authority to transfer for trial to the Panel's authority have been introduced but not passed.[254]

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251. *See supra* note 117 and accompanying text.

252. *See supra* note 118 and accompanying text.

253. The *Manual for Complex Litigation*, embodying ideas similar to those initially circulated by the then-Chair of the Panel shortly after the Supreme Court's decision, offers a variety of techniques for transferee judges desiring to resolve cases initially sent to them by the Panel:

- Prior to recommending remand, the transferee court could conduct a bellwether trial of a centralized action or actions originally filed in the transferee district, the results of which (1) may, upon the consent of parties to constituent actions not filed in the transferee district, be binding on those parties and actions, or (2) may otherwise promote settlement in the remaining actions.
- Soon after transfer, the plaintiffs in an action transferred for pretrial from another district may seek or be encouraged (1) to dismiss their action and refile the action in the transferee district, provided venue lies there, and the defendant(s) agree, if the ruling can only be accomplished in conjunction with a tolling of the statute of limitations or a waiver of venue objections, or (2) to file an amended complaint asserting venue in the transferee district, or (3) to otherwise consent to remain in the transferee district for trial.
- After an action has been remanded to the originating transferor court at the end of section 1407 pretrial proceedings, the transferor court could transfer the action, pursuant to 28 U.S.C. § 1404 or 1406, back to the transferee court for trial by the transferee judge.
- The transferee judge could seek an intercircuit or intracircuit assignment pursuant to 28 U.S.C. § 292 or 294 and follow a remanded action, presiding over the trial of that action in that originating district.

MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 119, § 20.132, at 224-25 (footnotes omitted).

254. *See, e.g.*, Multidistrict Litigation Restoration Act of 2005, H.R. 1038, 109th Cong. (2005) (proposing the addition of subsection (i) to § 1407). The text of the proposed new subsection follows:

How important would it be to add the power to transfer for purposes of trial? It does not seem that there has been a large upsurge in the number of cases returned for trial since 1998. And it does seem that the transferee judge's ability to make a variety of rulings pertinent to trial has expanded with the growing awareness that pretrial management includes many decisions that continue to govern the case at trial.[255] But the question remains. To the extent that courts lacking the power to try MDL cases cannot effectively dispose of them, it is arguable that the failure of Congress to add this authority has curtailed the maximum use of multidistrict proceedings.

2. Choice of Law

A closely related issue is choice of law, at least for cases the substance of which is governed by state law. The legislation proposed before Congress to expand the transfer power to include trial has not included provisions granting the transferee judge freedom to make choice-of-law decisions without having to pay obeisance to state choice-of-law doctrines.[256] But a choice-of-law provision was initially included in the related Multiparty, Multiforum Jurisdiction Act of 1999, which passed in 2002 without the provision.[257] Similar freedom

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(i)(1) Subject to paragraph (2) and except as provided in subsection (j), any action transferred under this section by the panel may be transferred for trial purposes, by the judge or judges of the transferee district to whom the action was assigned, to the transferee or other district in the interest of justice and for the convenience of the parties and witnesses.

(2) Any action transferred for trial purposes under paragraph (1) shall be remanded by the panel for the determination of compensatory damages to the district court from which it was transferred, unless the court to which the action has been transferred for trial purposes also finds, for the convenience of the parties and witnesses and in the interests of justice, that the action should be retained for the determination of compensatory damages.

Id.

255. *See supra* notes 186-187 and accompanying text (regarding Judge Grady's handling of the *Blood Products* litigation).

256. *See, e.g.*, Multidistrict Litigation Restoration Act of 2005, S. 3734, 109th Cong. § 3 (2005) (as introduced in the Senate on July 26, 2006).

257. Multiparty, Multiforum Trial Jurisdiction Act of 2002, Pub. L. No. 107-273, § 11020, 116 Stat. 1826 (codified in scattered sections of 28 U.S.C.). An earlier version of the proposed legislation included a new section 1660 of 28 U.S.C. with the following choice-of-law authorization for cases arising out of accidents in which at least 75 people have been killed:

(a) FACTORS.—In an action which is or could have been brought, in whole or in part, under section 1369 of this title, the district court in which the action is brought or to which it is removed shall determine the source of the applicable substantive law, except that if an action is transferred to another

would sometimes enable transferee judges to make more aggressive use of MDL proceedings.

The importance of choice-of-law issues may affect even the handling of cases asserting federal claims, when there is a divergence in attitudes among federal circuits about the federal substantive law or federal procedural law, a difference that may be magnified by the prohibition on transfer for trial. In one MDL case making claims under state law, for example, the district court felt that it was necessary to make different class certification analyses depending on which circuit the case came from.[258] More than twenty years ago, I argued that as to issues of federal law—including the application of the

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district court, the transferee court shall determine the source of the applicable substantive law. In making this determination, a district court shall not be bound by the choice of law rules of any State, and the factors that the court may consider in choosing the applicable law include—

(1) the place of the injury;
(2) the place of the conduct causing the injury;
(3) the principal places of business or domiciles of the parties;
(4) the danger of creating unnecessary incentives for forum shopping; and
(5) whether the choice of law would be reasonably foreseeable to the parties.

The factors set forth in paragraphs (1) through (5) shall be evaluated according to their relative importance with respect to the particular action. If good cause is shown in exceptional cases, including constitutional reasons, the court may allow the law of more than one State to be applied with respect to a party, claim, or other element of an action.

(b) ORDER DESIGNATING CHOICE OF LAW.—The district court making the determination under subsection (a) shall enter an order designating the single jurisdiction whose substantive law is to be applied in all other actions under section 1369 arising from the same accident as that giving rise to the action in which the determination is made. The substantive law of the designated jurisdiction shall be applied to the parties and claims in all such actions before the court, and to all other elements of each action, except where Federal law applies or the order specifically provides for the application of the law of another jurisdiction with respect to a party, claim, or other element of an action.

(c) CONTINUATION OF CHOICE OF LAW AFTER REMAND.—In an action remanded to another district court or a State court under section 1407(j)(1) or 1441(e)(2) of this title, the district court's choice of law under subsection (b) shall continue to apply.

Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999, H.R. 2112, 106th Cong. (1999).

258. *See In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 241 F.R.D. 435, 439 (S.D.N.Y. 2007). The judge reasoned that this treatment was required because the Supreme Court has held that certification—even for settlement purposes—must look to whether a case can be certified for purposes of trial. *Id.* at 440. But whether that method of explaining the stringency of class certification analysis meant also that class certification decisions in transferred cases must be determined according to the standards that would be applied by the transferor court if there were a trial is less clear.

Federal Rules of Civil Procedure—transferee courts did not have to try to discern possibly divergent attitudes in transferor circuits.[259]

It hardly needs to be said that the tasks for transferee judges are sufficiently daunting without having to divine whether the Federal Rules of Civil Procedure (or federal substantive law) are applied differently in different circuits and then to handle transferred cases in accordance with those differences. So to the extent that difficulty impedes MDL treatment, removing it would be a valuable way to facilitate full use of the MDL procedure.

But the choice-of-law problem raises a different issue regarding settlement. As we have seen, there may be reason for concern that the MDL procedure unduly stresses settlements, particularly nationwide settlements.[260] Settlements, of course, are compromises that need not attend precisely to differences in state law. With class actions, this reality has tempted judges to use Rule 23 to substitute grand compensation schemes for remedies tailored to differing state law.[261] To a significant extent, the Supreme Court's decision in *Amchem* scotched that activity.[262] To adopt an aggressive use of MDL procedures as a way of enabling national settlements under a single substantive regime seems an end run around these limitations.

Some view the passage of the Class Action Fairness Act, however, as freeing federal courts to fashion suitable substantive rules for nationwide class actions, or at least freeing them to develop federal choice-of-law rules that would select state substantive law without regard to state choice-of-law rules.[263] Were that the case, class actions would exhibit flexibility on choice of law that would not be available

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259. *See* Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 713-19 (1984). *But see* Robert A. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 MICH. L. REV. 703, 706-07 (1995) (arguing for continued application of transferor law, even on issues of federal law, if the cases might be returned for trial to the transferor forum).

260. *See supra* notes 240-245 and accompanying text.

261. *See generally* Marcus, *supra* note 157 (discussing the use of class action settlements to circumvent substantive state law issues). In the same vein, consider the following description of a settlement achieved after multidistrict transfer: "[T]he upshot of Judge Brieant's certification of a settlement class, accompanied by an injunction against duplicative litigation, was that the pendent claims of the class members were sacrificed for a gross resolution of the dispute on a nationwide basis." Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L.J. 507, 546 (1987).

262. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 622 (1997) ("The benefits . . . from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration.").

263. For a critical review of these arguments, see Richard L. Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. (forthcoming 2008).

for MDL proceedings, and that might provide an additional impetus for settlements that overlook choice-of-law difficulties, or perhaps even legislation to provide similarly for disregarding former choice-of-law problems in MDL litigation.

V. CONCLUSION

This Article focuses on maximalist use of MDL proceedings and finds that forty years experience has shown that the Panel has facilitated the aggressive use of multidistrict procedure. Although the Panel may think that "[w]e're traffic cops in effect . . . sending cases here and there,"[264] it seems that this "traffic cop" role has major importance. Repeatedly and understandably, the Panel has gone well beyond a minimalist view of its authority, using its transfer power for far more than merely facilitating orderly development of discovery. Instead, it has repeatedly employed its transfer power to achieve what might be called substantive objectives and sometimes overtly encouraged consideration of settlement.[265] And it has taken an interest in the posttransfer handling and fate of the cases it has transferred.[266] Partly because of its attitude toward its role, the great majority of cases have been resolved in the transferee districts, and many have led to major settlements resolving widespread litigation.

Those who emphasize maximum individual control of litigation may find this record unnerving. Indeed, it is not clear that Congress foresaw the great importance the Panel would have in regard to the phenomenon of dispersed litigation that was just emerging when Congress created the Panel. I have tried to show that their enthusiasm for minimum combination of issues and parties runs counter to the prevailing modern attitude toward joinder, which generally favors joinder in a multitude of situations.[267] Moreover, the Panel's longstanding impulse toward aggregate resolution of dispersed litigation is consistent with and furthers both the case management and settlement promotion features of modern federal-court judging.[268] So my basic conclusion is that the Panel's inclination toward maximalist multidistrict aggregation serves many valid purposes.

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264. Hansel, *supra* note 203, at 21 (quoting Judge Hodges, then the Chair of the Panel).

265. *See supra* notes 145-161 and accompanying text.

266. *See supra* notes 166-171 and accompanying text.

267. *See supra* Part I.

268. *See supra* Part III.

But there are some reasons for caution nonetheless. The absence of statutory authority to transfer for trial, or to overcome choice-of-law problems, stands in the way of fuller use of the transfer power, although settlement promotion may make these limitations relatively unimportant in many cases.[269] Other concerns about magnifying the Panel's role seem almost too academic to warrant attention. It functions as something of a unique body outside the overall structure of the federal court system, which is somewhat unnerving, and there are reasons to raise some concerns about what could be called potential or seeming bias in its operation. On the other hand, as I suggest, one could readily find a bias in favor of aggregate proceedings a positive virtue. So these concerns, though meriting mention, do not seem compelling.

In the final analysis, it is likely that revised institutional arrangements such as further legislation about the Panel's authority will have only a very modest effect on its role. Already, without any formal institutional provision, creative lawyers and judges are accomplishing remarkable things. The recent Vioxx settlement offers one striking example.[270] If completed, this settlement represents a resolution of a large number of claims pending before both state and federal courts. Although MDL transfer surely contributed to the resolution, it was far from enough by itself to bring it about. And expanded authority for the Panel, or more aggressive use of existing authority, would likely make only limited difference in such situations. Ultimately, the most important force favoring a maximalist use of aggregation is lawyerly creativity. That is a force that has always been in abundant supply in the United States, and will likely continue to be for decades to come.

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269. *See supra* Part IV.B.

270. Alex Berenson, *Merck Is Said To Agree To Pay $4.85 Billion for Vioxx Claims*, N.Y. TIMES, Nov. 9, 2007, at A1.