

# Designing Judicial Institutions: Special Federal Courts and the U.S. Judicial Panel on Multidistrict Litigation

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*The definitive feature of the Article III judiciary is independent judges working in a hierarchical structure. Special federal courts effectively operate outside this structure, raising questions about the implications for the procedural rights of parties and impartial adjudication. The United States Judicial Panel on Multidistrict Litigation (or “MDL Panel”) is one such special court. A powerful judicial institution with substantial discretion over complex litigation in the United States, the MDL Panel is one of a small number of special federal courts created pursuant to Article III by Congress and staffed by a Chief-Justice-appointed group of Article III judges for limited terms. These courts adjudicate with little oversight and limited public awareness but exercise substantial authority. The MDL Panel, for all practical purposes, controls where many of the most far-reaching and significant private civil actions will be resolved which can affect procedural and substantive rights of the parties. An understanding of the MDL Panel would shed light on the design of special courts and the effects on core questions of judicial theory. This paper relies on a large-scale database to examine empirically this special federal court and to consider the implications for the federal judicial branch.*

## I. INTRODUCTION

The federal judicial system is typically described as a hierarchical system with three tiers: civil suits and criminal prosecutions are filed in the federal district courts, losing parties may appeal to the U.S. Courts of Appeals, and petitioners may ask for review by the U.S. Supreme Court, which has the last word on federal law. And, for more than three hundred thousand lawsuits annually, that account is largely correct.<sup>2</sup> But it is incomplete. Missing

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<sup>2</sup> The modern structure whereby actions begin in the federal district courts are appealed to the courts of appeals and cert petitions are filed with the Supreme Court dates to roughly 1911 when the old circuit courts were finally abolished. An intermediate appellate court had been created in twenty years earlier. The Supreme Court’s discretion over its docket dates to the same time but has been expanded repeatedly since then. For a historical evolution of the hierarchy, see Tracey E. George, *On the Dynamics and Determinants of the Decision to Grant En Banc Review*, WASH. L. REV. (1999).

are a set of courts established by Congress under Article III to address specific types of claims, including the Foreign Intelligence Surveillance Court (FISA),<sup>3</sup> the Temporary Emergency Court of Appeals,<sup>4</sup> the Independent Counsel Court,<sup>5</sup> and most recently the Alien Terrorist Removal Court.<sup>6</sup> All four courts, which are staffed on a short-term and overload basis by life-tenured judges from other courts, were created on the grounds that certain questions require special treatment outside the normal Article III process. Special courts handle important matters and set far-reaching legal policy while acting almost entirely outside the procedural protections at the heart of the Article III judiciary. But none may have been as widely influential as the first court created in the modern specialization wave, the Judicial Panel on Multidistrict Litigation.

The United States Judicial Panel on Multidistrict Litigation, or “MDL Panel”, a court of seven federal circuit and district judges, may transfer factually related actions filed in different federal districts to a single judge in *any* federal district for consolidated pre-trial litigation.<sup>8</sup> The consolidated multidistrict action (or “MDL”) may involve only a few cases with a small number of parties or include hundreds (or even thousands) of cases and parties. The transferee judge has significant discretion over the management of the litigation prior to trial.<sup>9</sup> Questions of federal law are controlled by the law of the transferee, not the transferor, court.<sup>10</sup> While a case theoretically returns to the transferor

<sup>3</sup> Pub. L. No. 92-210, §211(b), 85 Stat. 743, 749 (creating the Foreign Intelligence Surveillance Court (FISA) and the Foreign Intelligence Surveillance Court of Review in 1978).

<sup>4</sup> Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, §211(b), 85 Stat. 743, 749.

<sup>5</sup> Pub. L. No. 92-210, §211(b), 85 Stat. 743, 749

<sup>6</sup> Ethics in Government Act of 1978, Pub. L. No. 95-521, §602(a) (creating a special “division” of the District of Columbia Circuit staffed by three judges chosen by the Chief Justice to appoint and oversee Independent Counsel).

<sup>8</sup> 28 U.S.C. § 1407(a).

<sup>9</sup> The transferee judge has discretion over the extent of coordination or consolidation (as well as the choice between the two). See, e.g., *In re The Bear Stearns Cos., Inc. Sec., Derivative & ERISA Litig.*, 572 F. Supp.2d 1377 (J.P.M.L. 2008); *In re Mut. Funds Litig.*, 310 F.Supp.2d 1359 (J.P.M.L. 2004); *In re Equity Funding Corp of America Sec. Litig.*, 375 F. Supp. 1378 (J.P.M.L. 1974). Moreover, the judge can, with little review, remand any individual case to its transferor court thereby removing it from the centralized proceeding. See, e.g., *In re Ivy*, 901 F.2d 7 (2d Cir. 1990); *In re Prudential Ins. Co. of America Sales Practices Litig.*, 170 F. Supp. 2d 1346, 1347-48 (J.P.M.L. 2001). The transferee judge also has authority to appoint lead attorneys and determine their compensation. See Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multidistrict Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010). The scope of the transferee judge’s discretion grants the transferee judge considerable leverage to encourage parties to progress along the course which the judge deems most prudent. As one transferor judge wryly observed, “it is almost a point of honor among transferee judges acting pursuant to Section 1407(a) that cases so transferred shall be settled rather than sent back to their home courts for trial.” *DeLaventura v. Columbia Acorn Trust*, 417 F. Supp. 2d 147 (D. Mass. 2006).

<sup>10</sup> See *In re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171 (D.C. Cir. 1987), aff’d sub. nom.,

judge for trial, nearly all cases are resolved in the transferee court.<sup>11</sup> Yet, the MDL Panel, like most special federal courts, is not well-known outside the attorneys and parties who appear before it.

The relative obscurity of the MDL process belies its importance.<sup>12</sup> Let's start by considering the lawsuits involved. If a manufacturer produces a harmful product, an airplane crashes, or a public corporation loses a large amount of money, then multidistrict litigation is a natural consequence. The Panel's docket reads like a laundry list of the most important lawsuits of the half-century. High-profile securities and derivative lawsuits related to the collapse of financial services firm Lehman Brothers<sup>13</sup> and to the Ponzi scheme of Bernie Madoff.<sup>14</sup> Consumer protection claims involving thousands of plaintiffs

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Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989) (holding that the airline's liability was not unlimited as it would have been in the transferor court but rather was limited to \$75,000 per passenger based on the law of the transferee circuit). Questions of state law, however, are treated as though the case had not been transferred. See Van Dusen v. Barrack, 376 U.S. 612 (1964) (holding that section 1404(a) transferors do not change the relevant state for purposes of choice-of-law rules); In re Air Crash Disaster at Boston, Mass. on July 31, 1973, 399 F. Supp. 1106, 1119-21 (D. Mass. 1975) (extending Van Dusen to section 1407 transfers.); Stirling v. Chemical Bank, 382 F. Supp. 1146, 1150 n. 5 (S.D.N.Y. 1974) (same).

<sup>11</sup> See Emery G. Lee, Margaret S. Williams, Richard A. Nagareda, Joe S. Cecil, Thomas E. Willging, & Kevin M. Scott, *The Expanding Role of Multidistrict Consolidation in Federal Civil Litigation: An Empirical Investigation*, working paper (detailing how, when, and where MDL cases are resolved); see also Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMP. LEGAL STUD. 459 (2004) (demonstrating that trial is rare in litigation generally). As Richard Nagareda has explained, "consolidated pretrial proceedings at the behest of the MDL Panel already form a setting ripe for plaintiffs' lawyers and defendants to begin discussions about a comprehensive peace." RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 260 (2007). Ninth Circuit Judge Alex Kozinski has taken a different view, concluding that the small numbers of cases returned to the transferor court "tell the story of a remarkable power grab by federal judges who have parlayed a narrow grant of authority to conduct consolidated discovery into a mechanism for systematically denying plaintiffs the right to trial in their forum of choice." In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig., 102 F.3d 1524 (9th Cir. 1996) (Kozinski, J., dissenting), rev'd sub. nom., Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998).

<sup>12</sup> Quantitative empirical scholarship on the MDL Panel also has been limited. The authors completed a recent study of the Panel's decisions. Margaret S. Williams & Tracey E. George, *Who Will Manage Complex Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation*, J. EMP. LEGAL STUD. forthcoming. Earlier works analyzed a subset of the MDL Panel's rulings. See Mark Herrmann & Pearson Bownas, *Making Book on the MDL Panel: Will It Centralize Your Products Liability Cases?*, 8 BNA CLASS ACTION LITIG. REP. 110 (2007) (examining the Panel's 137 decisions in products liability cases from 1968 to 2007); Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001 (1974) (reviewing all transfer orders issued before 1974); Daniel A. Richards, *An Analysis of the Judicial Panel on Multidistrict Litigation's Selection of Transferee District and Judge*, 78 FORDHAM L. REV. 311 (2010) (categorizing the reasons given by the MDL Panel to support its designation of a transferee court and judge during a five and a half year period).

<sup>13</sup> In re Lehman Brothers Holdings, Inc., Securities & ERISA Litig., 598 F. Supp. 2d 1362 (2009).

<sup>14</sup> See, e.g., In re Tremont Group Holdings, Inc., Sec. Litig., 626 F. Supp. 2d 1338 (J.P.M.L. 2009); In re Meridian Funds Group Sec. & ERISA Litig., 645 F. Supp. 2d 1360 (J.P.M.L. 2009); In re Optimal Strategic U.S. Equity Funds Sec. Litig., 648 F. Supp. 2d 1388 (J.P.M.L. 2009).

and millions of dollars including those arising from the subprime mortgage crisis of 2006.<sup>15</sup> Products liability actions, including more than 40,000 asbestos cases<sup>16</sup> and thousands of silicone gel breast implant suits,<sup>17</sup> as well as common disasters like the Union Carbide chemical plant disaster in Bhopal, India.<sup>18</sup> The bombing of Pan Am Flight 103 over Lockerbie, Scotland, the Soviet's downing of a Korean Air Lines flight over the Sea of Japan, and nearly every other air crash claim filed in federal court.<sup>19</sup> These MDLs are simply illustrative of the scope and scale of multidistrict litigation in federal courts.

The raw number of cases, claims, parties, and dollars alone would make the Panel's decisions a significant subject of study, but the impact of those cases reaches even farther. Because the lawsuits are among the most high-profile federal civil actions, their disposition influences the public's perception of the civil justice system and impacts the development of public policy in the related substantive and procedural areas of law. The handling and resolution of these disputes affects large numbers of individuals and alters the behavior of corporations, federal agencies, state governments, and law firms.

Like other special courts, the MDL Panel's substantive authority, membership, and procedures are different from traditional Article III courts. The Panel does not *decide* cases but rather decides *who* will decide cases. Judges are not appointed to the court but rather are assigned temporarily from other courts where they continue to hear cases. Panel

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<sup>15</sup> See, e.g., *In re Ameriquest Mortgage Co. Mortgage Lending Practices Litig.*, 408 F. Supp. 2d 1354 (J.P.M.L. 2005).

<sup>16</sup> In 1977, the MDL Panel issued an order to show cause why 103 asbestos personal injury actions pending in 19 districts should not be centralized. When all but one responding party opposed centralization, the MDL Panel vacated its show-cause order and did not centralize the actions. *In re Asbestos & Asbestos Insulation Material Products Liab. Litig.*, 431 F. Supp. 906 (J.P.M.L. 1977). Fourteen years later at the urging of eight federal district judges, the MDL Panel again issued a show cause order with respect to 26,639 actions pending in 87 federal districts. The parties disagreed over whether to consolidate and, if consolidation occurred, where the matters should be assigned. The MDL Panel centralized the actions before Judge Charles Weiner, an experienced MDL judge and former MDL Panel member, in the Eastern District of Pennsylvania. *In re Asbestos Products Liab. Litig. (No. VI)*, 771 F. Supp. 415 (J.P.M.L. 1991). Thousands of other actions were joined as tag-alongs. For a history of the course of the litigation at the district court level, see *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 597-608 ("In the face of legislative inaction, the federal courts—lacking authority to replace state tort systems with a national toxic tort compensation regime—endeavored to work with the procedural tools available to improve management of federal asbestos litigation. Eight federal judges, experienced in the superintendence of asbestos cases, urged the Judicial Panel on Multidistrict Litigation (MDL Panel), to consolidate in a single district all asbestos complaints then pending in federal courts. Accepting the recommendation, the MDL Panel transferred all asbestos cases then filed, but not yet on trial in federal courts to a single district[.]").

<sup>17</sup> *In re Silicone Gel Breast Implants Prod. Liab. Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992).

<sup>18</sup> *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984*, 601 F. Supp. 1035 (J.P.M.L. 1985).

<sup>19</sup> See, e.g., *In re Air Disaster in Lockerbie, Scotland, on December 21, 1988*, 733 F. Supp. 547 (J.P.M.L. 1990); *In re Korean Air Lines Disaster of September 1, 1983*, 575 F. Supp. 342 (J.P.M.L. 1983).

judges include district and circuit judges who come from across the United States because the seven judges must sit in different federal circuits. The Chief Justice appoints members from among the hundreds of sitting Article III judges and sets their terms. Just as its membership is distinctive, the MDL Panel's customs and procedures are as well.<sup>27</sup> The Panel travels to different places to hear oral arguments which are more informal and collegial than those before other multimember courts. The Panel sits for all cases with seven judges, more judges than any other collegial decision-making body in the federal courts except for en banc courts of appeals and the Supreme Court. The Panel's denial of a motion to consolidate is unreviewable, and a grant is only reviewable by extraordinary writ to the court of appeals for the district to which the cases have been transferred.<sup>28</sup> Finally, the Panel has over time and in different ways solicited work where other federal courts have tried to turn it away.

All special courts are defined by their exceptionality within the Article III branch.<sup>29</sup> Matters are removed from the typical adjudicative process to be handled by the judges of the special court. The court's members are chosen by the Chief Justice without any explanation or constraint. The specialization brings the judges in more regular contact and exchange with a defined set of interested parties. The special court's decisions are not subject to the usual oversight by higher courts or the public. The special court judges may have a stake in the court's continuation and an ability to accumulate authority through the court's highly specialized focus. Standard substantive and procedural rules do not apply. And, these exceptional and defining features raise meaningful concerns about party's procedural rights and the independence of the adjudicators.

The MDL process deprives parties, especially plaintiffs, of certain procedural rights which they otherwise hold. For example, the plaintiff's choice of forum is usually strongly favored.<sup>30</sup> But, a plaintiff's suit may be transferred to a district which she opposed and

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<sup>27</sup> The MDL Panel staff maintains a useful website, geared toward prospective filers, that provides extensive information on its procedures as well as orders. <http://www.MDL Panel.uscourts.gov/>.

<sup>28</sup> 28 U.S.C. §1407(e) ("No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.").

<sup>29</sup> See LAWRENCE BAUM, SPECIALIZING THE COURTS (2011).

<sup>30</sup> Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). The U.S. Constitution and federal and state statutes constrain the available options. Federal courts must have both personal jurisdiction and subject matter jurisdiction to hear a case. But, in large-scale and/or high-stakes cases, a plaintiff typically may choose among multiple locations and between state and federal court. The defendants in such actions typically are national or multi-national corporations, which have necessary minimum contacts to subject themselves to suit in many states. Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945) (expanding state reach over corporations by finding minimum contacts with, rather than presence in, a state was sufficient to meet the demands of due process);

which even lacks personal jurisdiction over her claim. The plaintiff's chosen counsel no longer handle her case as they effectively turn over pretrial decisions to lead attorneys chosen by the transferee judge.<sup>31</sup> MDL transfer therefore means that parties lose a basic level of control over the litigation of their claims. Ninth Circuit Judge Alex Kozinski has likened the process to both a "web" that "ensnare[s]" civil actions and a "vortex" that "sucks" in cases.<sup>33</sup>

A more fundamental criticism of special courts like the MDL Panel is grounded in questions about the implications of the assignment of Article III cases to a court which may lack important Article III protections. The Article III court structure is seen as the best available means of providing a fair and just means of resolving disputes. Life tenured judges who are assigned to a generalist court and handle an array of matters involving different parties are more likely to be disinterested in the outcome of any dispute: they lack self-interest in the outcome as well as protection from outside pressures. Monitoring by judges on the same court and reviewing courts serve as additional checks. And, the practices developed by courts further those interests as well. As a result, federal courts set the standard for what process is necessary for fairness. Debate over the trial of Guantanamo detainees has repeatedly turned on the need for justification for taking the prosecutions out of federal district courts and putting them in military tribunals. On the civil side, arguments regarding mandatory arbitration clauses often focus on whether arbitration provides a resolution process sufficiently similar to that afforded by courts. Special courts may be more easily influenced by political powers whether exercised by the other branches or by interest groups, by their own interests in the matters before them, and by the preferences of the Chief Justice who chose them.

Our paper proceeds as follows. We begin our paper by looking at the creation of the MDL Panel and its place in the history of special federal courts (Part II). "Special federal courts" for purposes of this project include only those courts whose members are Article III judges on other courts.<sup>34</sup> We then look more closely at the evolution of the Panel, offering the first detailed examination of who has served on the panel. In Part III, we propose a set

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Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102 (1987) (defining the boundaries of modern jurisdiction law).

<sup>31</sup> See Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and Proposal*, 63 VAND. L. REV. 107 (2010).

<sup>33</sup> In re American Continental Corporation/Lincoln Sav. & Loan Sec. Litigation, 102 F.3d 1524 (9th Cir. 1996) (Kozinski, J., dissenting), *rev'd sub. nom.*, Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998).

<sup>34</sup> We are not considering all courts of special jurisdiction, which would include Article III bodies like the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of International Trade. Their judges are appointed directly to the court through the Article III process, the courts operate just like other courts at the same level in their substantive powers and procedures, and they work within the judicial hierarchy. *See, e.g.*, Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §127(a), 165, 96 Stat. 25 (codified as amended at 28 U.S.C. §1295) (creating the U.S. Court of Appeals for the Federal Circuit); Customs Courts Act of 1980 (establishing the U.S. Court of International Trade).

of criteria by which we can evaluate a special federal court like the MDL Panel in order to assess whether the court's organization and operation are consistent with the fundamental goals of Article III. We offer the results of our empirical analysis of the MDL Panel on those metrics. We conclude in Part IV with recommendations.

## II. THE HISTORY OF SPECIAL JUDICIAL INSTITUTIONS AND THE GENESIS OF THE MDL PANEL

### A. *The Creation of Special Federal Courts and the Case of Multidistrict Litigation*

The federal courts in the Twentieth Century experienced substantial growth and change, especially in the number and complexity of civil suits.<sup>35</sup> Federal judges found themselves handling cases with multiple parties and multiple claims which might be filed as a single civil action or in separate actions but involving common facts. The Federal Rules of Civil Procedure as originally created in 1937 provided that a district court could consolidate separate actions involving a common question into a single action for pretrial and even trial. The goals were convenience, economy, and consistency. Trial courts were encouraged to consolidate. But neither the Federal Rules nor any federal statute addressed how to handle separate actions involving a common question if those actions were filed in different districts.<sup>36</sup>

The failure of federal law to address multidistrict litigation became apparent in the early 1960s when 1,880 civil anti-trust lawsuits were filed against a group of electrical equipment manufacturers in 35 judicial districts from coast to coast.<sup>37</sup> The suits involved more than 25,000 claims seeking treble damages from defendants, who had previously pled guilty or been convicted of criminal anti-trust violations.<sup>38</sup> These "electrical equipment" lawsuits, as they became known, threatened to overwhelm the federal trial courts.<sup>39</sup> The sheer number of suits was substantial. (To put the numbers in context, roughly 59,000 civil suits, most involving simple claims, were filed before 241 active

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<sup>35</sup> For a longer historical view of Section 1470, see Judith Resnik, *From "Cases" to "Litigation"*, 54 L. & CONTEMP. PROBLEMS 5, 29-34 (1991).

<sup>36</sup>The federal venue statute only allowed transfer to a place where the action could have originally been filed.

<sup>37</sup> See Letter from William E. Foley, Deputy Director, Office of the Deputy Attorney General, Administrative Office of the U.S. Courts, to Rep. John W. McCormack, Speaker of the House of Representatives, April 12, 1965; Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. JOURNAL 621 (1964) (This first-person history of the coordination of these cases was written by the Executive Secretary and Administrative Assistant to the Co-ordinating Committee for Multiple Litigation).

<sup>38</sup> The alleged anti-trust violations involved more than 1.5 billion dollars in heavy electrical equipment sales. See Neal & Goldberg, *supra* note, at 621; Richard Austin Smith, *The Incredible Electrical Conspiracy*, parts 1 & 2, Fortune, April 1961, at 132; May 1961, at 161 (This in-depth investigative report published in two parts on the price-fixing conspiracy and the government's case reveals a complex web of shady dealings that resulted in prison time for seven executives and nearly \$2 million in fines for 29 corporations.).

<sup>39</sup> See 112 Cong. Rec. 22146 (1966) (Senator Tydings described the litigation giving rise to the MDL bill which he introduced).

district judges in 1960.<sup>40</sup>) Plus, the cases raised complex substantive and procedural issues.<sup>41</sup> The simultaneous independent litigation of these related actions would not only have been inefficient and wasteful but also posed the risk of inconsistent decisions as different judges ruled on the same legal questions.<sup>42</sup>

The Judicial Conference of the United States created a new subcommittee—the Coordinating Committee for Multiple Litigation of the United States District Courts—to manage the pre-trial stages of the electrical equipment litigation. The Committee established a centralized, national pre-trial process with the voluntary participation of all parties and judges. Despite some initial skepticism, the coordinated pre-trial litigation was considered a great success.<sup>43</sup> In 1965, Chief Justice Earl Warren and the Conference proposed the permanent establishment of a similar body: a judicial panel with the power to transfer civil actions involving common questions of fact to a single district for consolidated pre-trial proceedings.<sup>44</sup> This proposal reflected a broader and longer interest among federal judges in “complicated” litigation. But, unlike the Federal Rules of Civil Procedure and the federal venue statute, the proposal took the authority for the transfer decision away from the individual district judge to whom the original case was assigned and gave it to a collective body.

Congress had prior experience with “special” courts. The federal judiciary began as essentially a two-tier system with district courts as the primary trial court and the Supreme Court as the primary appellate court with mandatory jurisdiction.<sup>45</sup> “Circuit

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<sup>40</sup> Administrative Office of the U.S. Courts, Annual Report of the Director (1960). In 2008, 267,000 suits were filed before 667 active district judges. *Id.*

<sup>41</sup> The federal trial courts had limited experience with private anti-trust suits: The average annual number had been less than 250 in the three prior years. *See* Neal & Goldberg, *supra* note, at 621 Tab. 1. And, the procedural challenges posed by the related criminal litigation, as well as the overlapping discovery requests, were substantial.

<sup>42</sup> As one observer put it, “[t]he specter of confusion and conflict in the discovery process, with hundreds of parties all over the country seeking simultaneously to take the deposition of the same witnesses or to obtain production of the same documents, was alarming.” Neal & Goldberg, *supra* note, at 622; *see also* Administrative Office of the U.S. Courts, Annual Report of the Director 95 (1962).

<sup>43</sup> *See Note, Consolidation of Pretrial Proceedings Under Proposed Section 1407 of the Judicial Code: Unanswered Questions of Transfer and Review*, 33 U. CHI. L. REV. 558, 560-61 (1966); John T. McDermott, *The Judicial Panel on Multidistrict Litigation*, 57 F.R.D. 215 (1973) (reporting that Chief Justice Warren in remarks to the American Law Institute claimed that “[i]f it had not been for the monumental effort of the nine judges on this Committee \*\*\* and the remarkable cooperation of the 35 district judges before whom these cases were pending, the district court calendars throughout the country could well have broken down.”). The Committee expanded its efforts to coordinate pre-trial litigation in other multidistrict disputes, continuing its oversight until replaced by the Panel.

<sup>44</sup> 1965 Report of the Judicial Conference of the United States 12, 13 (approving the draft of section 1407 for submission to Congress); 112 Cong. Rec. 22146 (1966) (Senator Tydings introducing a bill, S. 159, incorporating most of the Conference’s proposal).

<sup>45</sup> The Judiciary Act of Sept. 24, 1789, ch. 20, I Stat. 73.

courts" were created as part of the original judiciary act and given authority to try and review specific categories of cases, but Congress did not at that time also create circuit judgeships.<sup>46</sup> Instead, circuit courts were staffed by two district judges and a Supreme Court justice who rode the circuit to different places to hear argument.<sup>47</sup> Circuit courts thus were the first special federal courts.<sup>48</sup> The longest standing practice of a federal special court has been the use of three-judge district courts to hear challenges to the constitutionality of certain statutes.<sup>49</sup> But these prior courts were not granted the *prospective* power that would be granted to the MDL Panel.<sup>50</sup>

At the same time that it was considering the establishment of a special court on multidistrict litigation, Congress created the Federal Judicial Center "for the purpose of seeking knowledge of the best methods of judicial administration through scientific study so that it may be possible to administer justice in the Federal courts with maximum effectiveness and minimum waste."<sup>51</sup> The research arm of the federal judiciary would prove instrumental to innovation and adaptation in the federal courts, including the creation of special courts.

In 1968, Congress adopted Chief Justice Warren's recommendation, as revised, "to provide centralized management under court supervision of pretrial proceedings in multiple district litigation... to assure the just and efficient conduct of such cases."<sup>52</sup> The new court was focused entirely on procedure: it would not *decide* disputes, but rather

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<sup>46</sup> RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 29 (4th ed. 1996); FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT (1927).

<sup>47</sup> See ROSCOE POUND, ORGANIZATION OF COURTS 103-105 , 194-204 (1940); RUSSELL R. WHEELER & CYNTHIA HARRISON, CREATING THE FEDERAL JUDICIAL SYSTEM (2d ed. 1994). The circuit courts were abolished in 1911. The Evarts Act, Act of Mar. 3, 1011, ch. 231, § 297, 36 Stat. 1087, 1168.

<sup>48</sup> When Congress in 1893 created intermediate appellate courts (which we now think of as the "circuit" courts), it considered the possibility of other structural changes which would have included Article III courts with special functions. For a detailed list of proposed but rejected courts from 1800s and early 1900s, see George W. Rightmire, *Special Federal Courts*, 13 ILL. L. REV. 15, 15-17 (1918) (describing courts which would have specialized by claim (Indians, Patents, and Pension Appeals,) or by process (Arbitration)). It was not always clear how the judges would be selected or the bodies would operate. Rightmire also reviews all courts that were created outside the standard hierarchy. See *id.*; George W. Rightmire, *Special Federal Courts—II*, 13 ILL. L. REV. 98 (1918). These, however, were largely Article I courts of short duration.

<sup>49</sup> See Michael E. Solimine, *Congress, Ex Parte Young, and the Fate of the Three-Judge District Court*, 70 U. PITTS. L. REV. 101 (2008) (offering a history of the three-judge district court).

<sup>50</sup> We say "prospective" intentionally as it was unclear at the time how often the MDL Panel would act given the limited experience with mass litigation of the type at issue in the electrical equipment dispute.

<sup>51</sup> H.R. 6111, 113 Cong. Rec. 16199 (1967).

<sup>52</sup> House Report on S. 159, 114 Cong. Rec. 4925 (1968). These ideas also inform construction of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 1 ("[These rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding").

decide *who* should decide. The MDL Panel was the beginning of a wave of special courts created to address narrow but essential questions through the vehicle of a group of Article III judges from other courts working on a part-time basis:

- The Temporary Emergency Court of Appeals was created in 1971.<sup>53</sup>
- The Special Railroad Court was created in 1973.<sup>54</sup> In an odd twist, the MDL Panel appoints the three district judges who serve on the Special Railroad Court.
- The Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review were created in 1978.<sup>55</sup>
- The “Independent Counsel Court” also was created in 1978.<sup>56</sup>

The most recently created special court is the Alien Terrorist Removal Court which was established in 1996.<sup>57</sup> The court, comprised of five district judges appointed by the Chief Justice, may deport alien terrorists without following standard procedures.<sup>58</sup> As of last year, the court had not heard any matters, raising questions as to whether its special status has discouraged its use.<sup>59</sup>

Why the turn to special courts? Advocates predicted both reduced costs and greater efficacy decisions through the division of labor which both reflects and creates expertise.<sup>60</sup>

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<sup>53</sup> Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, §211(b), 85 Stat. 743, 749. Comment, *The Appellate Jurisdiction of the Temporary Emergency Court of Appeals*, 64 MINN. L. REV. 1247 (1980)

<sup>54</sup> Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, §289(b), 87 Stat. 985, 999 (codified as amended at 45 U.S.C. §719(b)).

<sup>55</sup> Pub. L. No. 92-210, §211(b), 85 Stat. 743, 749

<sup>56</sup> Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, §103, 92 Stat. 1783, 1788 (codified as amended at 50 U.S.C. §1803).

<sup>57</sup> Pub. L. No. 92-210, §211(b), 85 Stat. 743, 749

<sup>58</sup> Ethics in Government Act of 1978, Pub. L. No. 95-521, §602(a).

<sup>59</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 401, §§501-506, 110 Stat. 1214, 1258-68 (codified at 8 U.S.C. §§1531-37 (2006)).

<sup>60</sup> John Dorsett Niles, *Assessing the Constitutionality of the Alien Terrorist Removal Court*, 57 Duke L.J. 1833 (2008).

<sup>61</sup> See Stephanie Cooper Blum, “*Use It and Lose It*”: An Exploration of Unused Counterterrorism Laws and Implications for Future Counterterrorism Policies, 16 LEWIS & CLARK L. REV. 677 (2012).

<sup>62</sup> See also Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 776-778 (1983) (placing the question of judicial

In the case of the MDL Panel, for example, specialization would extend to knowledge of the process and patterns of multidistrict litigation as well as predictable and early determination of whether cases should be moved. Since a limited number of trial judges would have handled MDL matters and the issues raised by complex litigation are special, specialization seemed a logical approach.<sup>61</sup> A single decision-making body was also favored as more likely to be consistent and predictable in its rulings on a subject where that consistency was especially important. Finally, Congress would better be able to monitor rulings on the special topics assigned to these courts by watching only one body rather than monitoring the 94 districts.

The statute creating the MDL Panel provides for the basic structure of the court but leaves much of the implementation to the Panel itself as well as the Chief Justice. The next section turns to what happened after Congress created the Panel. The statute provided only a very basic frame which the Chief Justice and the judges whom he appointed had to fill in.

#### *B. The Characteristics of the MDL Panel Members*

Who has served on the MDL Panel? The characteristics of the panelists obviously tell us a great deal about the court as a descriptive matter but also has implications for its operation and public perception. In this section, we examine in detail the social background, judicial experience, and appointing President and Chief Justice for each of the forty-five MDL Panel judges who has served since the Panel's creation in 1968.

In order to put the panel's composition in context, we need to compare it to a relevant benchmark. The MDL statute provides that "[t]he judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit."<sup>62</sup> Thus, any sitting Article III judge, other than a Supreme Court justice, is eligible. Our first benchmark, then, is the population of 2,371 judges who have served on Article III courts from 1968-2012.<sup>63</sup> But, those judges may not be equally appropriate for appointment or

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specialization in the larger context of the call for labor specialization beginning with Adam Smith); Baum, *supra* note, at 4-5.

<sup>61</sup> Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111 (1990) ("Of course the broad application of this argument would counsel against any use of generalist judges. A narrower argument, however, is that certain areas are so complex that it is inefficient for a generalist judge to learn about them.").

<sup>62</sup> 28 U.S.C. §1407(d).

<sup>63</sup> In addition to the 94 district courts, 13 appellate courts, and Supreme Court, the Customs Court, the Court of International Trade, Court of Customs and Patent Appeals, and the Court of Claims are all included in this analysis. Of the 2,371 judges who served on one of those courts during this period, 218 served on two courts and 16 judges served on three Article III courts. Several judges served on the multiple courts at the same time, including those appointed to the Eastern and Western districts of Missouri and the Western, Eastern, and Northern Districts of Oklahoma. Other judges served on multiple courts consecutively. Judges appointed

willing to serve. In order to address that concern and also to provide a comparison to the Chief Justices' other appointments, our second benchmark is the 861 judges appointed by the Chief Justice to at least one committee of the U.S. Judicial Conference.<sup>64</sup> Of those 861, thirty-one judges served on both a Judicial Conference committee and the MDL Panel.<sup>65</sup>

## 1. Gender and Race

Most federal judges have been white men. Franklin Roosevelt appointed the first woman to an Article III court in 1934.<sup>66</sup> Only six women had been appointed by 1968. The representation of women increased dramatically since that time: 327 women, compared to 2,044 men, served on Article III courts between 1968 and 2011 (or 13.8% compared to 86.2% of judges). Women have made up a relatively larger portion of conference committee appointees. Of the 861 members of the judicial conference committees, 152 have been women (17.7%). By contrast, the MDL panel has had relatively smaller share of women: only 4 of the 45 Panel judges (or 8.9%) have been women. The first woman, Julia Gibbons, was appointed by Rehnquist in 2000. Recent MDL appointments, however, suggest that female appointments are trending up: four out of the 17 appointments since 2000 have been women (23.5%).<sup>67</sup>

Since 1968, the federal judiciary has become an increasingly racially diverse institution. During this period, 175 African-Americans served (7.4%), while other racial groups have seen more modest gains. Two American Indians (less than 1%), 22 Asian Americans (1%), 1 Asian and Hispanic judge (less than 1%), and 103 Hispanics (4.3%) have served on Article III courts. Seventeen judges did not list a racial or ethnic group. The remaining judges (2051) identified as white (86.5%).

Of the 861 members of the Judicial Conference Committees, 754 identified as white (87.6%). Fifty-nine judges (6.9%) were African American, thirty-seven were Hispanic

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to multiple courts simultaneously are assigned to a single court for purposes of calculating the descriptive statistics about the MDL Panel and the Conference Committees.

<sup>64</sup> Our committee membership data is based on appointments since 1971, the first year when data is available. Some of these 861 judges served on more than one committee, and others served only as "chair" of a committee and not as a member. For a basic explanation of the Judicial Conference committees, see ADMINISTRATIVE OFFICE OF THE U.S. COURTS, THE FEDERAL COURT SYSTEM IN THE UNITED STATES: AN INTRODUCTION FOR JUDGES AND JUDICIAL ADMINISTRATORS IN OTHER COUNTRIES 38-39 (2000).

<sup>65</sup> Terms of service on the Panel and the Conference Committees vary in their length. Panelists were initially appointed without fixed terms, but now the Chief asks them to serve for seven years. Likewise the Conference Committee appointments vary in terms of length (with some appointments listed as "Open Term") and in terms of how long a particular judge serves. Because there is no clear term limit for either set of appointments, we do not control for term length.

<sup>66</sup> Florence Ellinwood Allen served on the Sixth Circuit from 1934 through 1959. JEANETTE E. TUVE, FIRST LADY OF THE LAW: FLORENCE ELLINWOOD ALLEN (1984).

<sup>67</sup> See Appendix Table A for a complete list of MDL Panel judges.

(4.3%), five were Asian American (.6%), and one judge was American Indian (.1%). Unlike the members of the Judicial Conference Committees, all the members of the MDL Panel have been white.

The tables below show the gender and racial breakdown of each group by court type. Specialized courts are Article III courts to which the judge is appointed, such as the U.S. Court of International Trade (and its predecessor, the U.S. Customs Court).

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**Table 1. Women on Article III Courts**

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	<b>MDL Panel (N)</b>	<b>Judicial Conference (N)</b>	<b>All Article III (N)</b>
District Court	7.89% (3)	18.43% (117)	14.21% (275)
Appellate Court	14.29% (1)	15.53% (34)	12.26% (45)
Specialized Court	0	14.29% (1)	9.26% (5)
Supreme Court	--	--	13.33% (2)
<b>TOTAL</b>	<b>8.9% (4)</b>	<b>17.7% (152)</b>	<b>13.8% (327)</b>

*Note: Percentages reflect the proportion of women appointed to that level of court who also served on the MDL Panel or on a Judicial Conference Committee. The last column reports the percentage of all members of that type of court who are women. A judge who served on more than one type of court is reported based only on the judge's initial appointment during our period of study or, if already on the bench, the seat held in 1968.*

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**Table 2. Racial Minorities on Article III Courts**

		MDL Panel	Judicial Conference	All Article III
District Court	African American	0	6.61% (42)	7.60% (147)
	Hispanic/Latino/a	0	4.88% (31)	4.91% (95)
	Other	0	0.63% (4)	1.13% (22)
Appellate Court	African American	0	7.76% (17)	6.81% (25)
	Hispanic/Latino/a	0	2.74% (6)	2.18% (8)
	Other	0	.91% (2)	.54% (2)
Specialized Court	African American	0	0	3.70% (2)
	Hispanic/Latino/a	0	0	0
	Other	0	0	1.85% (1)
Supreme Court	African American	-	-	(6.67%) 1
	Hispanic/Latino/a	-	-	(6.67%) 1
	Other	-	-	0
TOTAL	All racial minority groups	0	11.9% (102)	12.8% (302)

*Note: The calculations are based only on judges who reported a race. Percentages reflect the proportion of minorities appointed to that level of court who also served on the MDL Panel or on a Judicial Conference Committee. The "Other" category includes judges who identify as Asian American, American Indian, or more than one race. The last column reports the percentage of all members of that type of court who are minorities. A judge who served on more than one type of court is reported based only on the judge's initial appointment during our period of study or, if already on the bench, the seat held in 1968.*

## 2. Judicial Experience

We examined three specific judicial experience variables: type of court (district or circuit) on which the judge served, the length of a judge's tenure prior to appointment, and the judge's prior experience as an MDL transferee judge. We find that district judges make up an even larger percentage of the MDL panel (96%) than we would predict based on the same figure for Conference committees (81%) and the Article III courts as a whole (82%).<sup>68</sup> MDL Panel judges have served on the bench longer before appointment than Conference committee judges (16 years as compared to 8.4 years). Finally, they are much more likely to have experience with multidistrict litigation.

MDL Panel judges may be either district judges or circuit judges. Perhaps not surprisingly given the composition of the Article III courts themselves, both the MDL Panel and the Judicial Conference Committees are dominated by judges serving on the district courts. Between 1968 and 2011, 1,935 judges served on district courts, 367 judges served on appellate courts, 15 judges served on the Supreme Court, and 54 judges served on specialized Article III courts. Of the 45 members of the MDL Panel, 43 were district judges (95.6%), while only two judges were from appellate courts. No specialized judges or Supreme Court justices have served on the MDL Panel. The committees of the judicial conference are also largely made up of district judges. Of the 861 members of the judicial conference, 700 initially served on district courts (81.3%), 151 served on appellate courts (17.5%), and 10 judges began their Article III service on a specialized court (1%). 161 members of judicial conference committees had no experience as a district judge (18.7%) while 1 member of the MDL Panel had no such experience (2%).

Looking at the court on which a judge served at the time of his or her appointment shows a slightly different breakdown by court type. Three-eighth judges were serving on district courts when they were appointed to the MDL Panel (84.4%), while seven were serving on appellate courts (15.6%). One judge, Julia Gibbons, was elevated from the district bench to the appellate court while serving on the MDL Panel. Judicial Conference appointment is again more common for district judges, with 635 committee members on district courts when appointed (73.8%). Appellate judges were a substantial portion of appointments, with 219 judges serving on the courts of appeals when tapped for a committee position (25.4%). Seven judges were serving on specialized courts (.8%), and no judges were sitting on the Supreme Court.

The average length of service for Article III judges between 1968 and 2011 is 19 years. (If we look only at those judges who left the bench, and not those serving until the end of our study in 2011, we find an average judicial service of 21 years.) Judges serving on the committees of the judicial conference served between 0 and 50 years before joining a

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<sup>68</sup> These figures are based on the court of service at the time of appointment to the MDL Panel or Conference committee.

committee, with the average amount of time being approximately 8.4 years. The modal value was 4 or 5 years of service before appointment to a conference committee.<sup>69</sup>

Judges on the MDL Panel also had varying lengths of tenure before appointment, between 5 and 29 years of service. Judge Hodges served the longest (29 years) before appointment while Judge Pollak had the briefest tenure (5 years). On average, judges served almost 16 years before appointment to the MDL Panel, perhaps a result of the need for experience with complex litigation before appointment to the Panel.<sup>70</sup>

The disproportionate number of district judges on the Panel may reflect an effort to appoint judges with complex litigation and in particular multidistrict litigation management experience. The statute makes no specific requirement about any other characteristic or expertise of the judge; however, the goal of specialization would seem to favor the selection of judges with prior MDL experience. And, this appears to have been the practice of Chief Justices. Chief Justice Earl Warren named the first seven panelists, appointing three from the Co-ordinating Committee including its chair, Tenth Circuit Chief Judge Alfred Murrah, as the first chair of the Panel.<sup>71</sup> Several other panelists served as trial judges in the electrical equipment litigation which led to the creation of the MDL Panel. We find evidence to support the common view that the norm of appointing panelists with complex litigation experience still prevails.<sup>72</sup>

Between 1968 and 2011 there were 1465 multidistrict actions consolidated before 778 different judges.<sup>73</sup> Figure 1 shows that, of the 2371 judges serving between 1968 and 2011, 1598 have had no experience as a transferee judge with multidistrict litigation, at least not as a judge. At the other end of the spectrum, Judge Weiner had 15 MDLs during his

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<sup>69</sup> Because these times are estimated from the first court on which the judge served during the period, we are over-estimating the time of service slightly. A better comparison is to consider the time in the position in which the judge served when appointed to the conference committee seat. Again, the range was from 0 to 50 years, and the average time of service was slightly smaller at 7.9 years. The modal time to appointment was 4 years.

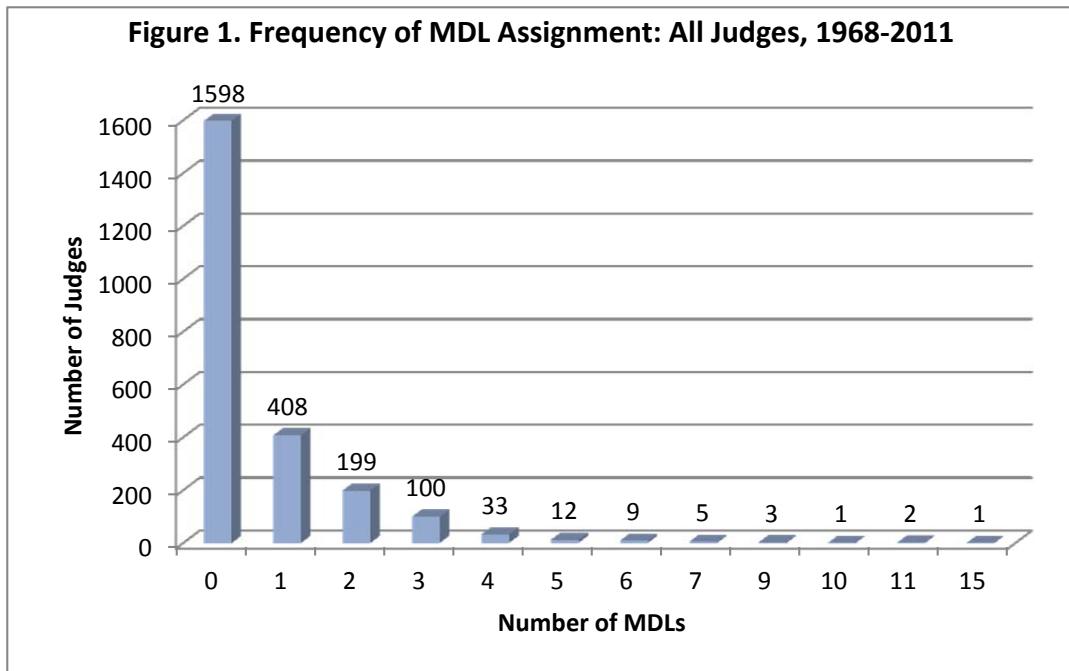
<sup>70</sup> In considering the time a judge spends in the seat where they serve at the time of appointment to the MDL Panel we see a slightly different pattern. The average time spent is 15.4 years, again raised by outliers such as Judges Hodges and Murrah, who served several decades before appointment to the MDL Panel. The range of service times is smaller, with one judge, Judge Gurfein, serving four years on the Second Circuit before appointment to the MDL Panel. Overall, appointment to the MDL Panel appears to take twice as long as appointment to the Judicial Conference Committees.

<sup>71</sup> John T. McDermott, *The Judicial Panel on Multidistrict Litigation*, 57 F.R.D. 215 (1973) (McDermott served as the Executive Attorney to the Panel, and this short essay offers his observations on the formative years of the Panel.). Judge Murrah also served as the second Director of the Federal Judicial Center, holding both posts simultaneously from 1970-1975. Federal Judicial Center, Biographical Directory of Federal Judges.

<sup>72</sup> See John G. Heyburn II, *A View From the Panel: Part of the Solution*, 82 Tul. L. Rev. 2225, 2227 (2008).

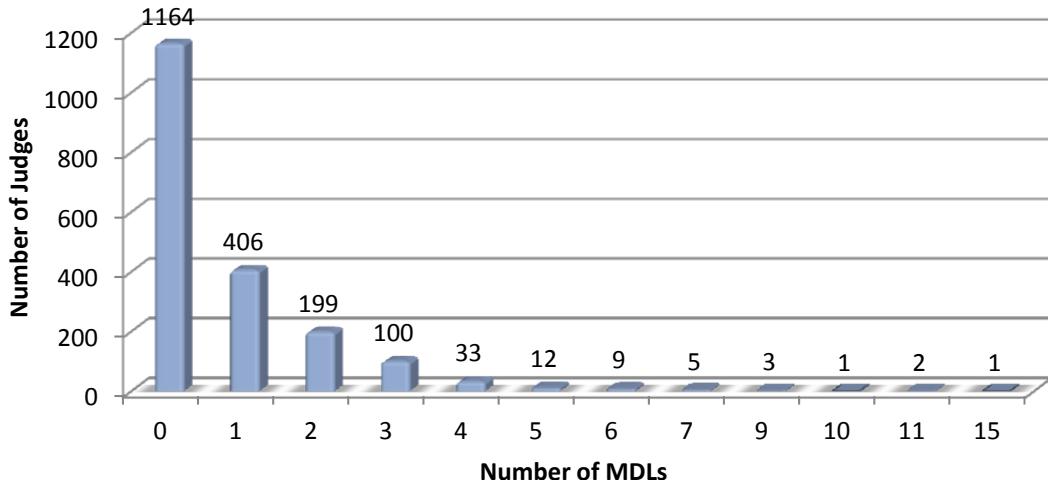
<sup>73</sup> Three cases were consolidated before multiple judges, and are excluded from this analysis because they were exceptional cases. Within the life of an MDL, cases are transferred to other judges for a variety of reasons. Our focus is on the judge initially assigned to the MDL at the time of consolidation.

tenure on the bench. The average number of MDLs for all judges serving between 1968 and 2011 is .62 MDLs assigned per judge. Among judges who never served on the panel,

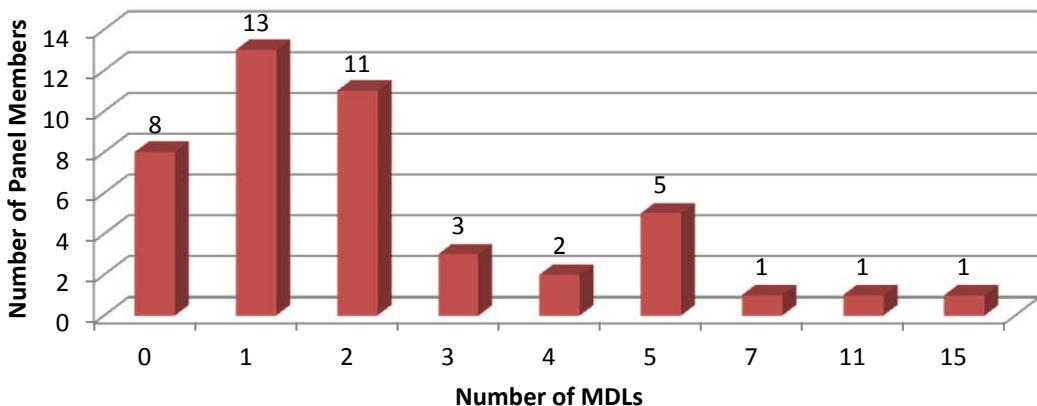


the average was .58 MDLs assigned.

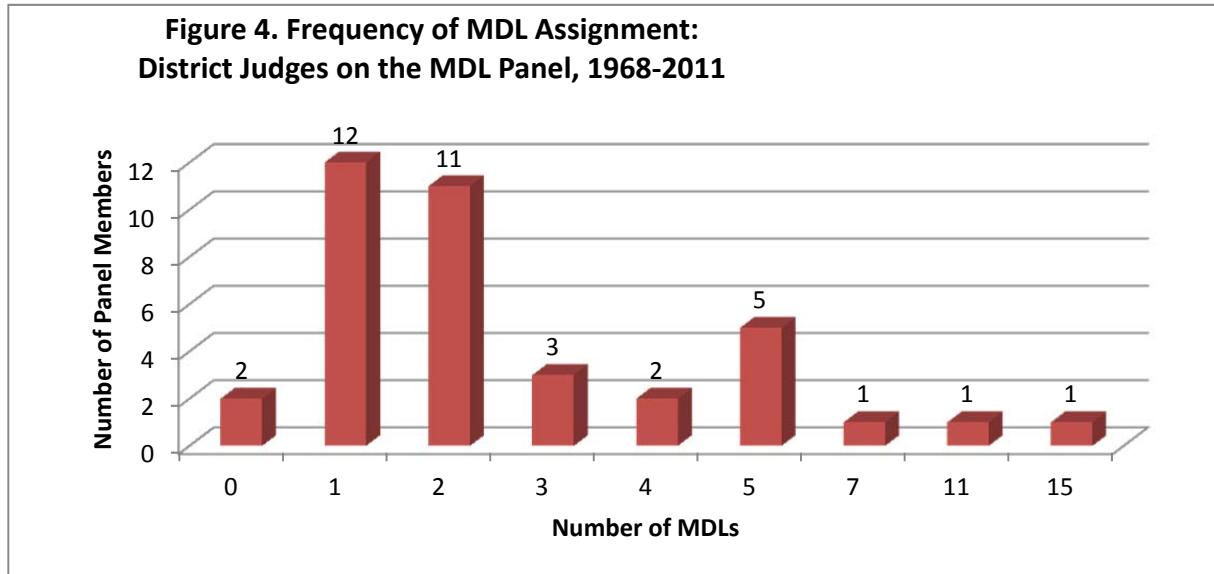
Of course, MDL assignments overwhelmingly go to district judges. Because including circuit judges in the frequency of assignment depresses the average, the chart below excludes circuit court judges. The average number of appointments is a slightly higher .75 per judge.

**Figure 2. Frequency of MDL Assignment: District Judges, 1968-2011**

While looking at the judiciary as a whole is interesting, we would expect those sitting on the MDL Panel to have more experience than the average judge. While the range of the data is the same, the average is, not surprisingly, higher for panel members (2.4 MDLs assigned). Interestingly, eight members of the panel received no MDLs during this period, three of whom were original panel members. Seven of the eight judges with no assignments served as circuit judges, either once appointed to the panel or prior to appointment. One of eight circuit judges had no district judge experience. Figure 3 shows the variation.

**Figure 3. Frequency of MDL Assignment: MDL Panel Judges, 1968-2011**

Once again, it is important to exclude those judges serving on circuit courts. Figure 4 shows the assignments for district judge panel members only. The average number of assignments is 2.8.



Interestingly, the vast amount of experience with multidistrict litigation comes once a member has joined the panel, as we will discuss in greater detail in our evaluation section. Twenty-one of the 45 MDL Panel judges had no prior MDL experience before being appointed to the Panel. While there is certainly more prior MDL experience for judges on the panel than for other judges, with an average of 1.3 MDLs assigned before appointment, the modal number of MDLs prior to serving is zero. If we exclude those judges serving on circuit courts at the time of appointment, only one of whom (Judge Gurfein) had MDL experience when he joined the panel, the average number of MDL assignments before joining the panel for district judges is 1.5 MDLs, but the modal category remains 0.

### 3. Appointing President and Appointing Chief Justice

All MDL Panel judges are Article III judges on either district or circuit courts, and as such were appointed by the President with the advice and consent of the Senate. Focusing solely on initial appointments, we find a judiciary almost evenly split between Democratic and Republican appointees. 1,126 judges (47.5%) were initially appointed to the bench by Democrats, while 1,245 (52.5%) were appointed by Republican presidents. Like the judiciary itself, the MDL Panel is even divided between judges appointed by Democrats and

those appointed by Republicans. Of the 45 members of the MDL Panel, 22 were appointed by Democratic presidents (48.9%) while 23 (51.1%) were appointed by Republicans. The Judicial Conference Committees, however, are not so evenly split. Of the 861 members of the judicial conference committees 340 (39.5%) were appointed by Democrats while 521 (60.5%) were appointed by Republicans.

Because judges are typically promoted to higher judicial positions by Presidents other than the one who initially appointed them, it is illustrative to consider the variation in appointments for the court on which the judge served when he or she was selected for the MDL Panel or a Conference committee. Once again, the Panel is closely divided between Democratic (21 or 46.7%) and Republican (24 or 53.3%) appointees. The Conference Committees were more likely to be appointed by Republicans (514 or 59.7%) rather than Democrats (334 or 38.8%). Because of the changes in the judiciary during this period, 13 judges are listed as sitting in their seat by reassignment. Nine of the 13 (69.2%) were reassigned by Republican presidents and four were reassigned by Democrats (30.8%). Adding these reassessments into the appointments listed above shows a Conference Committee composed of 60.7% Republican appointees and 39.3% Democratic appointees at the time the judge joined a Judicial Conference Committee.

The variation in appointing Chief Justice is limited by the short period of our study (1968 for the Panel and 1971 for committees), during which the MDL Panel members were appointed by only four Chiefs and the Judicial Conference Committee members by three. The original seven members of the MDL Panel were appointed by Chief Justice Warren. The remaining members were appointed by more conservative Chiefs: 11 were appointed by Chief Justice Burger, 18 were appointed by Chief Justice Rehnquist, and 9 were appointed by Chief Justice Roberts. Because the data for the Judicial Conference only go back to 1971, all members of the committees were appointed by conservative Chief Justices.<sup>74</sup> Chief Justice Burger appointed 74 of the members (8.6%), Chief Justice Rehnquist appointed 652 of the members (75.7%), and Chief Justice Roberts appointed 135 of the members (15.7%).

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<sup>74</sup> Judicial conference committee service dates are listed by year but changes in Chief Justice can occur throughout the year. Chief Justice Rehnquist started his tenure in September of 1986 and died in September of 2005. Because Chief Justice Burger served the majority of 1986 but Chief Justice Rehnquist served the majority of 2005, we assigned Chief Justice Burger to the appointments made in 1986 and Chief Justice Rehnquist to the appointments made in 2005.

### III. EVALUATING THE WORK OF THE MDL PANEL

Special courts raise two sets of concerns: one related to the court and the second to its judges.

Special courts may deprive parties of procedural rights.<sup>75</sup> Those procedural rights include the right of access to the same courts available to those who have substantially similar claims and/or defenses, the open debate and examination of arguments found in our common law system, and the review ensured by a hierarchical judicial system.

Special court judges may lack the independence that Article III was designed to create. Judicial independence is ensured through several features of Article III courts. Article III judges do not depend on parties that appear before them for the continuation of their positions. Indeed, most district courts and appellate courts face workload pressures so significant that the risk is that they will too strongly discourage parties to come to the court. Article III judges do not have a stake in the outcome of the cases which they decide, and therefore are more likely to be neutral. Article III establishes a judicial selection system that provides for the input of the President and the Senate (and the oversight of voters) and as a result favors a diversity (defined broadly) of judges; that is, no Article III judge serves based on one person's preference and the political system incentivizes the appointment of judges from different backgrounds.

We consider below each criteria and how to test whether it is satisfied in the work of one special court, the MDL Panel. We find that many aspects of the court's functioning should provide us with assurance that special courts can meet the ends of Article III. But other aspects raise concerns which need to be addressed as we lay out in our conclusion.

#### *A. Procedural Rights of the Parties*

##### 1. Choice of Forum

The MDL statute transfers cases from the district in which they were filed to a transferee court for all pre-trial matters. The original drafters of section 1407 recognized that they were balancing the "litigant's traditional privileges of selecting where, when and how to enforce his substantive rights or assert his defenses" against the costs and burdens posed by overlapping and conflicting pre-trial processes.<sup>76</sup> The drafters emphasized that cases would return to the transferor court for trial. But, the reality is that few cases survive to trial.<sup>77</sup> Thus, consolidation inevitably limits litigants' right to select a forum.

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<sup>75</sup> See, e.g., Niles, *supra* note (analyzing the Fifth Amendment implications of the Alien Terrorist Deportation Court).

<sup>76</sup> Co-ordinating Committee for Multiple Litigation of the United States District Courts, Comment on Proposed § 1407, at 5 (1965).

<sup>77</sup> See Emery G. Lee, Margaret S. Williams, Richard A. Nagareda, Joe S. Cecil, Thomas E. Willging, & Kevin M. Scott, The Expanding Role of Multidistrict Consolidation in Federal Civil Litigation: An Empirical

Ninth Circuit Judge Alex Kozinski complained that the rate at which MDL cases are resolved while at the transferee court “tell[s] the story of a remarkable power grab by federal judges who have parlayed a narrow grant of authority to conduct consolidated discovery into a mechanism for systematically denying plaintiffs the right to trial in their forum of choice.”<sup>78</sup> The procedure which evoked Judge Kozinski’s ire was “self-transfer” whereby MDL transferee judges transferred all of the matters to themselves for *trial*, rather than just pre-trial, on the basis of the federal venue statute.<sup>79</sup> The U.S. Supreme Court eventually struck that practice, concluding that Congress intended that any trial would take place in the original court rather than the MDL court.<sup>80</sup>

The implications of the transfer and consolidation decision to substantive rights can be seen by focusing on litigation resulting from the 2010 Deep Water Horizon oil spill disaster. Hundreds of tort suits were filed against BP seeking compensation for economic loss, property damage, and personal injuries.<sup>81</sup> Tort victims filed suit in every district along the Gulf Coast as well as districts scattered across the country. BP quickly moved to consolidate and transfer all suits to Judge Lynn Hughes in the Southern District of Texas. Judge Hughes sits in Houston where BP has its North American headquarters and where it bases its Gulf-drilling operations.<sup>82</sup> BP’s motion drew strong opposition from most

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Investigation, working paper (detailing how, when, and where MDL cases are resolved) As Richard Nagareda has explained, “consolidated pretrial proceedings at the behest of the MDL Panel already form a setting ripe for plaintiffs’ lawyers and defendants to begin discussions about a comprehensive peace.” Richard A. Nagareda, *Mass Torts in a World of Settlement* 260 (2007).

<sup>78</sup> *In re American Continental Corporation/Lincoln Savings*, 102 F.3d 1524, (Kozinski, J. dissenting). Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be- Part II: Non-Jurisdictional Matters*, 42 UCLA L. REV. 717 (1995).

<sup>79</sup> The venue transfer statute allows a district court to “transfer any civil action to any other district or division where it might have been brought” if doing so is both convenient to the parties and witnesses and in the interest of justice. 28 U.S.C. § 1404(a). The MDL statute on its face allowed transfer for pre-trial matters with remand of cases after such matters were resolved. Nevertheless, the statute for more than 25 years was interpreted to allow transferee judges to grant 1404(a) motions to change venue for transferred cases to the transferee court, effectively converting an MDL to a single district case. *See Pfizer, Inc. v. Lord*, 447 F.2d 122, 124-125 (2d Cir. 1971). The JPML Rules of Procedure specifically anticipated the possibility that a MDL transferee judge would transfer consolidated actions pursuant to 1404(a). *See* JPML Rule 15(d), later Rule 14(b).

<sup>80</sup> *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

<sup>81</sup> Plaintiffs also sued various other companies including rig owner Transocean Ltd., well contractor Halliburton Company, blowout preventer maker Cameron International, safety valve manufacturer Weatherford International, and BP’s joint operators Anadarko E&P Company and MOEX Offshore 2007. For a contemporaneous analysis of the parties’ positions, see Felicity Barringer et al., *Seeking Answers on Oil Spill as Questions Mount*, N.Y. Times, June 26, 2010, at A11; Carol J. Williams, *An Epic Legal Battle Is About to Begin; A Panel of Judges Will Decide Who Will Oversee Oil Spill Suits. Location Is Key*, L.A. Times, July 28, 2010, at A12.

<sup>82</sup> Media accounts from the time characterized BP as seeking to obtain a home-court advantage in the choice of federal courthouse location and a judge with significant experience in oil suits. *See, e.g.*, BP Wants Oil Spill

plaintiffs as well as the U.S. Department of Justice, which asked for assignment in New Orleans in the Eastern District of Louisiana (with some plaintiffs asking the Panel to assign Southern District of New York Judge Shira Scheindlin who has extensive MDL experience).<sup>83</sup> The Panel ultimately assigned the matter to Judge Carl Barbier in New Orleans.<sup>84</sup> While the Panel did not side with BP on the location for pre-trial litigation in the tort suits, the judges unanimously granted BP's contested motion to transfer securities and shareholder derivative suits, also related to the oil spill, to District Judge Keith Ellison in Houston.<sup>85</sup> BP later agreed to pay 7.8 billion to settle the tort suits consolidated in Louisiana.<sup>86</sup> BP won the dismissal of nearly all shareholder derivative, securities, and ERISA claims transferred to Texas.<sup>87</sup>

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Lawsuits Combined in Houston Court, Hous. Chron., May 11, 2010, at B10; Scott Hiaasen & Curtis Morgan, BP Seeks Oil-Tested Judge on Lawsuits, Miami Herald, May 27, 2010, at 1A Front; Jad Mouawad & John Schwartz, Rising Cleanup Costs and Numerous Lawsuits Rattle BP's Investors, N.Y. Times, June 2, 2010, at A17 (emphasizing the need for consolidation because court rulings in oil spill cases already conflict with one another); Rebecca Mowbray, Judges Gather to Consider BP Trial Site; Oil Companies Want Houston; Plaintiffs Want Anywhere Else, Times-Picayune (New Orleans), July 28, 2010, at A1.

<sup>83</sup>BP PLC Motion to Transfer and Consolidate, In re Oil Spill by the Oil Rig "Deepwater Horizon", MDL No. 2179, [www.MDL Panel.uscourts.gov](http://www.MDL Panel.uscourts.gov); see also Tresa Baldas, Big Easy or Bayou City for Spill MDL?, Tx. Lawyer, May 17, 2010, at 1 (reporting that BP had moved for consolidation in the Houston Division of the Southern District of Texas before Judge Lynn Hughes (BP America's headquarters are in Houston), while most plaintiffs had countered by recommending the Eastern District of Louisiana); Bill Lodge, Pressure Rising on BP: Lawsuit Turf Battles Beginning of Long War, Baton Rouge Advocate, June 14, 2010, at A1 (reporting that judges and/or litigants in Louisiana, Mississippi, Alabama and Florida were resisting efforts to stay litigation while BP's motion to transfer was pending before the Panel); Jeff Feeley & Margaret Cronin Fisk, BP Suits Should Be Sent to New Orleans, U.S. Says, Bloomberg, June 17, 2010, <http://www.bloomberg.com/news/2010-06-17/bp-oil-spill-federal-suits-should-be-combined-in-new-orleans-u-s-says.html>.

<sup>84</sup> In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, 731 F. Supp. 2d 1352 (J.P.M.L. 2010). For a discussion of the lively Boise-based hearings on the motion, see Susie Boring-Headlee, The United States Judicial Panel on Multidistrict Litigation: The Sprezzatura of the Federal Judiciary, The Advocate (Idaho State Bar), Sept. 2010, at 58.

<sup>85</sup> The shareholder derivative, securities, and ERISA actions were originally filed in the Western District of Louisiana and the Central District of California with potential tag-along actions pending in the Eastern District of Louisiana. Briefs were also filed by prospective plaintiffs whose subsequent suits, filed in the Northern District of Illinois and the Southern District of New York, were later consolidated with the earlier actions. See In re BP PLC Securities Litigation, 734 F. Supp. 2d 1376 (J.P.M.L. 2010); In re BP PLC Securities Litigation, 734 F. Supp. 2d 1380 (J.P.M.L. 2010).

<sup>86</sup> For an examination of Judge Barbier's management of the litigation, see Edward F. Sherman, The BP Oil Spill Litigation and Evolving Supervision of Multidistrict Litigation Judges, 30 Miss. Coll. L. Rev. 238 (2011).

<sup>87</sup> See, e.g., In re BP PLC Sec. Litig., 2012 WL 2617244 (S.D. Tex. 2012); In re BP PLC Sec. Litig., 2012 WL 432611 (S.D. Tex. 2012); In re BP Shareholder Derivative Litigation, 2011 WL 4345209 (S.D. Tex. 2011).

Resolution in the transferee court should not be considered in isolation from the potential positive implications for plaintiffs' claims, which might be too small for individual litigation. That is, transfer may expand their capacity to exercise their substantive rights.

## 2. Collegial Decisionmaking and Debate

Special federal courts hold a monopoly on the resolution of a specific and narrow range of issues. A judicial monopoly may bring attendant costs such as homogeneity of ideas and approaches and the concentration of power in the governed set of cases. But, unlike the geographic monopoly found in federal districts, an intercircuit body would have geographical diversity. A closer look at the workings of the Panel would be necessary to determine whether the court engaged in discussion and debate that reflected a competition of perspectives.

The purpose of a multimember body is to ensure the debate of ideas and arguments; hence, appellate panels, special courts considering constitutionality of certain statutes, and special courts all rely upon collective decision-making bodies. One way to evaluate the degree of discussion and debate is to see what can be observed in the body's decisions. All Panel actions require the agreement of four Panel members.<sup>88</sup> In 2005, Judge Wm. Terrell Hodges noted that during his tenure the Panel had never seen a dissenting vote cast in their decision to consolidate a case or not.<sup>89</sup>

We are collecting data on authorship and dissenting votes in all MDL decisions from 1968-2011. Thus far, we have found that for the first seven years when the Panel's membership did not change, the rate of disagreement on the MDL Panel was comparable to that on the courts of appeals during the same period, roughly nine or ten percent in cases in which the panel made a substantive decision.<sup>90</sup> But, dissents essentially disappear after 1978. We will be able to present more detailed information when the data work is complete.

The high degree of agreement may stem from how the Panel now goes about its work. Members of the Panel hear oral arguments at various locations around the country every two months. Since May of 2009, the Panel has held these hearings over two days, instead of one, in response to increasing caseload demands.<sup>91</sup> As Judge Heyburn noted, the Panel only hears oral arguments on the creation of a new MDL, and decisions about tag-

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<sup>88</sup> 28 U.S.C. § 1407

<sup>89</sup> Chair of Judicial Panel Sees Role as Gatekeeper, *The Third Branch*, Vol. 37, Number 11. November 2005.

<sup>90</sup> Donald R. Songer, Reginald S. Sheehan & Susan B. Haire, Continuity and Change on the United States Courts of Appeals 104-107 (2000).

<sup>91</sup> Panel Promotes Just and Efficient Conduct of Litigation, *The Third Branch*, Vol. 42, Number 2. February 2010.

along cases are decided on the paper record.<sup>92</sup> Within two weeks of a hearing, the Panel issues its decision.

### 3. Meaningful Review and Oversight

Specialization poses the risk of capture by interested parties who appear repeatedly in front of the same group of judges rather than irregularly before a dispersed, generalist set. But a hierarchical system can check that process: higher courts may review the special court's rulings to ensure neutrality. In the case of the MDL Panel, the appropriate court of appeals may review their decisions to grant consolidation and to remand previously consolidated cases to the original transferor court. The effectiveness of these checks on political influence will depend on how meaningful they are.

The statute sets the first barrier to meaningful oversight.<sup>94</sup> A denial of a motion to consolidate is unreviewable. A grant is only reviewable by extraordinary writ to the court of appeals for the district to which the cases have been transferred. And, the (rare) decision to return a case to the transferor court also requires a writ.<sup>96</sup> Writs of mandamus "are reserved for really extraordinary causes."<sup>97</sup> The writ is required for a range of managerial decisions made by district judges during the pre-trial process. But, the justification for the deference granted to pretrial management by trial judges cannot sustain the deference granted to what are in essence jurisdictional decisions by a court created solely for that purpose. The effect could be to insulate the court from oversight on a significant exercise of judicial authority.

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<sup>92</sup> Panel Promotes Just and Efficient Conduct of Litigation, *The Third Branch*, Vol. 42, Number 2. February 2010.

<sup>94</sup> 28 U.S.C. §1407(e) ("No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code."). Based on an extensive search, we failed to locate a single instance where the grant of a transfer motion was overturned. We did find one case where an MDL Panel's remand decision was overturned: *Royster v. Food Lion, Inc.*, 73 F. 3d 528 (4th Cir. 1996), in which a divided Fourth Circuit panel *sua sponte* reversed the Panel's remand of dismissed claims to the original transferor courts (which were in other circuits) to allow the parties to appeal the transferee court's dismissal to the Fourth Circuit (where the transferee court was located). The dissenting panelist characterized the majority's decision as "extraordinary, unsolicited, and ill-advised." *Id.* at 533, 535 (Butzner, J., dissenting).

<sup>96</sup> 28 U.S.C. §1407(e) ("No proceedings for review of any order of the [JPML] may be permitted except by extraordinary writ."). This must be distinguished from review of the decisions of the transferee judge which are subject to the normal rules for appellate review by the court of appeals for the circuit in which it is located.

<sup>97</sup> *Ex parte Fahey*, 332 U.S. 258 (1947).

In the MDL setting, courts of appeal have interpreted the requirement of the writ as extremely hard to meet.<sup>98</sup> As one panel explained, the Panel has “unusually broad discretion. . . to carry out its assigned functions,” including the initial decision on whether to create an MDL and the decision to end the life of an MDL by remanding actions to the original court.<sup>99</sup> To qualify for mandamus relief, the party challenging the Panel’s decision (whether the initial decision to transfer (or not) or a later decision to return transferred cases to the transferor court) must first show that it has no other adequate means to obtain relief.<sup>100</sup> The petitioning party must show that its right to the writ is clear and indisputable. Even if the petitioning party satisfies this burden, the court of appeals may refuse to grant the petition if the court concludes it is inappropriate under the circumstances.<sup>101</sup> Moreover, “only exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of this extraordinary remedy.”<sup>102</sup>

The statutory text coupled with the judicial interpretation of that text would lead one to expect that circuit courts rarely grant the writ in MDL cases. Yet, with so much opportunity for consolidation, and an increasing total number of MDLs each year, we would expect circuits to occasionally conclude that a writ is appropriate. We conducted a systematic search of all circuit court rulings in the Westlaw CTA database to test that hypothesis. We found only one case where an MDL Panel ruling was overturned. In *Royster v. Food Lion, Inc.*,<sup>103</sup> a divided Fourth Circuit panel *sua sponte* reversed the Panel’s remand of dismissed claims to the original transferor courts (which were in other circuits) to allow the parties to appeal the transferee court’s dismissal to the Fourth Circuit (where the transferee court was located). The dissenting panelist characterized the majority’s decision as “extraordinary, unsolicited, and ill-advised.”<sup>104</sup> While we cannot evaluate whether it was ill-advised, we can say that it was extraordinary. Indeed, no other circuit panel has ever reversed an MDL Panel decision. More significantly, a Panel’s decision to transfer and consolidate—clearly its most significant power—has never been set aside by a reviewing court.

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<sup>98</sup> David F. Herr, Multidistrict Litigation Manual §11.1 (2012 ed.) (review of the MDL Panel’s decisions, as this leading commentator put it, “is at best difficult to obtain.”

<sup>99</sup> See *In re Mary Nell Collins (asbestos)*, 233 F.3d 809 (3rd Cir. 2000) (denying petition for writ of mandamus on scope of remand by MDL Panel).*233 F.3d 809 (3rd Cir. 2000)* (denying petition for writ of mandamus on scope of remand by MDL Panel).

<sup>100</sup> *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004).

<sup>101</sup> See *Cheney*, 542 U.S. at 381, 124 S.Ct. 2576.

<sup>102</sup> *Id.* at 380, 124 S.Ct. 2576 (internal quotation marks and citations omitted).

<sup>103</sup> 73 F. 3d 528 (4th Cir. 1996).

<sup>104</sup> *Id.* at 533, 535 (Butzner, J., dissenting).

Thus, the criteria of meaningful oversight is absent for the MDL Panel. Review of this decision is not only difficult to obtain, it has never empirically happened. Our result runs counter to expectations that Congress, by creating a specialized court, will increase the monitoring of its decisions both by Congressional committees and other bodies. The opposite has happened as Congress has only once limited the Panel's prospective powers and then only indirectly when it let stand the Supreme Court's ruling that the MDL statute does not override the requirement of appropriateness of venue for the *trial* of civil actions.<sup>105</sup> Thus, transferee judges may not assign to themselves the power to try cases over which they do not have proper venue and jurisdiction.

#### *B. Independence of the Judges and the Risk of Politicization*

##### 1. Capture by Interest Groups

Special courts exist to meet specific needs of identifiable parties. The FISA Court only continues to have work if the federal government seeks its permission to issue warrants. But, administrations may side step the court's authority through its definition and construction of the Act and the surveillance work of agencies like NSA. The George W. Bush Administration did just that with its Terrorist Surveillance Program.<sup>106</sup> But, after negotiating with the FISA Court, it agreed to seek warrants for the program.<sup>107</sup> It appeared, as one commentator put it, that the FISA Court promised that warrants would be issued if the administration would bring the matters to it.<sup>108</sup>

The MDL Panel, like the FISA Court, only has work if parties seek consolidation and transfer. Congress could choose to terminate the Panel if it appears that few cases require MDL treatment. The original Panel actively fished for cases, monitoring dockets for specific types of cases and issuing show-cause orders to parties where cases seemed appropriate for consolidation. And, the rate at which petitions were granted was very high, well above half of motions were granted. While the grant rate continues to be high, it appears to have softened slightly.

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<sup>105</sup> Congress did the opposite in the case of actions under section 4C of the Clayton Act. Pub. L. 94-435, Title III, § 31, Sept. 30, 1976, 90 stat. 1394 (adding subsection h which provides that the Panel may transfer such actions for both pretrial *and trial*).

<sup>106</sup> Shane Harris & Tim Naftali, *Tinker, Tailor, Miner, Spy: Why the NSA's Snooping is Unprecedented in Scale and Scope*, Slate Magazine (Jan. 3, 2006).

<sup>107</sup> Eric Lichtblau & David Johnston, *Court to Oversee U.S. Wiretapping in Terror Cases*, NY Times A1 (Jan. 18, 2007).

<sup>108</sup> See Richard Posner.

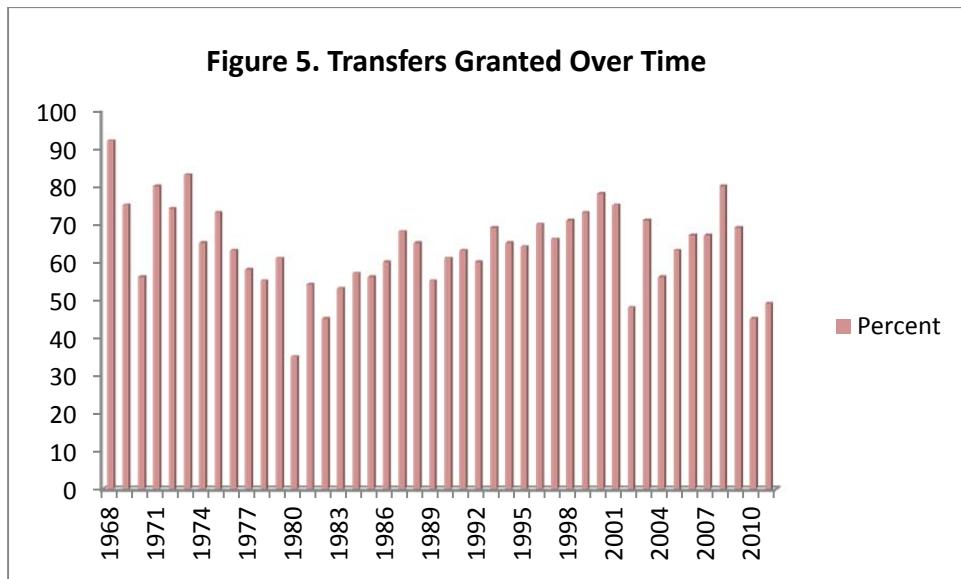
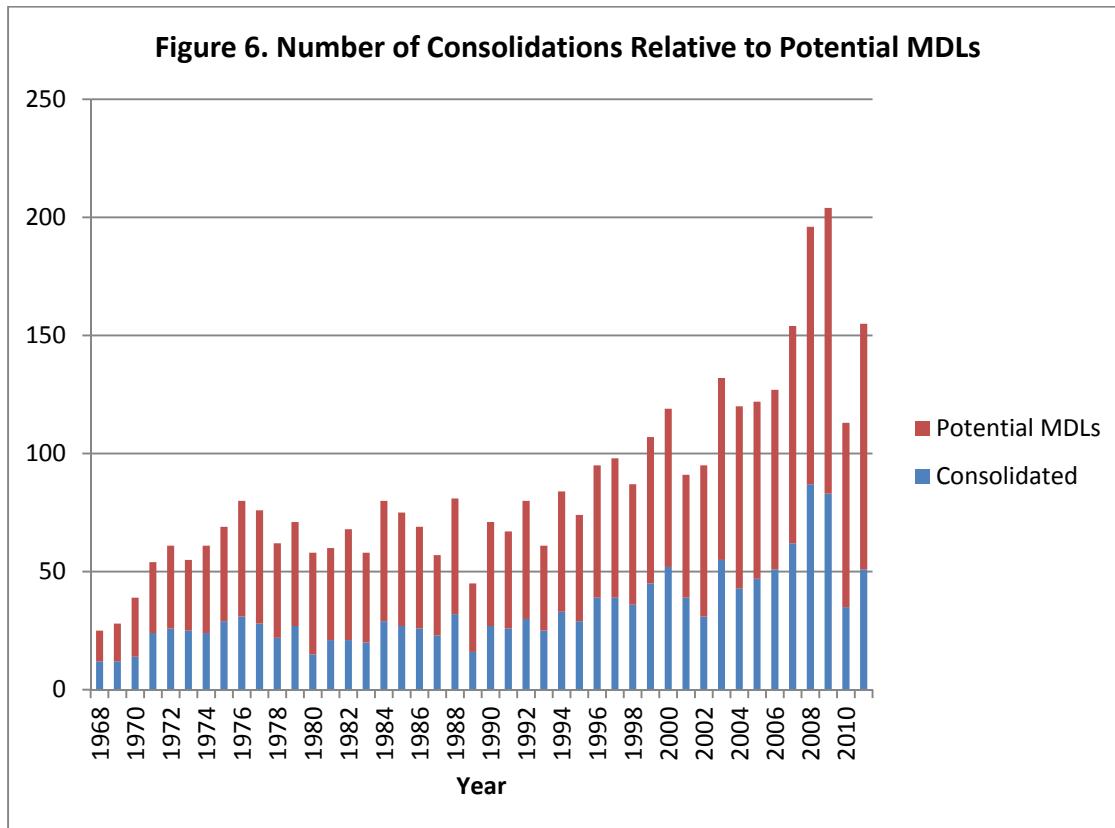


Figure 5 shows the pattern for MDL consolidation decisions over time.<sup>109</sup> While there is a significant amount of variation over time, the trend shows that while substantially more cases are granted now than in years past, the percentage of grants is smaller than in the early years of the panel. Figure 6 more clearly depicts the increase in the number of motions for consolidations, while the raw number of consolidations is relatively stable.

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<sup>109</sup> Information for Figures X and X+1 were gathered from the MDL orders themselves, available on Westlaw.



The risk of capture increases as the length of tenure does. Panel tenure is not set by statute. Chief Justice Warren suggested that no appointee should serve for more than three years.<sup>110</sup> The first seven members stayed on for an average of 10 years, however, setting a precedent. From 1968 through 2012, forty-one judges have served on the Panel with an average tenure of eight years.<sup>111</sup> According to current Panel Chair John Heyburn, Chief Justice William Rehnquist in 2000 adopted a practice of appointing panelists for seven-year terms, and Chief Justice John Roberts has continued that practice.<sup>112</sup> The terms are staggered with one member rotating off every year.<sup>113</sup> This turnover helps to lessen the risk of capture.

<sup>110</sup> See McDermott, *supra* note 53, at 218 n.5.

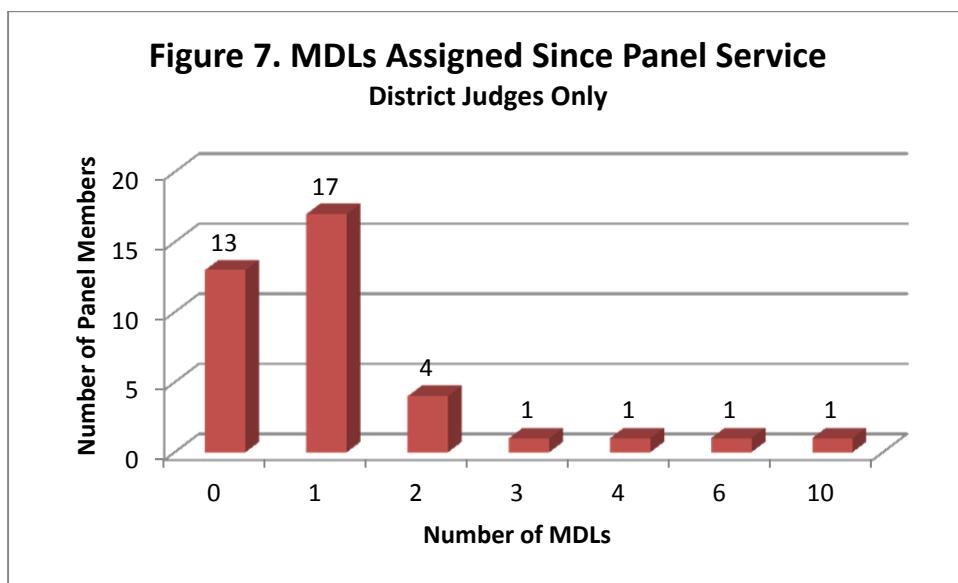
<sup>111</sup> For a complete list of Panel members and their terms, see Appendix Table A.

<sup>112</sup> See Heyburn, *supra* note 54, at 2227; *Chair of Judicial Panel Sees Role as Gatekeeper*, The Third Branch, Vol. 37, Num. 11, November 2005.

<sup>113</sup> See “Judicial Panel on Multidistrict Litigation Reorganized,” The Third Branch News Letter (June 2000).

## 2. Interests of Panelists

Judges cannot sit in cases in which they have a financial stake under the rules of ethics. But, other interests may be implicated by specific cases. For example, the MDL Panel may select one of its own members to serve as the transferee judge. The appointment is seen as recognition of a judge's skill and acumen and a sign of her status. An MDL judge's workload will be calculated to reflect the addition of the complex MDL matter. Work on MDL matters typically involves more complex and/or novel issues and sophisticated counsel. And, any ruling has far-reaching consequences. If a trial judge wants to be involved in interesting and important dispute resolution, MDL cases offer an opportunity to have an impact.



We found that Panel members are frequently assigned MDLs as reflected in Figure 7. But, many factors other than self-serving bias may account for that frequency, including seniority and prior experience. We tested whether MDL Panel membership explained the selection of a judge to serve as the transferee judge through a multivariate model presented in Table 3. We control for factors which are frequently cited by the Panel and commentators as important to its decision.<sup>114</sup>

<sup>114</sup> See Williams & George, *supra* note.

**Table 3. Regression Model of the MDL Panel's Choice of Transferee Judge: 2005-2009**

Variable	Coefficient	Robust Std. Error	P-Value
Chief Judge of the district at the time of the order	<b>0.5717</b>	0.2057	0.005
Senior judge at the time of the order	<b>-1.1135</b>	0.1543	0.000
Panel member at the time of the order	<b>1.2658</b>	0.4664	0.007
Panel member during career	0.4708	0.6109	0.441
Former Chief Judge	<b>0.5569</b>	0.1821	0.002
Number of cases per judge in district	<b>-0.0003</b>	0.0000	0.000
Judicial Cohort	0.0366	0.1176	0.756
Constant	<b>-2.7619</b>	0.0833	0.000

*The table reports results from a logit model estimating the district judge to whom an MDL is assigned for all MDLs created between 2005 and 2009. The data is based on 330 orders and 7,521 potential judges. The dependent variable is whether the Panel transferred to the judge (1=yes, 0=no). The independent variables related to the judges' experience are collected from the FJC judicial biographies database. District court workload is based on Administrative Office data. Data on the MDL Panel and judicial cohort were collected by the authors.*

*Statistically significant covariates are **bolded**.*

The multivariate model in Table 3 reveals that a number of judicial characteristics affect, negatively or positively, the probability that an MDL will be transferred to a judge.<sup>115</sup> Current and former chief judges as well as current members of the MDL Panel are more likely to be assigned an MDL whereas senior judges are less likely, all else being equal. Predicted probabilities of the factors above were estimated, and the results are shown in Table 4.

<sup>115</sup> The model correctly predicts 96% of the observations in the dataset, but reduces the error by less than 1%. Because there are multiple observations for the same MDL number, we clustered the results on the MDL number so the estimates of the standard error were more robust.

**Table 4. Factors Affecting Probability of Designation as Transferee Judge for Judges in Transferee District: 2005-2009**

Variable	Predicted Probability of Assigning Case to Judge
<b>Baseline</b>	5%
Current Chief Judge	9%
Senior judge	2%
Former Chief Judge	9%
Current JPML member	17%
Caseload minimum	6%

*The table reports the likelihood of assigning a case to a district judge given either mean or modal values of all other independent variables in the model reported in Table 3.*

The baseline probability is the likelihood that a case will be assigned to a specific judge given that the judge has never been Chief Judge, is on active status, has not served on the MDL Panel, sits on a district court with an average annual caseload per judge (as calculated by the Administrative Office of the U.S. Courts), and the judge is not from the same judicial cohort as a current Panel member. As reflected in Table 3, the likelihood of any specific judge being assigned the MDL is approximately five percent. Senior judges are less than half as likely as their active colleagues to receive the transfer. Chief Judges, both former and current, are nearly twice as likely to receive the transfer, and current Panel members are more than three times as likely to take an MDL assignment. The workload of judges has minimal effect; even the lowest caseload only increases the probability of assignment by one percentage point.

The MDL Panel, then, frequently draws on the experience of its own members to manage complex litigation. The Chief Justice's appointment of a district judge likely reflects the Chief's assessment of the judge's knowledge and experience with complex cases. Indeed, Warren staffed the first Panel with judges who were at the vanguard of complex litigation, managing the electrical equipment cases. Thus, the Panel selects from its own ranks with the confidence that its members can handle the unique challenges of MDL litigation. Yet, self-selection also may raise some concerns about the ability of the Panel to objectively evaluate a prospective transferee judge's qualifications and concerns about self-dealing by the court.

### 3. Control by the Chief Justice

The Article III appointment process for federal judges has been the subject of a great deal of research and discussion, but far less attention has been paid to appointments *within* the judicial system.<sup>116</sup> Where the Chief Justice appoints, we might expect to see the appointing Chief's preferences reflected in the identity and behavior of the MDL Panel judges. That is, as Ted Ruger has written in his research on the Chief Justice's appointment power, the unchecked power grants the Chief "unusual latitude to shape outcomes by matching particular kinds of judges with particular tribunals."

If it is not prior judicial experience with multidistrict litigation that makes a judge a likely candidate for appointment to the MDL Panel, what characteristic could be driving these appointments? The discussions above show that the differences between the panel and the bench as a whole are not great, with some exceptions. In fact, the MDL looks much like other elite organizations within the judiciary.

One possibility is that the Article III judges appointed by the Chief Justice are more like the Chief than other members of the judiciary. A modest literature suggests that the appointment power of the Chief Justice allows him to shape judicial administration in line with his own preference.<sup>117</sup>

To consider this possibility we examined the Judicial Common Space scores for all Article III judges between 1968 and 2011.<sup>118</sup> Of the 2068 judges with scores, the average ideology was .03, a moderate to conservative judge. Members of the Judicial Conference were more conservative, with a score of .07, a statistically significant difference at the .05 level. On the other hand, member of the MDL Panel were not different from the rest of the Article III judiciary, with an average score of -.01, but the difference was not statistically significant.

While group differences are certainly interesting, perhaps a more interesting relationship can be found in the variation of appointments by individual Chief Justices.

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<sup>116</sup> But see Dawn M. Chutkow, *Policy Control, Political Entrepreneurs, and the Courts: Judicial Conference Committee Appointments*, Working Paper (August 2012); Theodore Ruger, *Chief Justice Rehnquist's Appointments to the Foreign Intelligence Surveillance Act Court: An Empirical Perspective*, 101 NW. L. REV. 239 (2007); 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. PENN. L. REV. 1575 (2006).

<sup>117</sup> See Chutkow, *supra*; Fish 1973; Nixon 2003; for an example of appointment to specialized courts see Ruger 2004.

<sup>118</sup> See Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303 (2007); <http://epstein.usc.edu/research/JCS.html>. (providing the individual scores). While not all judges have Common Space scores, the vast majority do. Of the 2371 judges in our study, 2068 had a Common Space score (87.2%). As with service in the Article III courts, ideology scores are based on the first available score for each judge.

Table 5 below shows the average score of each Chief Justice appointing to the MDL Panel, along with the Chief's score and the average distance for each Chief's appointments.

**Table 5. Average Ideology of Chief Justice's MDL Panel Appointees**

Chief Justice	Justice's Ideology	Average Ideology of Appointees (N)	Average Absolute Distance between Chief and Appointee
Earl Warren	-0.11	-0.13 (7)	0.24
Warren Burger	0.22	-0.13 (11)	0.44
William Rehnquist	0.63	0.18 (18)	0.45
John Roberts	0.53	-0.14 (9)	0.67

While Chief Justice Rehnquist was the only chief justice to appoint more conservative members of the panel, on average, Chief Justice Roberts appoints member of the MDL Panel the most unlike himself in terms of ideology. In fact, the appointments of Chief Justice Rehnquist are the most unlike any other group in terms of their conservatism, with statistically significant differences between the appointments of Rehnquist and Burger, Rehnquist and Roberts, and the appointments of Rehnquist to non-panel members.<sup>119</sup> All other ideological differences are not statistically significant at conventional levels. Chief Justice Warren appointed members of the Panel most like himself, and his appointments differed significantly from Chief Justices Rehnquist and Roberts. In terms of ideological distance, no other relationships are statistically significant.<sup>120</sup>

As noted above, the members of the Judicial Conference Committees, on average, are more conservative than the Article III judiciary as a whole during our time period. As the table below shows, this is largely driven by more conservative conference members appointed by Chief Justice Roberts. Table 6 below show the differences in appointees for the three Chief Justices.

<sup>119</sup> Those were not members of the JPML had an average ideology of .03.

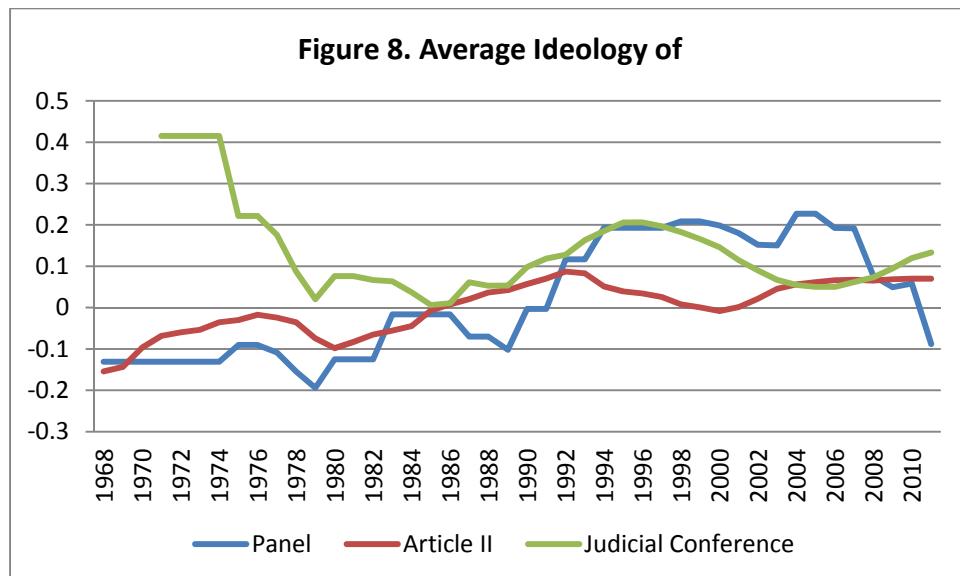
<sup>120</sup> While a more generous comparison might be made between the appointments of a Chief and the judges eligible for them to appoint at any given time, the data are not structured to test that relationship at this time.

**Table 6. Average Ideology of Chief Justice's Conference Committee Appointees**

Chief Justice	Justice's Ideology	Average Ideology of Appointees (N)	Average Absolute Distance between Chief Justice and Appointee
Warren Burger	0.22	-0.00 (71)	0.33
William Rehnquist	0.63	0.06 (633)	0.57
John Roberts	0.53	0.14 (121)	0.39

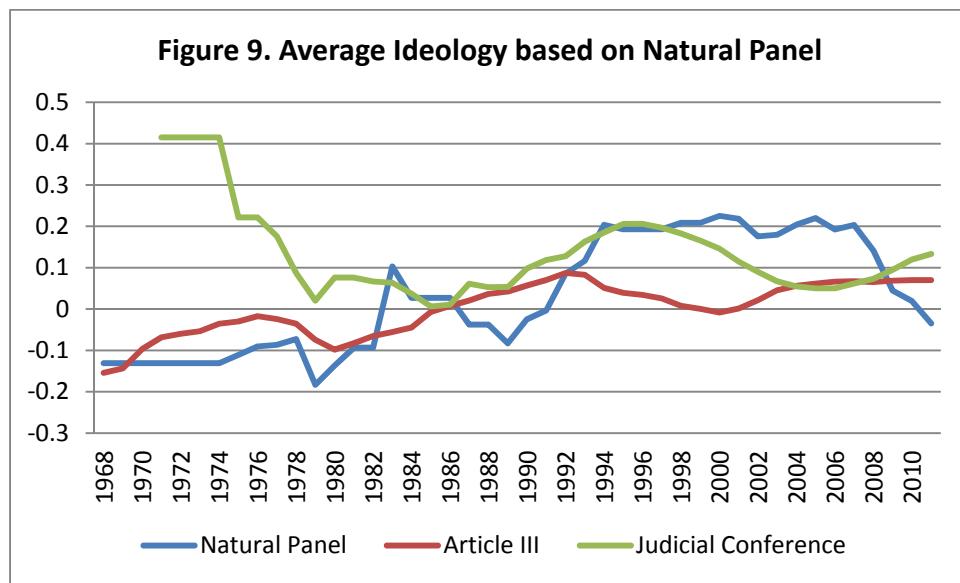
On average, the appointments of Chief Justice Roberts to the Judicial Conference Committees are more moderate than himself, but more conservative than those of his colleagues, and the differences are statistically significant. In fact, both the appointments of Chief Justice Rehnquist and Chief Justice Roberts are statistically significant different from those who do not serve on Conference Committees.<sup>121</sup> In terms of the absolute distance between a Chief and his appointee, we find that Rehnquist appointed committee members less like himself (in terms of ideology) than either of his counterparts, though he appointed substantially more members overall. The differences between Rehnquist and the other Chief Justices are statistically significant.

To gather a sense of how these appointments are affecting the ideological composition of the MDL Panel and the Judicial Conference Committees over time, we plotted the average ideology for each group along with the Article III judiciary as a whole by time. The results are shown below.



<sup>121</sup> The average ideology of a non-committee member is .03.

The above table shows the average ideology for members of the MDL Panel, all Article III judges, and members of the Committees of the Judicial Conference by time. The averages for the MDL Panel were created by estimating the average ideology for all judges serving on the MDL Panel in a given year, regardless of the Natural Panel on which they served (for more on this, see below). This means that in years with a significant amount of MDL Panel turnover, such as 2000, more than seven judges are included in the estimate. While this runs counter to understanding the dynamics of any individual panel, it is more comparable to the averages for entire judiciary and the members of the judicial conference, which are estimated the same way.

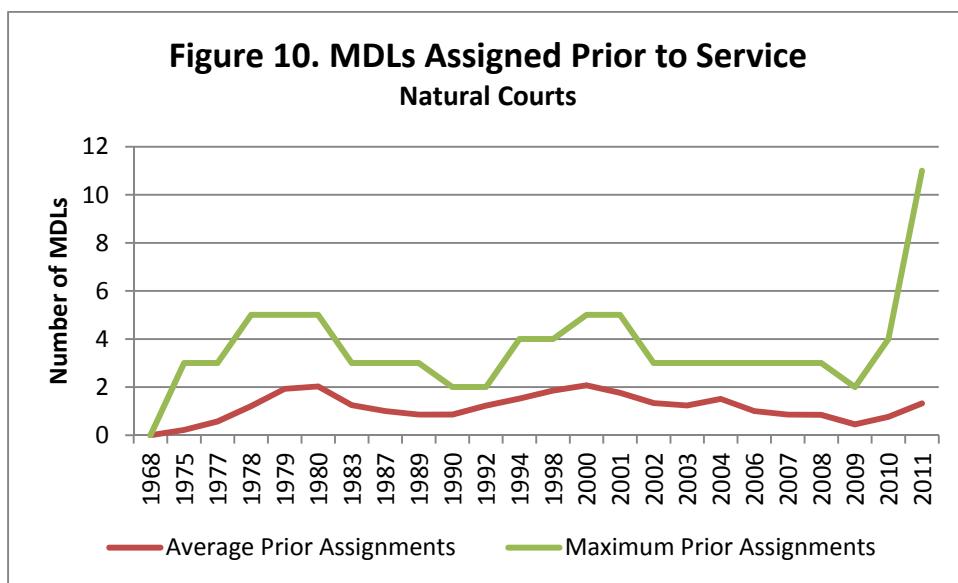


To gain a sense of the panel dynamics, average ideology scores were estimated for each individual panel, and then averaged by year. These averages are plotted in the table above, along with the averages for all Article III courts and the members of the Judicial Conference for comparison. Both charts show some interesting patterns. The Judicial Conference committee began more conservatively than the MDL Panel or the Article III judiciary as a whole, but all three are much closer ideologically now than they have been in the past. This is a function of the MDL Panel and the judiciary becoming more conservative and of the Judicial Conference moving in a more liberal direction.

Overall though, it would appear as if members of the MDL Panel are not significantly different from the rest of the Article III, nor have they varied all that greatly across the four Chief Justices appointing them. One relationship does stand out, however. Thirty-one of the 45 members of the Panel were appointed to both the panel and the Judicial Conference Committee, and only two of the thirty-one served on a Judicial Conference Committee after serving on the MDL Panel. Thus, perhaps Conference Committee service puts a judge on the radar of the Chief Justice for appointment to the MDL Panel.

With all the variation in the MDL Panel, the Judicial Conference Committees, and the judiciary as a whole, it is important to step back and summarize what we know about the MDL Panel and how it fits into the larger judiciary. One way to summarize this information is by looking at “Natural Panel” similar to looking at Natural Courts. Appendix Table B shows the variation in court type, women’s representation, Chief Justice Appointments, ideology, and amount of MDL experience.

One interesting finding of looking at the Natural Panel is the ebbs and flows of prior MDL experience among panel members serving in any given year. Figure 10 shows how the amount of MDL experience prior to joining the MDL Panel changed over time during the period of our study.



While the average amount of experience with managing complex cases has stayed between roughly 1 and 2 cases per judge since the early years of the MDL Panel, the maximum number of cases for any individual judge has varied quite a bit. (The minimum number of cases is 0 for 45 out of 50 natural panels). The appointment of Judge Charles Breyer brought a wealth of MDL experience to the Panel, with 11 prior MDLs before serving on the MDL Panel. This appointment more than doubled the average amount of experience in the panel prior to Breyer’s appointment.

#### IV. CONCLUSION

[UNDER CONSTRUCTION]

## APPENDICES

### A. Members of the U.S. Judicial Panel on Multidistrict Litigation: 1968-2012

### B. Natural MDL Panels: Composition of Panels with Constant Membership

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#### **Appendix A: Members of the U.S. Judicial Panel on Multidistrict Litigation: Appointed by U.S. Supreme Court Chief Justice from 1968 to 2012**

Judge	Appointing President	Home Court	Appointed to Panel	Appointing Chief Justice	Resigned from Panel	Chair Appointment
Alfred P. Murrah	FDR	10 <sup>th</sup> Cir.	5/29/1968	Warren	10/30/1975	5/29/1968
Edward Weinfeld	Truman	NY-S	5/29/1968	Warren	11/15/1978	-
Edwin A. Robson	Eisenhower	IL-N	5/29/1968	Warren	7/1/1979	-
John Minor Wisdom	Eisenhower	5 <sup>th</sup> Cir.	5/29/1968	Warren	11/15/1978	11/6/1975
Joseph S. Lord, III	JFK	PA-E	5/29/1968	Warren	7/17/1978	-
Stanley A. Weigel	JFK	CA-N	5/29/1968	Warren	7/1/1979	-
William H. Becker	JFK	MO-W	5/29/1968	Warren	2/1/1977	-
Andrew A. Caffrey	Eisenhower	MA	11/6/1975	Burger	6/1/1990	2/20/1980
Roy W. Harper	Truman	MO-E	2/1/1977	Burger	9/30/1983	-
Charles R. Weiner	LBJ	PA-E	10/25/1978	Burger	9/30/1983	-
Murray J. Gurfein	Nixon	2 <sup>nd</sup> Cir.	11/15/1978	Burger	12/16/1979	11/15/1978

**Appendix A: Members of the U.S. Judicial Panel on Multidistrict Litigation: Appointed by U.S. Supreme Court Chief Justice from 1968 to 2012**

Judge	Appointing President	Home Court	Appointed to Panel	Appointing Chief Justice	Resigned from Panel	Chair Appointment
Edward S. Northrop	JFK	MD	6/6/1979	Burger	9/30/1983	-
Robert H. Schnacke	Nixon	CA-N	7/1/1979	Burger	11/19/1990	-
Fred Daugherty	JFK	OK-E	3/1/1980	Burger	11/19/1990	-
Sam C. Pointer	Nixon	AL-N	3/1/1980	Burger	12/7/1987	-
Hugh S. Dillin	JFK	IN-S	10/1/1983	Burger	10/26/1992	-
Louis H. Pollack	Carter	PA-E	10/1/1983	Burger	10/26/1992	-
Milton Pollak	LBJ	NY-S	10/1/1983	Burger	11/30/1994	-
Halbert O. Woodward	LBJ	TX-N	3/8/1989	Rehnquist	6/23/1992	-
John F. Nangle	Nixon	MO-E	6/1/1990	Rehnquist	12/1/2000	6/1/1990
Robert R. Merhige, Jr.	LBJ	VA-E	11/19/1990	Rehnquist	6/8/1998	-
William B. Enright	Nixon	CA-S	11/19/1990	Rehnquist	6/1/2000	-
Barefoot Sanders	Carter	TX-N	10/26/1992	Rehnquist	6/1/2000	-
Clarence A. Brimmer	Ford	WY	10/26/1992	Rehnquist	6/1/2000	-
John F. Grady	Ford	IL-N	10/26/1992	Rehnquist	6/1/2000	-

**Appendix A: Members of the U.S. Judicial Panel on Multidistrict Litigation: Appointed by U.S. Supreme Court Chief Justice from 1968 to 2012**

Judge	Appointing President	Home Court	Appointed to Panel	Appointing Chief Justice	Resigned from Panel	Chair Appointment
Louis C. Bechtle	Nixon	PA-E	12/6/1994	Rehnquist	6/29/2001	–
John F. Keenan	Reagan	NY-S	6/8/1998	Rehnquist	6/1/2006	–
Bruce M. Selya	Reagan	1 <sup>st</sup> Cir.	6/1/2000	Rehnquist	6/1/2004	–
Julia Smith Gibbons	W. Bush (Reagan)	6 <sup>th</sup> Cir. (TN-W) <sup>122</sup>	6/1/2000	Rehnquist	12/30/2003	–
Morey L. Sear	Ford	LA-E	6/1/2000	Rehnquist	12/31/2002	–
Wm. Terrell Hodges	Nixon	FL-M	6/1/2000	Rehnquist	6/13/2007	12/1/2000
D. Lowell Jensen	Reagan	CA-N	12/1/2000	Rehnquist	06/01/2008	–
J. Frederick Motz	Reagan	MD	7/13/2001	Rehnquist	06/01/2009	–
Robert L. Miller, Jr.	Reagan	IN-N	1/1/2003	Rehnquist	10/15/2010	–
Kathryn H. Vratil	H.W. Bush	KS	2/2/2004	Rehnquist	NA	–
David R. Hansen	H.W. Bush	8 <sup>th</sup> Cir.	7/9/2004	Rehnquist	05/01/2011	–
Anthony J. Scirica	Reagan	3 <sup>rd</sup> Cir.	6/1/2006	Roberts	06/15/2008	–

<sup>122</sup> Judge Julia Smith Gibbons was a district judge in the Western District of Tennessee at the time of her appointment to the MDL Panel. She was appointed to the district bench by President Reagan. President George W. Bush nominated her to the court of appeals.

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**Appendix A: Members of the U.S. Judicial Panel on Multidistrict Litigation: Appointed by U.S. Supreme Court Chief Justice from 1968 to 2012**

Judge	Appointing President	Home Court	Appointed to Panel	Appointing Chief Justice	Resigned from Panel	Chair Appointment
John G. Heyburn II	H.W. Bush	KY-W	6/14/2007	Roberts	NA	6/14/2007
W. Royal Furgeson	Clinton	TX-W	09/22/2008	Roberts	NA	
Frank C. Damrell, Jr.	Clinton	CA-E	12/09/2008	Roberts	10/15/2011	
David W. Trager	Clinton	NY-E	10/07/2009	Roberts	04/01/10	
Barbara S. Jones	Clinton	NY-S	05/21/2010	Roberts	NA	
Paul J. Barbadoro	H.W. Bush	NH	11/08/2010	Roberts	NA	
Marjorie O. Rendell	Clinton	3rd Cir.	05/24/2011	Roberts	NA	
Charles R. Breyer	Clinton	CA-N	10/16/2011	Roberts	NA	

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*The U.S. Judicial Panel on Multidistrict Litigation is comprised of seven district and/or circuit judges. Any sitting district or circuit judge may be appointed by the sitting U.S. Supreme Court Chief Justice to fill a vacant seat, with the one constraint that no two judges may sit in the same circuit.*

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