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JUDICIAL ADMINISTRATION

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HEARINGS

BEFORE

SUBCOMMITTEE NO. 5

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

3
EIGHTY-NINTH CONGRESS

SECOND SESSION

ON

H.R. 3991

RELATING TO THE RETIREMENT OF JUDGES OF THE TERRITORIAL
DISTRICT COURTS

H.R. 6703

TO AMEND SECTION 144 OF TITLE 28 OF THE UNITED STATES CODE

H.R. 8276

TO PROVIDE FOR THE TEMPORARY TRANSFER TO A SINGLE DIS-
TRICT FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEED-
INGS OF CIVIL ACTIONS PENDING IN DIFFERENT DISTRICTS
WHICH INVOLVE ONE OR MORE COMMON QUESTIONS OF FACT,
AND FOR OTHER PURPOSES

H.R. 16575

TO PROVIDE FOR THE APPOINTMENT OF UNITED STATES
MARSHALS BY THE ATTORNEY GENERAL

AUGUST 31, 1966

Serial No. 21

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WEDNESDAY, AUGUST 31, 1966

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE No. 5
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10:35 a.m., pursuant to recess, in room 2141, Rayburn House Office Building, Hon. Emanuel Celler (chairman of the committee) presiding.

Present: Representatives Celler, Donohue, and MacGregor.

Also present: Kenneth R. Harkins, chief counsel, Antitrust Subcommittee, and Martin R. Hoffmann, associate counsel.

The CHAIRMAN. The committee will come to order.

The first bill on the agenda this morning is H.R. 16575 to provide for the appointment of U.S. marshals by the Attorney General, and we have with us Assistant Attorney General, the Honorable Barefoot Sanders, whom we will be glad to hear.

(The bills follow:)

[H.R. 3991, 89th Cong., 1st sess.]

A BILL Relating to the retirement of judges of the territorial district courts

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the second paragraph of section 373 of title 28, United States Code, is amended to read as follows:

"Any judge of any such courts who is removed by the President of the United States upon the sole ground of mental or physical disability, or who fails of reappointment, shall be entitled, upon attaining the age of sixty-five years or upon relinquishing office if he is then beyond the age of sixty-five years, (a) if his judicial service aggregated sixteen years or more, to receive during the remainder of his life the salary he received when he relinquished office, or (b) if his judicial service aggregated less than sixteen years but not less than eight years, to receive during the remainder of his life that proportion of such salary which the aggregate number of years of his judicial service bears to sixteen."

[H.R. 6703, 89th Cong., 1st sess.]

A BILL To amend section 144 of title 28 of the United States Code

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 144 of title 28 of the United States Code is amended so as to read:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than thirty days before the trial or hearing of the proceeding, or good cause shall be shown for failure to file it within such time. An order shall then be entered directing that an authenticated copy

of the affidavit shall be forthwith certified to the chief judge of the circuit in which such proceeding is pending, and said chief judge, or any judge designated by him, shall determine whether the affidavit is timely and sufficient. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

[H. R. 8276, 89th Cong., 1st sess.]

A BILL To provide for the temporary transfer to a single district for coordinated or consolidated pretrial proceedings of civil actions pending in different districts which involve one or more common questions of fact, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 87 of title 28, United States Code, is amended by inserting therein after section 1406:

"§ 1407. Multidistrict litigation

"(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will promote the just and efficient conduct of such actions: *Provided, however,* That no action shall be so transferred without the consent of the district court in which it is pending. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counterclaim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

"(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

"(c) Proceedings for the transfer of an action under this section may be initiated by the judicial panel on multidistrict litigation by notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated. Such notice shall specify the manner, time, and place of the hearing to determine whether the transfer shall be made. The panel's order of transfer shall be entered in the office of the clerk of the district court of the transferee district and shall be effective when thus entered. With the order so filed there shall be filed the consent of the district courts from which the actions are transferred. The clerk of the transferee district court shall forthwith transmit a certified copy of such order to the clerk of the district court of the district from which the action is being transferred.

"(d) The 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. The concurrence of four members shall be necessary to any action by the panel.

"(e) When actions are transferred hereunder, no district court refusing to consent to transfer of related litigation may make any order for or permit discovery in conflict with the discovery proceedings in the transferred actions.

"(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure."

SEC. 2. The analysis to chapter 87 of title 28, United States Code is amended by inserting the following new section:

"1407. Multidistrict litigation."

after

"1406. Cure or waiver of defects."

[H. R. 16575, 89th Cong., 2d sess.]

A BILL To provide for the appointment of United States marshals by the Attorney General

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 541(a) of title 28 of the United States Code is amended to read as follows: "The Attorney General shall appoint a United States marshal for each judicial district."

(b) Section 541(c) of title 28 of the United States Code is hereby repealed.

(c) Section 545 of title 28 of the United States Code is hereby repealed.

(d) The caption of section 541 of title 28, United States Code, is amended to read

"§ 541. Appointment and residence of marshals."

(e) The sectional analysis at the beginning of chapter 33 of title 28, United States Code, is amended by changing item 541 to read "Appointment and residence of marshals" and changing item 545 to read "Repealed."

SEC. 2. (a) Section 24(b) of the Organic Act of Guam, as amended (Act of Aug. 1, 1950, 64 Stat. 390; 48 U.S.C. 1424b(b)), is amended to read as follows: "The President shall appoint, by and with the advice and consent of the Senate, a United States attorney for Guam to whose office the provisions of chapter 31 of title 28 shall apply."

(b) Section 24 of such Act is further amended by redesignating the present subsection (c) as subsection (d) and inserting a new subsection (c) reading as follows:

"The Attorney General shall appoint a United States marshal for Guam to whose office the provisions of chapter 33 of title 28 shall apply."

SEC. 3. (a) Section 45(a) of title 3 of the Canal Zone Code is amended to read as follows: "The Attorney General shall appoint a United States marshal for the District of the Canal Zone to whose office the provisions of chapter 33 of title 28, United States Code, shall apply."

(b) Section 45(b) of title 3 of the Canal Zone Code is hereby repealed.

(c) Subsections (c), (d), and (e) of section 45 of title 3 of the Canal Zone Code are redesignated as subsections (b), (c), and (d), respectively.

(d) The caption of section 45 of title 3 of the Canal Zone Code is amended to read:

"§ 45. Appointment, leave, and residence of United States marshal; deputies and assistants; salaries."

(e) The sectional analysis at the beginning of subchapter II of chapter 1 of title 3 of the Canal Zone Code is amended by changing item 45 to read "Appointment, leave, and residence of United States marshal; deputies and assistants; salaries."

SEC. 4. Nothing in this Act shall affect the tenure of any United States marshal serving under a presidential appointment on the effective date of this Act.

STATEMENT OF HON. BAREFOOT SANDERS, ASSISTANT DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. SANDERS. Mr. Chairman and members of the subcommittee, I appreciate your affording me the opportunity to appear and testify for the Department in support of H.R. 16575 introduced by the chairman.

This bill provides for the appointment of U.S. marshals by the Attorney General. Its purpose is to provide a merit system of career appointments. Its effect will be to complete the transformation of the U.S. marshals' service into a career service.

The Office of U.S. Marshal was created by the Judiciary Act of 1789. That act did not say how marshals were to be appointed, but shortly after its enactment President Washington, on the authority of article II, section 2 of the Constitution, nominated and the Senate confirmed the first 13 marshals. In 1801 this practice was written into law. The appointment of marshals by the President with the

advice and consent of the Senate for a term of 4 years—with two exceptions—is now provided for in 28 U.S.C. 541.

In the early years of the service, marshals had a variety of duties: to take the census, to execute courts martials, to be fiscal agents of the courts. They reported to the Secretaries of Treasury, Interior, and the Navy and to the courts. They were the sole Federal law enforcement presence in many areas, and their exploits and adventures are a part of the history and lore of the frontier West.

The United States marshals have been a part of the Department of Justice since the Department was created in 1870. There are now 92 marshals and 620 deputy marshals, serving in 91 judicial districts.

I might add here, Mr. Chairman, that the reason for the difference between 92 and 91 is there are 2 marshals in South Carolina, but only 1 judicial district in the State, due to the consolidation of the 2 former districts by legislation last year.

No statute or regulation prescribes any minimum qualifications or standards of experience for U.S. marshal nominees. The duties of the marshal and their deputies may be classified broadly as follows: service of process, transportation and commitment of prisoners, attendance upon the court and preserving order in the courtroom, and service as disbursing officers.

These are ministerial, not policymaking, responsibilities. They can and should be supervised and performed by career employees, selected on a merit basis through established Civil Service procedures outside the area of political patronage.

Let me say that our support of this bill is not a criticism of our present marshals. Many are well qualified. Twenty have advanced from the post of deputy marshal or have had previous experience as a marshal. We simply believe that over the long pull, a merit system of appointments will produce a better qualified marshal than the present method.

Indeed, the functions of the marshals' service are to a great extent already under civil service. The 278 clerical assistants have always been under civil service. On July 1 of this year the first steps were taken to place deputy marshals under competitive civil service by requiring that all new appointments to the office must be selected from those who have passed the Treasury enforcement examination.

Previously, since 1954, deputy marshals had been under civil service, but in noncompetitive status.

This bill would complete the task of making the marshals' service entirely a merit and career service. Appointments of marshals by the Attorney General would be made in accordance with regulations of the Civil Service Commission. We believe that the result will be a better marshals' service offering the incentive of promotion to the top to those within, and affording improved service to the public because of the expertise which only a career service can build.

Mr. Chairman, this proposal is not new. Extension of the merit system to United States marshals was recommended in 1912 by President Taft's Commission on Economy and Efficiency. It was recommended again in 1937 by President Roosevelt's Commission on Administrative Management, in 1949 under President Truman by the first Hoover Commission, and in 1955 under President Eisenhower by the second Hoover Commission. I think it can fairly be said that all of these groups had the same central purpose—to provide for better

administration and better management in Government and better service to the public. We believe that passage of this legislation will accomplish that purpose.

There is no need for the President and the Senate to devote attention to filling 92 jobs which are purely ministerial and law enforcement positions. No other activity that we know of has as high a proportion of presidential appointees to the overall work force—92 out of approximately 1,000, or about 1 in 10, are Presidential appointees.

Certainly not the FBI with its 15,000 employees, nor the Immigration Service, nor the Bureau of Prisons, all within the Department of Justice and all a part of law enforcement. Certainly not the Internal Revenue Service with 12,000 agents and 2 presidential appointees, nor the Secret Service with approximately 600 agents and a director appointed by the Secretary of the Treasury, nor the postal inspectors with over 1,000 inspectors and a chief appointed by the Postmaster General.

In summary, Mr. Chairman, this bill will provide for the appointment of non-policy-making public servants on the basis of proven merit. It will provide an improved structure of accountability within the Justice Department. It will assure continuity and improvement of service—

The CHAIRMAN. Mr. Sanders, I think there is great merit in the bill, but what is the prospect of getting a bill like this through the Senate?

Mr. SANDERS. Mr. Chairman, I have not pursued it over there. I would be hopeful about it. I think we have seen that a great many Senators recognize the problem that political patronage appointments pose for them, and it has been said in previous floor debate on the subject many years ago that when they make one appointee to a position of this type, they make 1 friend and 20 enemies, and I think that is a point that is getting around.

The CHAIRMAN. That does not prevent them from trying to keep unto themselves as much patronage as possible. No similar bill has been offered, as far as I know, in the Senate.

Mr. SANDERS. No, sir; we decided to start here first, Mr. Chairman.

The CHAIRMAN. I hate like the mischief to go to a lot of effort and pass a bill like this and have it disregarded in the Senate.

Mr. SANDERS. That, of course, is a hazard we encounter with a good deal of legislation; perhaps it would be true here more than most. I must be frank to say I have not explored the Senate possibilities, but we know there is some support there for it.

The CHAIRMAN. Appointments of marshals now are made upon the recommendation of the Senators usually, are they not?

Mr. SANDERS. Yes, sir. There are varied practices pursued on that, but they always have to be with the approval of the Senator.

The CHAIRMAN. I mean the names are sent to the White House for approval. The procedure is more or less automatic, is it not?

Mr. SANDERS. No, sir; there are those Senators who follow the policy of submitting a whole list of names and ask us to choose the most qualified candidate, but it is always checked with the Senator from the majority party in the State of the district concerned. Again, it is a patronage appointment, no question about it.

The CHAIRMAN. The deputy marshals are appointed by the Attorney General?

Mr. SANDERS. Yes, sir.

The CHAIRMAN. Are the names of the deputy marshals recommended by the marshal usually?

Mr. SANDERS. Up until July the first of this year they were recommended by the marshal himself and then hired by the Attorney General. Since July 1st they must be taken from the civil service register of people who passed Treasury enforcement examinations, so only those people, only those eligibles can be recommended by the marshal to the Attorney General.

The CHAIRMAN. Excuse me just a minute.

Go ahead, Mr. Sanders.

Mr. SANDERS. At the present time—that is, since July 1st—the only people which the marshal can recommend for appointment as deputy marshal are people who have passed the Treasury enforcement examination and have been certified on the civil service register to the marshal as having passed that examination. Those names can then be submitted to the Attorney General by the marshal and the Attorney General approves or disapproves their appointment. They are strictly merit, competitive appointments.

The CHAIRMAN. Does that conclude your statement, Mr. Sanders?

Mr. SANDERS. Yes, sir; I had an extra paragraph, but it is there in the record and I am sure it can fit in.

In summary, the present method is an anachronism. We want to build a career marshals' service and we hope this bill will do that. We hope it will have your favorable consideration, Mr. Chairman.

Mr. MACGREGOR. Mr. Sanders, do you have any figures as to multiple-term service among marshals? In other words, what is the average length of service; the term is 4 years, is it not?

Mr. SANDERS. Yes, sir; the term is 4 years and then a great many of them are renominated when the same administration stays in power. The length of service of marshals—I have the figures on that here if I can place my hands on them. By and large the majority of marshals, I think about 40 or so, have less than 5 years' service and about 46 have 5 to 10 years' service. I may be a little high on that figure. Twenty of the marshals, as I mentioned in my statement, have previous service as deputies or as former marshals. That is 20 of our present marshals.

Mr. MACGREGOR. You have used the figures 40, 46, and 20. What percentage of the total have you covered in those?

Mr. SANDERS. I think I exceeded the total, Congressman. Here, I have the figures:

Less than 5 years' service, 44; 5 to 10 years' service, 46; 10 to 15 years' service, 2; making a total of 92.

I might add that in that 46 with 5 to 10 years' service are a great many renominations of people who have just over 5 years' service having been appointed in 1961 and now entering their second 4-year term.

The CHAIRMAN. Mr. Sanders, what happens to the term of the present marshals?

Mr. SANDERS. They are protected under this bill; they will serve out their present term unless sooner removed by the President.

The CHAIRMAN. After their 4-year term is up, they are out?

Mr. SANDERS. When their terms are up, they would have to come under this system; yes, sir.

The CHAIRMAN. In some places the term is more than 4 years, is it not?

Mr. SANDERS. Only in two places, Mr. Chairman. In the Canal Zone it is 8 years and in the Virgin Islands there is no term.

The point is, of course, that they have no guarantee——

The CHAIRMAN. In other words, in the Virgin Islands he has a perpetual appointment during his lifetime.

Mr. SANDERS. It is at the pleasure of the Attorney General.

The CHAIRMAN. Oh, at the personal wish of the Attorney General?

Mr. SANDERS. Yes, sir; it is an appointment made by the Attorney General without the confirmation of the Senate. It is the only such appointment of a marshal. It is not under the civil service, competitive or noncompetitive. The Canal Zone, as I say, is 8 years and that is a presidential appointment.

Mr. MACGREGOR. Mr. Sanders, at the bottom of page 2 of your statement you indicate the belief of the Justice Department that the result of the passage of the bill under consideration will be a better marshal service offering the incentive of promotion to the top to those within and affording improved service to the public because of the expertise which only a career service can build.

Mr. SANDERS. Yes, sir.

Mr. MACGREGOR. Don't we have substantially that now on the basis of the figures that you have given us with respect to those who have served for more than 10 years under the present system?

Mr. SANDERS. No, Congressman, because we only have 2 marshals who have served more than 10 years, and when I am talking about incentive for promotion, we have 20 of our marshals who have previous service as deputies, but the man who is serving in a career position as a deputy, for instance, has little hope unless he can cultivate political contacts that he will be nominated, it seems to me, as a U.S. marshal. These are just part of the facts of life; whereas if they were brought under civil service, competitive or otherwise, it would be on the basis of merit as other civil service appointments are, and those that are deputies, senior deputies, supervisory and chief deputies, we believe would have the incentive of moving on up the line.

As to better service, we think that will result in having at the head of the offices people who are brought in there on a merit system completely divorced from the political arena. And that comes from continuity.

The CHAIRMAN. As to salaries, the Attorney General fixes the salaries of the marshals, does he not?

Mr. SANDERS. We fix the salaries in the Department at this time under a GS classification and they range from GS-11 up to GS-15. We have six who are GS-15's. The majority are GS-13.

The CHAIRMAN. That situation would not be changed?

Mr. SANDERS. That would not be affected by this; no, sir.

Mr. MACGREGOR. What determines the GS rating?

Mr. SANDERS. The job description which, in turn, comes from the responsibility of the office in terms of business, in terms of personnel supervised, in terms of workload in the courts, in terms of workload in the service of process, transportation and commitment of prisoners, and their responsibilities as disbursing agents.

The six largest offices in the country are the ones which have GS-15 marshals.

Mr. MACGREGOR. It is not necessarily based on seniority of service then, but responsibilities and workload in the particular marshal's office involved?

Mr. SANDERS. These things have to do with setting the GS rating entirety. The in-step, of course, within the grade, comes from seniority. I have seen it happen on two or three occasions in the time that I have been here that if in an office the workload substantially increases, we then give consideration to raising the GS classification of that office.

The CHAIRMAN. Thank you very much, Mr. Sanders.

Mr. SANDERS. Thank you, Mr. Chairman.

(Mr. Sanders prepared statement is as follows:)

STATEMENT OF BAREFOOT SANDERS, ASSISTANT DEPUTY ATTORNEY
GENERAL

Mr. Chairman and members of the subcommittee, I appreciate you affording me the opportunity to appear and testify for the Department in support of H.R. 16575 introduced by the Chairman.

This bill provides for the appointment of United States marshals by the Attorney General. Its purpose is to provide a merit system of career appointments. Its effect will be to complete the transformation of the United States marshals' service into a career service.

The office of United States marshal was created by the Judiciary Act of 1789. That Act did not say how marshals were to be appointed but shortly after its enactment President Washington, on the authority of Article II, Section II of the Constitution, nominated and the Senate confirmed the first thirteen marshals. In 1801 this practice was written into law; the appointment of marshals by the President with the advice and consent of the Senate for a term of four years (with two exceptions) is now provided for in 28 U.S.C. 541.

In the early years of the service marshals had a variety of duties—to take the census, to execute courts-martial, to be fiscal agents of the courts. They reported to the Secretaries of Treasury, Interior, and the Navy and to the courts. They were *the* federal law enforcement presence in many areas, and their exploits and adventures are a part of the history and lore of the frontier West.

The United States marshals have been a part of the Department of Justice since the Department was created in 1870. There are now 92 marshals and 620 deputy marshals, serving in 91 judicial districts. No statute or regulation prescribes any minimum qualifications or standards of experience for U.S. marshal nominees. The duties of the marshals and their deputies may be classified broadly as follows: service of process, transportation and commitment of prisoners, attendance upon the court and preserving order in the court room, and service as disbursing officers. These are ministerial, not policy making, responsibilities. They can and should be supervised and performed by career employees, selected on a merit basis through established Civil Service procedures outside the arena of political patronage.

Let me say that our support of this bill is not a criticism of our present marshals. Many are well qualified. Twenty have advanced from the post of deputy marshal or have had previous experience as a marshal. We simply believe that over the long pull a merit system of appointments will produce a better qualified marshal than the present method.

Indeed, the functions of the marshals' service are to a great extent already under the Civil Service system. The 278 clerical assistants have always been under Civil Service. On July 1 of this year the first steps were taken to place deputy marshals under competitive Civil Service by requiring that all new appointments to the office must be selected from those who have passed the Treasury Enforcement Examination.

This bill would complete the task of making the marshals' service entirely a merit and career service. Appointments of marshals by the Attorney General would be made in accordance with regulations of the Civil Service Commission. We believe that the result will be a better marshals' service offering the incentive of promotion to the top to those within, and affording improved service to the public because of the expertise which only a career service can build.

Mr. Chairman, this proposal is not new. Extension of the merit system to United States marshals was recommended in 1912 by President Taft's Commission on Economy and Efficiency. It was recommended again in 1937 by President Roosevelt's Commission on Administrative Management, in 1949 under President Truman by the first Hoover Commission, and in 1955 under President Eisenhower by the second Hoover Commission. I think it can fairly be said that all of these groups had the same central purpose—to provide for better administration and better management in government and better service to the public. We believe that passage of this legislation will accomplish that purpose.

There is no need for the President and the Senate to devote attention to filling 92 jobs which are purely ministerial and law enforcement positions. No other activity that we know of has as high a proportion of Presidential appointees to the overall work force of the organization—92 out of approximately 1,000, or about 1 in 10. Certainly, not the FBI with its 15,000 employees, nor the Immigration Service, nor the Bureau of Prisons, all within the Department of Justice and all a part of law enforcement. Certainly, not the Internal Revenue Service with 12,000 agents and two Presidential appointees, nor the Secret Service with approximately 600 agents and a director appointed by the Secretary of the Treasury, nor the Postal Inspectors with over 1,000 inspectors and a Chief appointed by the Postmaster General.

In summary, this bill will provide for the appointment of non-policy making public servants on the basis of proven merit. It will provide an improved structure of accountability within the Justice Department. It will assure continuity and improvement of service in the marshals' offices and provide incentive to those within the marshals' service.

The present method of appointment of United States marshals is an anachronism. However desirable it may once have been it now has no relevance to the needs of modern law enforcement nor the requirements of efficient administration. We believe that we must strive to build a career service and that this bill will do.

We urge your favorable consideration of H.R. 16575.

H.R. 3991

The CHAIRMAN. The next bill will be H.R. 3991, relating to retirement of judges of the territorial district courts. We have with us the distinguished justice of the Third Circuit Court of Appeals, Judge Albert B. Maris. We will be very glad to hear from you, Judge.

STATEMENT OF JUDGE B. MARIS, THIRD CIRCUIT COURT OF APPEALS, PHILADELPHIA, PA.

Judge MARIS. Thank you. May I, Mr. Chairman, hand up to each of you a little memorandum that will be helpful in following what I have to say, which is very simple, I hope.

(The memorandum referred to is as follows:)

H.R. 3991—RETIREMENT OF TERRITORIAL JUDGES (28 U.S.C. 373)

Any judge of a territorial district court who resigns after attaining the age of 70 years and after serving at least 10 years, or after attaining the age of 65 years and after serving at least 15 years, shall continue to receive during the remainder of his life the salary he received when he relinquished office.

Any judge of a territorial court who is removed solely for physical or mental disability or who fails of reappointment shall be entitled if he is then 65 years of age or, if not, upon attaining that age, to receive during the remainder of his life (a) the full salary he received when he relinquished office, if his judicial service aggregated 16 years, or (b) that proportion of such salary which the aggregate years of his judicial service bears to 16, if his judicial service aggregated less than 16 years but not less than 10 years.

No provision is made for a territorial judge whose judicial service aggregates less than 10 years.

Judge MARIS. This bill would simply provide that a territorial judge who has served 8 years and fails of reappointment or is removed for some physical or mental reason not involving his competency would be entitled to a deferred annuity, deferred pension measured by salary, beginning at age 65, in lieu of the present provision which is that he must have served 10 years before he can receive such a pension.

Now, the background is this, gentlemen: There are two provisions in the present law which I have outlined in the little memorandum here. This simply states the present law with respect to the retirement of territorial judges. The first is that if a judge reaches the age of 70 in office and resigns after serving 10 years, he may receive full salary for the rest of his life; or if he reaches the age of 65 and has served 15 years, he may receive full salary. That is patterned on and follows the pattern of the retirement plan for other Federal judges, but the second provision is the one which we are concerned with here, which is the earlier one, and still in the law, that if a judge is removed—this does not involve resignation—but if he is removed for physical or mental disability or if he fails of reappointment after the expiration of his term, because all these judges are appointed for terms of 8 years, at present he receives the full salary of his office if he has served 16 years. And if he had served 10 but less than 16, he receives a proportion of his salary representing the proportion of his length of service to 16.

The problem arises from the fact that a territorial judge is not appointed for 10 years, but 8 years, which means if he fails of reappointment after the original appointment, he receives no retirement allowance whatever, because under the present law he must have served 10 years in order to get even the deferred allowance at the age of 65.

The purpose of this bill is simply to tailor this retirement provision into the provision for the appointment of such judges, that is, to provide that 8 years' service, the full service of one term, will be sufficient to permit the judge as and when he becomes 65 years of age to receive a pension based upon the proportion of his salary which his length of service bears to 16 years.

Now, I can illustrate the problem by an actual case. Judge Walter Gordon of the District Court of the Virgin Islands, who is one of these territorial judges, was appointed for a term of 8 years. He had a preliminary service under a recess appointment of 1 year, and next July his term will expire, and he will have served 9 years, and he will be 73 years of age, and obviously will not be in normal course considered for reappointment for another term.

But he would go out of office without any retirement allowance whatever because he would not have served 10 years. Through no fault of his, his term will have expired. He would be willing to continue, but his term would have expired, so the simple purpose of this bill is to reduce that minimum length of service required for retirement annuity from 10 to 8 years.

Of course, the amount of the annuity will be reduced also, because it would be based on the actual length of service as contrasted to 16 years, and if the service was 8, it would be eight-sixteenths, or one-half, of salary.

At present if it was 10 years, it would be ten-sixteenths, or five-eighths of salary.

That is the whole purpose of the bill, gentlemen, and we feel it is a matter of simple justice. These gentlemen are appointed to distant

areas; they cut off their connections with the practice of law in their home States. There is one in Guam, one in the Canal Zone, and one in the Virgin Islands.

Mr. MACGREGOR. If the distinguished judge will permit the interruption, are we to understand that service in the Virgin Islands is a hardship post?

Judge MARIS. Well, it is not exactly a hardship from the standpoint of life there. Some of the problems that a judge has to grapple with there are a little difficult, as I happen to know, being on the Court of Appeals for the Virgin Islands and having grappled with a good many of them myself.

Mr. MACGREGOR. I understand it is most attractive.

Judge MARIS. The basic point is that the judge cuts himself off. Judge Gordon came from California; he has no present ties that he could go back to and next year if there is no provision for any retirement allowance, he goes back home without a cent and this we don't think is right.

Mr. MACGREGOR. Judge, how many judges would be affected by this amendment?

Judge MARIS. Three.

The CHAIRMAN. Just three? Who are they?

Judge MARIS. Because the Puerto Rican judges who would have been affected are now being given life tenure by a bill which you passed and the Senate passed last week—the two district judges were under it, they will no longer be under it. The judges are the judge of the District Court of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands. They are the only three involved in this bill and all of those, of course, are distant outlying areas.

The CHAIRMAN. Do they all have more than 8 years?

Judge MARIS. They are all appointed for 8 years; 8 years is the uniform term of office of all three of these judges.

The CHAIRMAN. How long have they served?

Judge MARIS. You mean actually, the present incumbents?

In the case of Judge Shriver in Guam, he is on his second term. He will have served a total of 16 years when his term expires. In the case of Judge Crowe in the Canal Zone, he is also on his second term. He was reappointed, and he will have served 16 years. So this bill really would not affect them. They would have the length of service anyway.

In the case of Judge Gordon, he will have served only 8 years.

The CHAIRMAN. So, only one judge will be personally affected by this bill.

Judge MARIS. One present judge, that is right. What would happen in the future, we do not know.

But these other two men were first appointed rather at a younger age and were therefore of an age for reappointment, but if a man is appointed around 60 and is about 70 or so when his 8 years is up, it is not likely that he will be reappointed.

The CHAIRMAN. Any questions?

Mr. Donohue?

Mr. DONOHUE. Is there any limitation on the age of a person when he will be appointed?

Judge MARIS. No, it is entirely a matter for the President, I suppose, and the Senate. I think the Presidents mostly have followed a policy of appointing, seeking to appoint, men below the age of 60 as Federal judges and territorial judges, but that is not always so.

Mr. DONOHUE. There is no compulsory retirement age?

Judge MARIS. No, the compulsory retirement in the case of these territorial judges is the expiration of their terms of office. They are appointed for 8 years and at the end of that time, of course, their service is terminated except that under the law they may continue temporarily in office until their successors are appointed. But that is simply a normally short period until the President has appointed the successor.

Mr. DONOHUE. And as a general rule, they are usually men that have been associated with law firms, are they not?

Judge MARIS. Oh, they have been practicing lawyers.

Judge Crowe of the Canal Zone, was a practicing lawyer in Kentucky; Judge Shriver——

Mr. DONOHUE. A member of a firm of several members?

Judge MARIS. That I cannot answer. Judge Paul Shriver was from Denver, Colo. He is in Guam. I don't think he was a member of a firm. I think he was practicing alone and was also in some other Government service, legal service, I think, before he was appointed.

Judge Gordon was chairman, I believe, of the parole board, I am not sure that is the correct name of it, in California, when he was appointed Governor of the Virgin Islands and after a period of service as Governor, he was appointed judge of the Virgin Islands. He is from, I think, Berkeley, Calif.

Mr. MACGREGOR. Judge, it may not be relevant to our discussion here, but do you have any feelings about the workload of these judges, how it might compare with the caseload that a Federal court judge has?

Judge MARIS. Well, I would say that the workload as I have observed it, and I have been in all three of these areas officially, the workload in the Virgin Islands is increasing very much and is getting to the point where it is about all that one judge can manage. The activity there is increasing a great deal in recent years and this judge has, of course, all of the local work, including probate and all criminal business, local and Federal as well as civil.

I think the workload in the Canal Zone and in Guam is lighter, and probably would be less than the average Federal district judge carries. On the other hand, those are pretty remote posts and not particularly desirable posts, so this perhaps is a factor that could also be taken into consideration.

The CHAIRMAN. Are there any other questions?

Thank you very much. We will now hear your testimony on the next bill.

H.R. 6703

Our next bill is H.R. 6703, which is a bill to amend section 144 of title 28, United States Code, concerning filing affidavits of prejudice.

Judge MARIS. Mr. Chairman and gentlemen, this is a bill which has been proposed by the Judicial Conference to amend the present law with respect to the manner in which district judges may be challenged for disqualification by litigants. It involves the amendment of section 144 of title 28 of the United States Code.

There are two matters involved here. I have prepared a memorandum in which the present law is shown and that which would be eliminated by this amendment is enclosed in black brackets and the new matter to be inserted is in italic.

(The memorandum referred to is as follows:)

H.R. 6703 WOULD AMEND 28 U.S.C. § 144

(Deleted matter in black brackets; new matter in italic)

“§ 144. Bias or prejudice of judge

“Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

“The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than [ten] *thirty* days before the [beginning of the term at which the proceeding is to be heard] *trial or hearing of the proceeding*, or good cause shall be shown for failure to file it within such time. *An order shall then be entered directing that an authenticated copy of the affidavit shall be forthwith certified to the chief judge of the circuit in which such proceeding is pending, and said chief judge, or any judge designated by him, shall determine whether the affidavit is timely and sufficient.* A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.”

The bill embodies a proposal approved by the Judicial Conference at its session in March 1962, Rept. Jud. Conf. Mar. 1962, pp. 7-8.

Judge MARIS. As I say, there are two matters here to which this bill is addressed.

The first is that at the present time an affidavit of bias and prejudice which the section authorizes the petitioner to file directed to a particular district judge must be filed at least 10 days before the beginning of the term at which the proceeding is to be heard.

Now, there are two difficulties with that.

In the first place, that would likely be a good while before anybody really knows what judge is going to hear the case and, in the second place, by recent enactment formal terms of court as such have been abolished. We do not have terms as we used to have. But the basic trouble there is that in many courts, particularly the larger courts where the business is carried on on a single calendar system and the cases are all listed on one calendar and then assigned as they come to different judges of the court to try, no one can know that length of time ahead what judge is going to hear the case and, therefore, no one can be in position to prepare an affidavit of bias or prejudice.

Therefore, it is proposed that to meet that as best we can because it is difficult to meet it fully, the provision be changed so that the affidavit shall be filed not less than 30 days before the actual trial. Ordinarily in most cases, by 30 days before the time is fixed for trial it will be known which judge is going to try.

If that is not known, and it would not be in some districts where the cases are assigned from day to day, then there is a provision here which has always been in the law that if good cause is shown for failure to file within that time, it may be filed later. That is the first point; to try to make it a little more feasible to file such an affidavit by making the time limits a little more realistic.

The second and more important point here is that heretofore, under this statute, the judge who was being challenged by the affidavit is

the judge who passes upon whether it is sufficient. That is a pretty difficult assignment to give anybody, and it has given rise to a good deal of criticism, although judges by and large, I think, have tried to be fair about this.

Now, this is not the duty to determine whether the allegations of the affidavit are true or whether they have merit, but merely whether the affidavit on its face, and if you take it to be true, makes out a sufficient case to disqualify the judge; but even so, it presents a difficult problem if you call upon the judge who is being attacked by the affidavit to pass upon whether it is sufficient.

So this bill would provide that in such a case the affidavit shall be certified to the chief judge of the circuit and either he or some other judge whom he may designate will pass on the sufficiency and timeliness of the affidavit, rather than the judge with respect to whom the affidavit is made.

The Judicial Conference feels this is an appropriate change; it is in the interest of good, orderly procedure and will eliminate a lot of criticism which has heretofore been directed to judges who have received such affidavits and have held them to be insufficient, whereas perhaps it was questionable whether they were insufficient or not.

This is a human tendency to take that kind of an attitude in an attack on yourself. This would eliminate that.

Now, the Department of Justice has made a suggestion here, and I think quite properly, that it ought to be made very clear that the action of whatever judge is assigned to take it, the action of passing on the affidavit, should be treated as in the district court, so that it would be reviewable on appeal along with any other questions in the case.

The CHAIRMAN. At that point, Judge, this bill says that the sufficiency and timeliness shall be passed by such chief judge or any judge designated by him.

If it is passed upon by the chief judge, could it thereafter be appealed to the circuit court?

Judge MARIS. That is the point I am directing myself to. The chief judge would be disqualified from sitting in the court of appeals on the appeal, of course.

The CHAIRMAN. Would it not then be necessary to put in some amendment to the effect that the judge would be sitting as a district judge?

Judge MARIS. I am suggesting, Mr. Chairman, as an amendment to cover this point which we had not thought of, but the Department has, and I think it is a valid point. In line 8 on page 2 of the bill, after the first word "him," I would insert—

The CHAIRMAN. On what line?

Judge MARIS. Line 8 on page 2, of the printed bill, after "him," I would insert "sitting in the district court." That would make it clear that this action was in the district court and would be a part of the district court record and would come up on appeal.

Now, of course, any judge assigned to pass on this would be disqualified to sit in the court of appeals, just as a circuit judge who has been assigned to sit in a district court and has tried a case is disqualified; but that would not prevent an appeal being heard by other judges of the court of appeals who would not be disqualified.

The CHAIRMAN. In other words, if the chief judge would be sitting in the district court and would pass upon the sufficiency and timeliness

of the affidavit, an appeal of that decision as to the timeliness and sufficiency could be taken. The judge who made that decision would be disqualified.

Judge MARIS. No question about it in my mind, just as much as if he had actually tried the case, because he was trying an important part of the case, very definitely participating in the case.

The CHAIRMAN. This bill has been recommended by the Judicial Conference?

Judge MARIS. Yes, it has been recommended by the Judicial Conference. In fact, it was——

The CHAIRMAN. And I understand the Department of Justice also supports the bill with this amendment?

Judge MARIS. Yes, with this amendment which I think is a very good amendment, because it clarifies what we all along assumed would be the fact, but I think it is well to spell it out, that the action would be in the district court; no matter what judge took the action, it would be sitting in the district court and not in the court of appeals.

The CHAIRMAN. Any questions?

Mr. Donohue?

Mr. DONOHUE. Well, under this bill, as I understand it, there would be no time limit within which the affidavit could be filed?

Judge MARIS. Yes, the limit is——

Mr. DONOHUE. It would be filed within a reasonable time before the case, after the case was assigned to a particular judge?

Judge MARIS. Ordinarily the time limit is 30 days before the trial, but if it could be shown that you did not know then who was going to try the case, then you could file it later.

Mr. DONOHUE. As you pointed out, Your Honor, if you are in a court where the cases are assigned from day to day and let us say today your case was assigned to judge so-and-so to be tried a week from today.

Judge MARIS. Then I think without question you could file it today or tomorrow, or as soon as you could get it ready after you knew who the judge was that was going to try your case. That would certainly be a good cause.

Mr. DONOHUE. I was wondering if we should have some language to the effect "within a reasonable time after the case is assigned to a particular judge, but not later than 30 days."

Judge MARIS. Well, the 30 days would be too long in that case, because you would not know 30 days ahead.

You see, the difficulty here is we have several different systems of conducting district courts. We have many, many multiple-judge district courts where there are separate calendars and the cases are assigned to individual judges when they come into the clerk's office initially. Everybody knows which judge is going to try that case when it comes up.

Then we have these other situations like in the Southern District of New York and the Eastern District of Pennsylvania where there is a common calendar and the cases are peeled off that calendar as a judge is ready to try them. That might be one day. In other words, you might not know at 10 o'clock this morning that this afternoon judge X is going to get that case.

Mr. DONOHUE. What does the lawyer do under such circumstances if he feels that the judge to whom it has been assigned might be prejudiced for some reason or another?

Judge MARIS. I think he files the affidavit as soon as he can and then the other judge to whom the chief judge assigns the affidavit to determine whether it is timely and sufficient would determine whether this was timely under all the circumstances of the case.

Mr. DONOHUE. Let us take the case that you have cited in those courts where you walk in at 10 o'clock when the list is called, and the assigning judge says, "Well, such and such a case shall be heard by Judge so-and-so this afternoon at 2 o'clock."

Judge MARIS. I suppose you then rise and say, "Your Honor, I desire to file an affidavit of bias and prejudice against Judge so-and-so and I will hope to have it ready by 2 o'clock this afternoon."

Mr. DONOHUE. Let us assume that the assigning judge says, "Well, that may be so, but I am still going to assign it to Judge so-and-so." What does he do then?

Judge MARIS. I suppose he has to go through with it; he has to go ahead until the affidavit has been passed upon. This raises a very difficult problem. Normally, I would think the judge would say, "Well, we will pass the case for the time being until this affidavit is passed on." That would be a reasonable attitude to take.

Mr. DONOHUE. I would think so.

Judge MARIS. But I suppose everyone is not always reasonable and we just cannot—

Mr. DONOHUE. Calling on our own experiences, we have found judges which would be adamant and would just say, you go right ahead, notwithstanding you think that Judge so-and-so might be prejudiced.

Judge MARIS. Well, once he files this affidavit, then it becomes the duty of the court to pass that to the chief judge and have it passed on.

Mr. MACGREGOR. He has to pass on it as to the sufficiency and timeliness?

Judge MARIS. And this is a question as to timeliness.

Mr. MACGREGOR. Not as to the question of bias or projection?

Judge MARIS. Whether or not on the face it states a case, if on its face it states a case, and they say he filed it as soon as he could. Then that judge must be withdrawn from the case.

Mr. MACGREGOR. I apologize for interrupting.

Mr. DONOHUE. In the meantime the case is going on before the judge the lawyer thinks is prejudiced?

Judge MARIS. I have an idea that lawyer would be in the court of appeals for a writ of prohibition directed to that judge until the affidavit is passed on. There are various ways this can be dealt with.

There might be extreme cases. It is a little hard to envisage every one. At the present time, you see, you have an outright provision that says "10 days before the beginning of the term" and that is entirely too far back, in our opinion. Perhaps this should be—perhaps you could spell out a little more in the way of a reasonable time, but it seems to me the statute which has always said—says if good cause should be shown for failure to file it within that time. All you show are the facts of life.

You couldn't possibly have filed it before that day, could not possibly. Therefore, no one, it seems to me, could possibly hold that was not good cause for filing it on that day.

Therefore, it was timely. Therefore if it is sufficient, the judge under the statute may no longer proceed with the case.

See, the statute starts out to say, whenever a party to any proceeding makes and files a timely and sufficient affidavit, such judge shall proceed no further therein, but another judge shall be assigned to hear the proceeding.

The CHAIRMAN. Judge, does this not resolve itself more or less in the following: The present method is rather cumbersome in this sense. If the judge refuses to remove himself after the allegation that he may be prejudiced, the case goes on?

Judge MARIS. That's right.

The CHAIRMAN. And the only remedy that the lawyer has or the client of the lawyer has is to appeal?

Judge MARIS. At the end of the case.

The CHAIRMAN. At the end of the trial, or he could pursue a writ of mandamus or a writ of prohibition, which is rather cumbersome.

Judge MARIS. Yes, possibly so, if it appears clearly on the face of the affidavit that it was sufficient.

The CHAIRMAN. To avoid all that, you simply cut this Gordian knot as it were, and you have an immediate remedy direct to the chief judge or any judge that he may designate sitting in the district court.

Judge MARIS. You get an impartial——

The CHAIRMAN. To pass upon the sufficiency or the timeliness only, but not as to whether there is or is not actual prejudice.

Judge MARIS. You get a judge who is not involved in this issue at all to pass on it, which we do not have now, and that seem to us the basic fault of the statute. The judge who is being attacked is the one who is passing on it today. That is a difficult thing for any human being to do.

Mr. MACGREGOR. Doesn't he pass only on the sufficiency and timeliness?

Judge MARIS. Yes, sufficiency covers a broad range. He may look at it narrowly or broadly and say, "Well,"—it is awfully hard for a man in that position to distinguish between the truth of the allegations and the sufficiency of them, assuming they are true.

He says, "I know they are not true," and so he looks at them with a jaundiced eye. It is a hard job for a man to do.

Mr. MACGREGOR. But how can Judge A determine what is in Judge B's mind with respect to a particular case so as to determine the sufficiency?

Judge MARIS. He only passes on what the party says.

Mr. MACGREGOR. Sufficiency though.

Judge MARIS. Sufficiency of the affidavit, assuming it to be true, the courts have always said that. You have to take those allegations to be true. If they are not true, then you have a remedy by way of prosecution for perjury.

A man makes false allegations, he puts himself in a position where he is subject to criminal judgment. The passing upon sufficiency of the allegation is like passing on the sufficiency of a complaint. He takes what it says to be true, and it is on that basis you must pass on the affidavit.

May I just add this: That is the basis, but the difficulty is that the judge who is being attacked, if he passes on it, tend to go beyond that and consider that these things are not true. Therefore, this affidavit is worthless and so forth. It is hard for him to do it.

Mr. DONOHUE. Will the gentleman yield?

Mr. MACGREGOR. I yield to the gentleman from Massachusetts.

Mr. DONOHUE. Passing on the timeliness and sufficiency of this affidavit by the chief judge. Is there anything in our rules of procedure to postpone the trial?

Judge MARIS. I think there is nothing spelled out in that, no. Of course, this is to be done promptly, it is to be forthwith certified. Immediately the affidavit goes to the chief judge and it is not a matter that calls for any great length of time to look at it and say whether it is adequate and sufficient.

Mr. DONOHUE. I have in mind this, Your Honor: Supposing the chief judge is not available?

Judge MARIS. Well, there is always either a chief judge or an acting chief judge. I mean, if the chief judge is out of the circuit, then the next circuit judge who is senior in commission is acting as chief judge. The theory of our statute is, and I think the fact is, that there is always a person performing the duties of the chief judge in the circuit. Otherwise, a lot of things would not function that we require to function. So I would think that it is fair to say that we could expect very prompt action on these affidavits.

Mr. DONOHUE. Did I understand you to say that when the chief judge is passing upon the sufficiency of the allegations in the petition, motion—

Judge MARIS. On the affidavit.

Mr. DONOHUE. In fact, he is assuming that the allegations contained—

Judge MARIS. Are true.

Mr. DONOHUE (continuing). In the motion are true?

Judge MARIS. That's right, that is the basis. It is just like a demurrer to a complaint. You take everything in there to be true, and you say, is that sufficient to disqualify a man because he did this, that and the other thing. You are not passing on whether he actually did or said those things, that is the responsibility of the party that made the affidavit. If they are false, then he must answer for that.

Mr. DONOHUE. Thank you, sir.

Mr. MACGREGOR. Judge, let's take a hypothetical situation: You have two Federal district judges sitting in a particular term. One is known rightly or wrongly among the legal fraternity in that area as a plaintiff's judge—we are talking about civil cases now. And the other is known as a defendant's judge. Are you not encouraging the filing of affidavits against the former by all the defendants' attorneys and against the latter by all plaintiffs' attorneys?

Judge MARIS. I don't believe those affidavits have been filed. We are not doing anything here other than, in effect, having an impartial judge pass upon such affidavits, but they must be directed to particular prejudice against this party, not prejudice against a group in a community unless you can connect that directly with this party.

I think that the present law would open up that situation if it is opened up, but I do not believe it has been taken advantage of, not to my knowledge.

Mr. MACGREGOR. Well, my experience in the Federal district court in Minnesota, the affidavits that have been filed have been largely frivolous and resulted from a desire of a form of shopping, and have been disregarded by the district judges, and properly so, because of

the quality and caliber, frankly, of those responsible for the filing of the affidavits. And they have often been filed for obfuscation and delay.

Judge MARIS. That happens.

Mr. MACGREGOR. And I am afraid that we are increasing, if we pass this bill, the opportunities for more of said practices.

Judge MARIS. Well, that's possible, but I do not think so, because I think that the judges to whom these will be assigned to pass upon their validity, their sufficiency and their timeliness will take a proper view of them. If they are frivolous, they will dismiss them.

Mr. MACGREGOR. That is what bothers me. They decide only upon sufficiency and timeliness.

Judge MARIS. That is all they are decided on now.

Mr. MACGREGOR. But the one who is deciding on it is in a position to know what is in his mind.

Judge MARIS. I think this is more to meet what has been felt to be public criticism of a system under which a man passes upon an attack against himself, and to maintain the impartiality of the Federal Judiciary in that regard.

There is just felt to be something a little immoral and improper about having the man whose prejudice is in issue deciding whether he is prejudiced or not.

Mr. MACGREGOR. But in his rulings on evidence, he must take into consideration his own experience, which is necessarily subjective, and the right of appeal lies in the mistakes made in rulings on evidence just as on rulings on sufficiency or an affidavit of bias and prejudice.

Judge MARIS. Mr. Congressman, there is no doubt each of us on the Federal bench has our prejudices and all. But what we must not do is to deal with the case of a fellow human being whom we have personal reasons to be prejudiced about, whom we don't like for some private reason. That is all this is directed at.

Mr. MACGREGOR. I am not aware of any public criticism of the present system.

Judge MARIS. Pardon?

Mr. MACGREGOR. I am not aware of any public criticism of the present law.

Judge MARIS. It has come to the Judicial Conference and it has been raised by certain Members of Congress of both Houses in the past.

The CHAIRMAN. How did this arise in the Judicial Conference? Whose suggestion was this? Was it as a result of complaints, or what?

Judge MARIS. It was as a result of legislation which went a good deal further than this, that was proposed, bills in past Congresses and the Conference therefore called for a study of it by the committees of the Conference and the committees after that study came to this proposal, feeling that this was an appropriate way to handle these cases.

Mr. MACGREGOR. I would just be curious, Mr. Chairman, since Judge Maris has referred to the Congress requesting the Judicial Conference—I am not aware that the Judiciary Committee in the 6 years I have served on it has considered any legislation previous to this on this subject. Perhaps it has.

Judge MARIS. We are not suggesting that there have been serious cases of denial of justice; there have been some cases, I know in the

past, where judges have held affidavits of prejudice directed against them to be insufficient where they would much better have withdrawn from the case; much better.

And I think some of those cases have given rise to the suggestion that this power ought to be transferred to an independent judge who was not involved.

Mr. MACGREGOR. If I may, Mr. Chairman, this matter disturbs me. Let's assume a situation which perhaps is extreme, Judge Maris, but let's assume that you had on the Federal district bench a judge who thought he was qualified to continue serving, but the chief judge of the circuit thought otherwise.

A couple of affidavits of bias and prejudice were filed against the hypothetical district judge that I will describe and the chief judge of the circuit decided in each case that they were sufficient and timely. This started a rash of affidavits filed against that particular district judge.

Could you not in that extreme situation deny that Federal district judge the opportunity to hear any cases?

Judge MARIS. Well, your hypothesis, as I understand it, is that the judge was thought not to be competent by reason of age or something.

Mr. MACGREGOR. He thought he was competent, but the chief judge of the circuit thought he was incompetent.

Judge MARIS. And the parties apparently thought he was incompetent because they filed the affidavits. That raises the problem of those judges with increasing age having failing powers, and that is a problem which may be dealt with by the chief judge and the Judicial Council of the circuit through the assignment of business rather than in this way. These affidavits are not intended to be directed toward disqualifications of that kind.

Mr. MACGREGOR. I appreciate that is not the intent, but we have to consider the possible use of legislation that may be passed.

Judge MARIS. Yes, that is right. Well, we have to assume that the matter will be fairly administered, I suppose. I do not know how else we can approach legislation of this kind. I would think that any chief judge of a circuit with the responsibility and business of the circuit would take that point of view, but I am not a chief judge of a circuit.

Mr. MACGREGOR. Thank you, Judge Maris.

Judge MARIS. Thank you.

The CHAIRMAN. Thank you very much, Judge.

H.R. 8276

Our final bill this morning will be H.R. 8276. We have two distinguished judges present, Chief Judge William H. Becker, of the Western District of Missouri, Kansas City, Mo.; and Judge Edwin A. Robson, the Northern District of Illinois, Chicago, Ill.

Gentlemen, we will be glad to hear from you.

Judge ROBSON. Mr. Chairman, to expedite this hearing, we have divided the responsibility of presenting the details with reference to H.R. 8276.

The CHAIRMAN. I think it would be better if you would sit down and use the microphone, Judge.

STATEMENT OF JUDGE EDWIN A. ROBSON, NORTHERN DISTRICT
OF ILLINOIS, CHICAGO, ILL.

Judge ROBSON. We have divided the responsibility of making this presentation between Dean Phil C. Neal, who is the dean of the law school at the University of Chicago and executive secretary to the Coordinating Committee and Multiple Litigation of the Judicial Conference, and Chief Judge William H. Becker of the Western District of Missouri.

Dean Neal will present the background of the legislation and Judge Becker, the details of it.

The CHAIRMAN. All right, Dean.

STATEMENT OF PHIL C. NEAL, DEAN, UNIVERSITY OF CHICAGO
LAW SCHOOL

Dean NEAL. Mr. Chairman, my name is Phil C. Neal and I am dean of the University of Chicago Law School. Since 1962 I have been associated with the Coordinating Committee for Multiple Litigation as its executive secretary, although I should perhaps say that since I became dean of the law school in 1963 my role in the work of the Committee has been mainly a consultative one.

Judge Robson asked me to speak briefly about the background of this bill and I am happy to do so.

The bill was proposed by the Judicial Conference of the United States. It was drafted and proposed by the Committee referred to, which is the special subcommittee appointed in 1962 by the Chief Justice and which has been known as the Coordinating Committee for Multiple Litigation. It is a subcommittee of the Committee on Trial Practice and Technique of the Judicial Conference of the United States.

The bill grows out of the work of the Committee in connection with the large number of private treble damages cases filed against the electrical equipment industry under the antitrust laws resulting from the successful prosecution of the major electrical equipment manufacturers in 1961.

There were some 1,800 cases filed by something like 3,600 private plaintiffs, and these cases were pending in more than 30 districts in the United States simultaneously. They presented an enormous and unprecedented problem of possible conflict in the litigation as these cases proceeded, and this special Committee was appointed by the Chief Justice to consider ways of simplifying and expediting the litigation.

Now, the solution that emerged from the appointment of this Committee was what has been referred to as coordination of the discovery procedures in these cases. What really developed was cooperation among a large number of Federal judges who had these cases pending before them.

The technique of coordination took the form, first, of agreeing upon uniform sets of interrogations and other aspects of uniform pretrial orders. There was established a central depository for the deposit of the million or so documents which were produced in connection with this litigation. Perhaps most useful and inventive of all, there was

held a lengthy series of depositions which have been known as the depositions, in which the deponents were examined once by counsel representing all of the parties engaged in this great litigation and the depositions thereafter became available for use in all of the separate trials.

Now, without going into further details, because I know your time is short here today, as to the way in which the electrical equipment cases were conducted, I want to move to explain the different theory on which this proposed new section of title 28, section 1407, has been drafted.

The solution that emerged from the efforts of the Coordinating Committee was highly successful given all of its circumstances, but I think it must be said that it is a cumbersome kind of procedure and one that it would be unwise to try to rely upon in future instances of this kind of related litigation pending in many different districts.

Not only is it a somewhat cumbersome procedure since it involves a large number of judges getting together from time to time and holding consolidated hearings and then going back to their separate districts and holding separate hearings, but it is also a somewhat fragile procedure, because it is dependent upon the unanimous agreement of the judges involved for it to work.

The theory on which the bill before you has been drafted may be thought of by analogy to the situation which would exist if all of these related cases were pending in a single district court. There would then be available, first, the possibility of assigning all of these cases to a single judge or several judges who work closely together and there would be available the possibility of limited or complete consolidation of the proceedings under rule 42(a) of the Federal Rules of Civil Procedure.

Any such logical solution of the problem of efficient handling of this dispersed litigation under the existing title 28 is made difficult because of limitations in the provisions for transfer of actions. The principal existing provision that is relevant to this problem is section 1404(a) of title 28, which provides for transfer of actions from one district to another under certain limited circumstances.

The important limitations of section 1404(a) so far as the existing problems are concerned are these. First, section 1404(a) permits transfer of a case only to a district where the action might have been brought.

Now, in the case of these 1,800 suits against the electrical equipment industry, it would have been largely coincidental, obviously, if the defendants in all of these cases had all been usable in a single district. It turned out to a considerable extent that this was true, and in the final phases of the litigation the existing transfer provisions have been used quite widely, but there is that serious difficulty in 1404(a) as a general source of reliance for this kind of efficient handling of cases.

The second difficulty in section 1404(a) is that it does not provide for or contemplate a partial transfer; that is, the transfer which may be the only kind that is really needed to carry out this sort of coordination, a transfer for the discovery phases of the litigation only. The efforts of the Coordinating Committee were directed in large part to the pretrial, discovery phase of the litigation, and I think its most important accomplishments were in this area of coordination. Under section 1404(a) there is no provision for that kind of transfer.

Finally, and perhaps most important, section 1404(a) is inadequate because it leaves the question of transfer to the determination of the court in a particular case and to the initiative of the parties in that case. What is needed in order to lay a foundation for the kind of coordinated handling of these related cases that has gone on in the electrical cases is some machinery in the Federal judiciary which can determine what ought to be done from the standpoint of the judiciary as a whole, and the interests not only of the parties in a single case in a single district but of the parties affected by the entire mass of litigation.

Section 1407, the proposed bill, responds to these needs by providing for three principal features. First, it provides that where multiple-related cases are pending in different districts and the just and efficient disposition of the cases requires their being brought together for pretrial proceedings, such cases may be transferred to any district.

Second, it provides that such a transfer shall take place under the provisions of this bill for the pretrial phases of the litigation, leaving the place of trial where the action began or in some other district to which the action might conceivably be transferred under the existing provisions of section 1404(a).

Third and in some ways the most important part of the proposal, it would create for the determination of these problems a special panel of Federal judges appointed by the Chief Justice consisting of seven judges, no two of whom would be from the same circuit. It would be the function of this panel to initiate and also to consider applications for the consolidation of multidistrict litigation for pretrial purposes and thereafter to function somewhat in the way the Coordinating Committee has functioned, by seeing to it that the necessary judicial manpower is brought to bear upon the consolidated litigation.

The Attorney General has considered this legislation and there is a letter to the chairman of the committee supporting the measure from Mr. Ramsey Clark, suggesting two amendments in the proposal which I think I shall leave to Judge Becker to comment upon. He can represent to you the view of the Committee on these proposed amendments.

I would like to close this part of my remarks simply by saying that my personal opinion is that the proposed measure represents an important step forward in laying statutory foundation for carrying out in future instances the kind of efficient management of mass litigation that has gone on under the work of the Coordinating Committee in connection with the electrical equipment cases. I think that it would contribute very significantly to the efficient disposition of the business of the Federal courts in other instances where multiple cases growing out of the same transactions are pending in different districts.

(The following comment was submitted for inclusion in the record.)

COMMENT ON PROPOSED SECTION 1407 MULTIDISTRICT LITIGATION

As directed by the March 1964 resolution of the Judicial Conference of the United States, the Co-Ordinating Committee for Multiple Litigation (a subcommittee of the Committee on Pre-Trial Procedure and Practice) has examined the need for legislation and rules to treat the special problems presented by multi-district litigation. During the past year the Committee has analyzed its experience in the electrical equipment litigation, consulted with the judges and lawyers who participated in the *ad hoc* coordination program for those cases, and appraised numerous proposals designed to expedite proceedings when related civil actions are pending in more than one district. Proposed § 1407 is recom-

mended as an important step in improving judicial administration for this class of cases.

The Co-Ordinating Committee considered whether the necessary procedural changes could be accomplished under existing rule-making authority. Study led to the conclusion that venue, historically a matter of legislative concern, would be affected by any appropriate solution of the problems. An earlier draft of a similar proposed statute would have provided the necessary statutory authority but would have required substantial implementation by the panel under specifically delegated flexible rule-making authority. After considering the comments received on an earlier draft, the Committee has concluded that its objectives can be achieved by the more limited and specific statute now proposed which authorizes only implementing rules not inconsistent with any Act of Congress or the Federal Rules of Civil Procedure.

Two techniques, court control of pre-trial proceedings and centralization of such proceedings, are basic to the proposal. By authorizing unified treatment for multi-district actions involving one or more common questions of fact, the statute would create the possibility of applying to these cases ordered pre-trial procedures like those generally recommended for protracted cases pending in a single district. See, *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351 (adopted by the Judicial Conference of the United States—March 1960). Centralization of pre-trial proceedings is sought in order to minimize the additional litigation costs which are engendered in multi-district litigation through overlapping and conflicting discovery, such as repetitive depositions and document production and minor variances in written interrogatories which may impose undue burdens on the answering parties.

SCOPE OF THE STATUTE

The statute affects only the pre-trial stages in multi-district litigation. It would not affect the place of trial in any case or exclude transfer under other statutes (e.g., Title 28, U.S.C. §§ 1404(a) and 1406(a)) prior to or at the conclusion of pre-trial proceedings.

The civil actions which would be affected by the statute must meet several general requirements. First, they must involve one or more common questions of fact. Second, they must be pending in more than one district. Although present procedures permit coordinated or consolidated treatment of related cases brought in or transferrable to a single district, these procedures do not provide for such treatment where the cases must remain pending in several districts. The proposed statute would not affect existing methods of coordinated or consolidated treatment of cases pending in a single district. Third, the circumstances must be such that coordinated or consolidated pre-trial proceedings would promote the just and efficient conduct of such actions. This final requirement limits the applicability of the proposed statute to litigation in which significant economy and efficiency in judicial administration may be obtained.

LIMITED TRANSFER

The major innovation proposed is transfer solely for pre-trial purposes. The statute's objectives of eliminating conflict and duplication and of assuring efficient and economical pre-trial proceedings would thus be achieved without losing the benefits of local trials in the appropriate districts. An advantage of this statute in multi-district litigation over alternative techniques, such as the class action, is that each action remains as an individual suit with the litigants retaining control over their separate interests. The Advisory Committee's Note to Proposed Rule 23 (F.R. Civ. P.) comments that, "Even when a number of separate actions are proceeding simultaneously, experience shows that the burdens on the parties and the courts can sometimes be reduced by arrangements for avoiding repetitious discovery or the like." *Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts* 118 (U.S. Government Printing Office, 1964). Proposed § 1407 would maximize the litigant's traditional privileges of selecting where, when and how to enforce his substantive rights or assert his defenses while minimizing possible undue complexity from multi-party jury trials.

Under proposed § 1407 the transferee district court would have the usual powers provided by the Federal Rules of Civil Procedure, including authority to render summary judgment, to control and limit pre-trial proceedings, and to impose actions for failure to make discovery or comply with pre-trial orders. The deposition judges would have powers over the deponents and the actions as judges of the districts in which the depositions are taken.

Transfer to the most desirable forum is provided by permitting pre-trial transfer "to any district." Present transfer provisions for civil actions, which are not limited to pre-trial proceedings, restrict the transferee districts available. For example, Title 28, U.S.C. § 1404(a) limits the change "to any district or division where it [the civil action] might have been brought." Similarly, Title 28, U.S.C. § 1406(a) restricts transfer "to any district or division in which it [a case] could have been brought." Analogous problems are presented when multiple bankruptcy petitions are filed by or against the same bankrupt. Section 32 of the Bankruptcy Act, Title 11, U.S.C. § 55, permits transfer and consolidation "in the court which can proceed with the same for the greatest convenience of parties in interest."

Benefits from consolidated pre-trial procedures for related cases have been recognized as grounds for transfer under Title 28, U.S.C. § 1404(a). In *Popkin v. Eastern Air Lines, Inc., et al.*, 204 F. Supp. 426, 431 (E.D. Pa.); *mandamus* granted *sub nom., Barrack, Administratrix, et al. v. Van Dusen U.S. District Judge, et al.*, 309 F. 2d 953 (1962), *rev'd.* and *remanded*, 376 U.S. 612 (1964), the district court granted defendants' § 1404(a) motions to transfer 55 personal injury and wrongful death actions to another district where 114 cases which arose from the same crash were pending, stating that:

"The interest of justice requires the transfer of these cases to the transferee District for these reasons, among others: (1) Consolidation of all the cases arising from this accident for *purposes of proceedings before trial* is likely to procure fairer and more orderly trials for all litigants and save needless time and expense for the public, including jurors, and other litigants whose cases are awaiting trial." (Emphasis supplied.)

JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

The statute provides for the designation of a judicial panel on multi-district litigation empowered to: (1) initiate transfer proceedings; (2) transfer civil actions for coordinated or consolidated pre-trial proceedings with the consent of the district courts from which the actions are transferred; (3) assign a judge or judges to conduct such proceedings and request the Chief Justice to make inter-circuit assignments for this purpose; (4) act as and designate other judges as deposition judges in any district; and (5) remand transferred actions to the districts from which they were transferred at or before the conclusion of pre-trial proceedings. The Chief Justice is granted authority to designate the panel's membership which shall consist of seven circuit and district judges.

When allocating multi-district litigation among the districts or assigning a judge or judges to conduct pre-trial proceedings, the panel would be functioning primarily in an administrative capacity. Analogous procedures for dividing the judicial business of a single district are found in certain districts where this function is performed by an executive committee of the district judges. For example, General Rule 10(e), Rules of the United States District Court for the Northern District of Illinois, provides:

"(c) *Executive Committee*: The assignment of cases to calendars and judges . . . shall be done under the general direction of an Executive Committee consisting of three judges of this court . . ."

The Committee's experience in organizing the deposition program for the electrical equipment antitrust litigation indicates that swifter and more flexible procedures for inter-circuit assignment of judges to conduct depositions are desirable. At some stages a program may not require judges or may require several deposition judges. At other times prompt attention from a larger group of judges may be useful. Frequent changes of the judicial personnel assigned to this task may also be advantageous. To permit rapid changes in the assignment of judicial personnel, the statute authorizes the panel and the judges to whom the cases are assigned to "exercise the powers of a district judge in any district for the purpose of conducting pre-trial depositions in such coordinated or consolidated pre-trial proceedings." In addition, the panel is empowered to delegate this responsibility to other judges "when needed."

In accordance with the national character of the litigation with which the panel will be concerned, its membership will be drawn from seven judicial circuits. The members will be designated by the Chief Justice who presently has analogous functions in connection with inter-circuit assignments and in his capacity as presiding officer of the Judicial Conference of the United States. Title 28, U.S.C. §§ 291-295, 331.

Transfer would be effected by entry of the panel's order and the filing of the required consent of the district courts from which the actions are transferred in the office of the clerk of the transferee district court. This procedure is modeled on present techniques for effecting removal from state courts. Title 28, U.S.C. §1446(e).

By providing for entry of the panel's transfer orders in the transferee district it is intended to insure that appellate review, when available, will take place in one Court of Appeals. The proposed section does not attempt to alter or clarify present doctrines as to the availability or scope of review of transfer orders. Transfer orders under §§1404(a) and 1406(a) may be reviewable solely by *mandamus*. See, *Philip Carey Mfg. Co., et al. v. Taylor*, 286 F. 2d 782 (C.A. 6, 1961), *cert. den.*, 366 U.S. 948 (1961) (§1404(a) proceeding); *Bankers Life & Casualty Co. v. Holland, Chief Judge, et al.*, 346 U.S. 379 (1953) (§1406(a) proceeding). On the other hand, it has been argued that such orders are appropriate for direct review under the doctrine of *Cohen, Executrix, et al. v. Beneficial Industrial Loan Corp., et al.*, 337 U.S. 541 (1948). Note, *Appealability of 1404(a) Orders: Mandamus Misapplied*, 67 Yale L.J. 122 (1957). Orders of the district court remaining cases improperly removed from state courts are not reviewable. Title 28, U.S.C. §1447(d).

Mr. DONOHUE (presiding). Now we will hear from Judge Becker.

STATEMENT OF CHIEF JUDGE WILLIAM H. BECKER, WESTERN DISTRICT OF MISSOURI, KANSAS CITY, MO.

Judge BECKER. Mrs. Chairman, I would like to state briefly—

Mr. DONOHUE. If I might interrupt, the House will be going into session at 12 o'clock.

Judge BECKER. I will make this—

Mr. DONOHUE. As you make your statement, will you have that in mind?

Judge BECKER. With that in mind, would it be satisfactory if a paper were filed later answering some of the criticisms of the bill?

Mr. DONOHUE. Yes, it would be most welcome.

Judge BECKER. This bill is designed to provide central national pretrial management of masses of litigation which, according to the records, just swamp the courts. Today the cases must be handled and tried in the districts in which they are filed, and many repetitive duplicating processes are carried on by judges on the same issues with the same witnesses and with the same exhibits.

In the pretrial phases of the case there is no existing statute which would permit centralized, coordinated, consolidated pretrial management of these cases. A situation which might occur that would justify invocation of this statute if it became law would be one in which a drug, one of the wonder drugs, was sold nationally to millions of people for arthritis, we will say, and it should be claimed by responsible authority that there was some negligence in the manufacture or the sale of the drug and that many thousands of people have suffered side effects. Then cases would be filed in all of the districts of the United States.

In those cases there would be only one issue, principal issue, and that would be the validity of the charges against the manufacturer of the drug.

Now, cases of that kind could be transferred by this judicial panel created by this bill to one district for pretrial purposes and a witness deposed whose deposition would serve in thousands of cases, as was the case in the electrical equipment litigation, done in another manner.

We feel that there is a litigation explosion occurring in the Federal courts along with the population explosion and the technological

revolution; that even with the addition of many new judges, the case-load, the backlog of cases pending, is growing; and that some new tools are needed by the judges in order to process the litigation which results from the matters which I have mentioned, as well as from extensions of the jurisdiction of the Federal courts by acts of Congress. And this is a method which we think will work.

This bill was submitted to the Attorney General and the Department of Justice. On January 7, 1966, General Ramsey Clark addressed to the chairman of this committee a letter in which he approved the bill with certain modifications.

The first suggested modification was that a portion of the bill be changed to exclude certain antitrust actions brought by the United States; that is, criminal actions and injunctive actions, but not damage actions, found on page 3 and page 4 of his letter.

This suggested modification is agreeable to the Committee. We had attempted by conference to secure their views before the bill was drafted and had offered to put this suggested provision into the bill at that time. It certainly should be inserted in the bill.

The second provision was elimination of that part of the bill which requires the consent to transfer of the district judge from whom the case is transferred by the panel on multiple litigation. I am authorized to state that this suggested amendment has the approval of a majority of the Committee and I feel and the majority of the Committee feel that this change should be made, so we are in agreement with the Department of Justice on this matter.

Mr. DONOHUE. Would you permit me to interrupt?

Judge BECKER. Yes, sir.

Mr. DONOHUE. Do you agree that it should be amended by inserting the language contained in the letter from Assistant Attorney General Clark in his letter of January 7, 1966?

(The letter from the Department of Justice referred to is as follows:)

OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., January 7, 1966.

HON. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice concerning H.R. 8276, a bill "To provide for the temporary transfer to a single district for coordinated or consolidated pretrial proceedings of civil actions pending in different districts which involve one or more common questions of fact, and for other purposes."

The bill would add a new section 1407 to title 28, United States Code, which would permit the transfer to a single district for coordinated or consolidated pretrial proceedings of civil actions pending in different districts which involve one or more common questions of fact. Such transfer shall be made by a judicial panel on multidistrict litigation, consisting of seven circuit and district judges appointed by the Chief Justice of the United States, upon determination by the panel that the transfer will promote justice and efficient conduct of such suits. The transfer requires the consent of the court in which the suit is pending, and each action so transferred shall be remanded by the panel at or before the conclusion of the pretrial proceedings to the district from which it was transferred. The panel may separate any claim, cross claim, counterclaim, or third party claim and remand any of such claims before the remainder of the action is remanded.

The coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges assigned by the judicial panel. The panel may request, for this purpose, the temporary assignment of a circuit or district judge to the transferee district by the Chief Justice of the United States or the chief judge of the circuit. Proceedings for the transfer of an action may be initiated by the judicial panel by notice to the parties in all of the actions concerned of the manner, time and

place of the hearing to determine whether the transfer shall be made. The concurrence of four members of the panel shall be necessary to any action of the panel. When actions have been transferred by order of the panel, no district court refusing to consent to the transfer of related litigation may make any order for or permit discovery in conflict with the discovery proceedings in the transferred actions.

At present, there is no specific provision governing the conduct of discovery and pretrial proceedings on a consolidated basis. The massive national discovery program, which was established in response to the unprecedented number of electrical equipment treble damage actions, was instituted under the authority of Supreme Court rule-making power, which in turn resulted in a delegation of authority to a coordinating committee of judges for the purpose of working out an appropriate procedure for handling common discovery problems. The bill is an outgrowth of the experience gained under this national discovery program, and is an apparent attempt to codify some of the steps taken thereunder. [For a general discussion of the Program, see Neal and Goldberg, *The Electrical Equipment Antitrust Cases; Novel Judicial Administration*, 50 A.B.A.J. 621 (1964).]

This legislation was recommended by the Judicial Conference of the United States. The Department of Justice favors its enactment but suggests that it be amended in two respects.

We believe that Government prosecutions under the antitrust laws should be excluded from the scope of the measure. If the bill applied to such antitrust actions, it is anticipated that numerous private plaintiffs would file treble damage suits immediately following the filing of a Government suit. In consequence, Government suits filed by this Department would almost certainly be substantially delayed, often to the disadvantage of injured competitors who are awaiting the outcome of the Government suit upon which to predicate their damage actions. Furthermore, there is no need for participation of injured competitors at this stage since section 5(b) of the Clayton Act (15 U.S.C. 16(b)) tolls the running of the statute of limitations on their damage suits while the Government litigation is proceeding. Private plaintiffs may use discovery to uncover information relating only to damages or information that we have already obtained through the use of grand juries, civil investigative demands or informal interviews. Moreover, if we wish to avoid such delay, we may be forced to share with private plaintiffs information already in our possession that we prefer to keep confidential and to relinquish the control of a consolidated discovery proceeding to a private plaintiff's attorney. While exempting the Government from this legislation may occasionally burden defendants because they may have to answer similar questions posed both by the Government and by private parties, this is justified by the importance to the public of securing relief in antitrust cases as quickly as possible. To treat the Government differently is not arbitrary, for the purpose of the governmental suit normally differs from that of a private suit: the Government seeks to protect the public from competitive injury, while private parties are primarily interested in recovering damages for injuries already suffered. We therefore recommend that the Government's civil antitrust suits be exempted from this legislation. On the other hand, the Government's damage suits should be included, for the Government's purpose in bringing such a suit is the same as that of a private party. Accordingly, it is suggested that a new subsection (g) be added to section 1 of the bill to read as follows:

"(g) Nothing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws. 'Antitrust laws' as used herein include those acts referred to in the Act of October 15, 1914, as amended (38 Stat. 730; 15 U.S.C. 12), and also include the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13, 13a and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117, 15 U.S.C. 56); but shall not include section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a)."

Also, we believe that the provision of the bill which requires the consent of the district court from which an action is transferred should be deleted. To require such consent seems superfluous since seven circuit and district judges must consider the proposed transfer and four members of the panel approve it before it can take place. Requiring the consent of the transferor district judge would give a veto power and in essence require voluntary cooperation of all in order to consolidate discovery proceedings.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

RAMSEY CLARK,
Deputy Attorney General.

Judge BECKER. Yes, I think his language is satisfactory. I think there are many ways this same thing may be said, but we are satisfied with the proposals of General Clark in this particular matter.

Now, on the question of eliminating the veto power of the local district judge to refuse to transfer the case, a majority of the committee is agreeable that it be eliminated. I personally feel it would be a good thing to do what General Clark says about it.

In respect to other features of the bill, I will, with my colleagues, prepare a paper which we can send to the committee for distribution so as to shorten this presentation.

I do want to say that the bill has been appraised and analyzed in two law review articles, one in the Notre Dame Lawyer and one in the Chicago University Law Review. It has also been criticized by the Council of the Antitrust Section of the American Bar Association, which caused a recommendation and resolution to be adopted at the Montreal meeting, copies of which recommendation and resolution we have furnished to counsel for distribution among members of the committee this morning. Because the time is so short, I will not go into the answers to those criticisms orally, if it is satisfactory that I may cover them with a paper in which our answers to those criticisms are set forth.

MR. DONOHUE. I might say, Your Honor, that any papers that you do submit will be made a part of the record.

(Subsequently, Judge Becker submitted the following memorandum:)

MEMORANDUM

To: The Honorable Emanuel Celler, Chairman, Committee on the Judiciary House of Representatives, Washington, D.C.
 From: Coordinating Committee on Multiple Litigation of the Judicial Conference of the United States.
 Subject: Response to criticisms contained in the Report of the Section of Antitrust Law of the House of Delegates of the American Bar Association on H.R. 8276, 89th Congress.

Because of lack of time in the hearing before House Judiciary Subcommittee No. 5 on H.R. 8276, this memorandum has been prepared. Only yesterday the report of the Antitrust Law Section, referred to above, was secured from the Council of the Section of Antitrust Law of the American Bar Association.

The following portion of this memorandum consists of a point-by-point answer to the criticisms contained in the subject report.

Criticism No. 1.—On page 5, in the first two full paragraphs of the report, H.R. 8276 is criticized on the ground that "the procedure provided for by this legislation is applicable whenever there are as few as two cases filed with a common question of fact."

The answers to this criticism are as follows:

(1) This is no objection to a transfer statute. Under Section 1404(a), only one case may be transferred for all purposes, including pretrial. There has been no unsatisfactory experience under Section 1404(a).

(2) Such a result is not expected in ordinary cases, even by the Antitrust Section, as shown by the following quotation from page 10 of its report:

"We do not suggest that the Judicial Panel on Multi-District Litigation would ever construe the statute, if enacted, so liberally as to permit two cases in different Districts with but one question of fact to be consolidated for pretrial proceedings."

(3) The panel of seven judges especially chosen to rule upon questions of transfer can be trusted to exercise a prudent discretion in granting or denying motions to transfer under H.R. 8276. The foregoing answer is an express concession of this by the Antitrust Section.

(4) It is conceivable, however, that two protracted complex cases pending in different districts may present a greater problem than 100 simple cases. In such unusual circumstance, transfers under H.R. 8276 may be the most desirable choice.

Criticism No. 2.—The report, on page 5, criticized H.R. 8276 on the following ground: "The District Courts have shown in the electrical cases that they now have adequate authority under existing statutes and the Rules of Civil Procedure to accomplish consolidated pretrial proceedings when appropriate. In the electrical cases the District Courts provided for a single series of national pretrial depositions and discovery of documents."

The answer to this criticism is as follows:

This is an erroneous statement of fact. In the electrical cases there were no multi-district consolidated pretrial proceedings. Multi-district consolidated pretrial proceedings are not presently authorized by law. For this reason it was often necessary to convene all of the available judges before whom electrical equipment cases were pending. At times, up to twenty-five district judges sat hearing arguments, when one or two could have heard arguments in simple pretrial proceedings. The judges who heard the arguments were not able to act until they had returned home, rescheduled the arguments and submitted the recommendations of their colleagues. This was a great waste of money and of judicial time. Under H.R. 8276, such pretrial proceedings may take place in one district to which all the cases have been transferred and consolidated for pretrial purposes.

Criticism No. 3.—The report of the Antitrust Section, at pages 5 and 6, criticized H.R. 8276, as presently drawn, upon the ground that one judge could, in effect, veto any proposed transfer of cases pending before him.

This criticism was made by the Deputy Attorney General on behalf of the Department of Justice and is valid in the opinion of a majority of the judges on the Coordinating Committee.

Criticism No. 4.—On page 6, in the first sentence of paragraph (1), H.R. 8276 is criticized on the ground that the same judge should preside "over the pretrial proceedings who is to preside at the trial of the case."

The answer to this criticism is as follows:

This view fails to consider litigation as a whole. If this theory were followed in practice, it is conceivable that in a multi-district litigation twenty-five or more judges in twenty-five districts will be performing the same function at the same time on each of the pretrial processes involved in each case. In some instances different decisions may result from the same question. If this view were followed, there could be a great waste of judicial time and expense with great inconvenience to parties and witnesses, and the possibility of failure on the part of the judiciary to process massive litigation.

Criticism No. 5.—On page 6, the report of the Antitrust Section makes the following criticism:

"Absent unusual circumstances, all pretrial proceedings should be in the District in which the case is pending. It is generally a hardship to both the litigants and their counsel to participate in pretrial proceedings in the city at a great distance from the District in which their case is pending."

In answer to this criticism, the statement is true but has no relevance to the merits of H.R. 8276. The criticism concedes that there may be unusual circumstances present which would render the statement irrelevant. H.R. 8276 is designed to deal with cases involving "unusual circumstances." The same statement can be made about existing Section 1404(a). It is only in unusual circumstances that a case is transferred to another district for all purposes under Section 1404(a). The same would be true under H.R. 8276.

Criticism No. 6.—On page 7 of the report of the Antitrust Section, the asserted justification for H.R. 8276 "does not affect the actual trial of any case" is criticized.

In answer to this criticism, it is true that by defining the issues and the scope of discovery there may be some effect upon the actual trial of a case. But there could be an effect upon the actual trial of a case only if the local District judge approved of the definition of the issues and of the scope of the discovery. Upon remand of the case to the local judge after pretrial, he could redefine the issues and make other and further discovery orders. In other words, it is expected that the pretrial proceedings under H.R. 8276 would be helpful but would not be binding upon the judge who tried the case.

Criticism No. 7.—H.R. 8276 is criticized, on page 7 of the report of the Antitrust Section, on the following grounds:

"The problem is aggravated by the proposed bill under which portions of a case may be pretried in different districts. The bill (subparagraph (a)) states that the judicial panel "may separate any claim, cross-claim, counterclaim or third party claim and remand any of such claims before the remainder of the action is remanded."

H.R. 8276 incorporates standard procedures under the existing Rules of Civil Procedure. The separation of a claim, cross-claim, counterclaim or third party claim is a routine judicial process under existing Federal Rules of Civil Procedure. This is adapted by H.R. 8276 to permit unique local claims, cross-claims, counter-claims or third-party claims which do not affect national issues to be separated and remanded for local pretrial. It is further designed to permit a claim for relief to be fully pretried and then remanded to the local court for prompt trial, without awaiting final disposition of collateral third party claims and cross-claims.

Criticism No. 8.—The report of the Antitrust Section, on page 7, criticized H.R. 8276 on the ground that "pretrial proceedings and discovery should be conducted in the context of the entire controversy." Reference is made to Rules 13 and 16 of the Federal Rules of Civil Procedure.

The answer to this criticism is that, though the statement is true, it has no bearing on the merits of H.R. 8276. The bill does not contemplate the conduct of pretrial proceedings and discovery outside the context of the proceedings in the entire controversy. The statement is really a ground for recommending H.R. 8276. The "entire controversy" may involve hundreds or thousands of suits in many districts. Only by transferring and consolidating for pretrial can pretrial proceedings, including discovery, be conducted in the context of the entire controversy.

The references to rules 13 and 16, Federal Rules of Civil Procedures have no bearing on H.R. 8276. Consolidated pretrial proceedings under the bill will be held in conformity with the Federal Rules of Civil Procedure, including rules 13 and 16. There is no suggestion in H.R. 8276 that the transferee court should be relieved of following the provisions of rules 13 and 16.

Criticism No. 9.—The report of the Antitrust Section on page 8, in the first full paragraph, contains merely a summary of the foregoing specific criticisms which have been answered earlier in this memorandum.

Criticism No. 10.—On page 8 of the report of the Antitrust Section, H.R. 8276 is criticized on the ground that "the proposed bill fails to recognize that the parties may incur substantial expense when pretrial and discovery proceedings are held in a distant forum."

The answer to this criticism is that the bill will save expense to the litigants and witnesses, as well as to the courts. The experience in the electrical equipment antitrust cases and other pending multiple litigation indicates that H.R. 8276 will effect great savings by eliminating repetitive and identical pretrial proceedings in each case in each district. Furthermore, the Panel on Multi-District Litigation will take into consideration expenses occasioned by transfer under H.R. 8276 in the exercise of its discretion. This is similar to the routine exercise of judicial discretion under the existing provisions of Section 1404(a).

Criticism No. 11.—On page 9 of the report of the Antitrust Section, H.R. 8276 is criticized on the ground that the bill "would have an adverse effect upon transfers under Sections 1404 and 1406 of 28 U.S.C."

The answer to this criticism is that H.R. 8276 provides an additional judicial tool which will not be exercised to the prejudice of applications under Sections 1404 and 1406. A transfer under Section 1407 will be employed only when the panel finds that such transfer is more desirable in the interests of the administration of justice and the convenience of parties and witnesses.

Criticism No. 12.—On page 9, the report of the Antitrust Section criticized H.R. 8276 on the ground that the electrical cases were an unusual situation, not common in civil litigation.

The answer to this criticism is that there are several similar situations in which the pending cases are now being handled with the advice of the Coordinating Committee. In fact, there is good reason to believe that there will be recurring massive multi-district litigation in the future.

In the criticism concerning the unusual character of the electrical cases, reference is made to the present ability of the judges to provide coordinated pretrial proceedings. The pretrial of the electrical equipment antitrust cases would, however, have been less costly, consumed much less judicial time and would have been much less difficult under H.R. 8276. Furthermore, if in the future more than one mass of multi-district litigation occurs at the same time, the federal judiciary would probably be unable to process these masses of litigation simultaneously.

Criticism No. 13.—On page 9, the report of the Antitrust Section recommends that the practice of coordinated pretrial procedure or consolidated pretrial procedure should be limited to the exceptional situation.

The answer to this criticism is that the panel will be expected to employ the provisions of H.R. 8276 only in the unusual, exceptional case. In determining whether a situation is exceptional or unusual, the number of cases is not decisive. For example, in certain class actions there may be a single case which involves 500 complex protracted claims for relief. In other words, the panel will be expected to grant transfers under H.R. 8276 only when it finds that the special circumstances demonstrate genuine and over-riding needs for such transfers.

Criticism No. 14.—On page 10 of the report of the Antitrust Section, the final criticism is stated in part as follows:

"Wholly aside from the merits of this proposal, it is a mistake to amend the law relating to judicial procedures on a piecemeal basis."

In this criticism it is further suggested that the Advisory Committee on Federal Rules of Civil Procedure is considering the question of pretrial discovery.

The Coordinating Committee has treated the question of venue (which is the subject of the bill) as historically within the province of Congress. There are some who feel that venue should be considered as within the rule-making power of the Supreme Court rather than within the province of Congress. Nevertheless, the Coordinating Committee believes that the traditional exercise of Congressional power in this field should be respected.

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

Respectfully submitted.

COORDINATING COMMITTEE FOR MULTIPLE LITIGATION,
By EDWIN A. ROBSON, *Judge.*
WILLIAM H. BECKER, *Judge.*

Judge BECKER. Thank you. I am going to omit that part of the presentation.

I would like to invite the attention of the committee to the fact that this bill does not create any new court. It employs on the panel for multiple litigation, sitting, working judges of the district courts and circuit courts of appeal. There is no added personnel insofar as the judiciary is concerned in the operation of this bill.

The bill is aimed to increase the efficiency of the courts without decreasing the quality of the administration of justice; and particularly to save time and money for the litigants and witnesses; and also to save money for the United States by eliminating duplicating judicial processes, and to eliminate costly repetitive pretrial proceedings in various districts, all on the same issue, which proceedings have caused great inconvenience to the witnesses and the custodians of documents and other persons who are having to be repeatedly exposed to this process; and to provide an alternative to transferring a case from one district to another for all purposes.

We feel that there are many situations in which the local interest in the trial of the case and part of the pretrial of the case ought to be retained in the interest of the administration of justice. This would give another alternative wherein those situations in which a court could—rather the panel could—cause a case to be transferred for pretrial processing with a mandatory duty that that case be returned to the local district for trial when the pretrial processes have been concluded.

The time is about up and I will extend these remarks with the paper.

Mr. DONOHUE. Without objection, you will be permitted to do that.

We will also incorporate at this point in the record the statement of the American Bar Association, Section of the Antitrust Law Division.

(The statement follows:)

STATEMENT OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW
RECOMMENDATION OF THE SECTION OF ANTITRUST LAW TO THE HOUSE OF DELEGATES
OF THE AMERICAN BAR ASSOCIATION ON H.R. 8276, 89TH CONGRESS

The Section of Antitrust Law recommends that the House of Delegates adopt the following resolution:

"I. Resolved, That the American Bar Association recommends to the Congress that it not enact H.R. 8276, a bill to provide for the temporary transfer to a single District for coordinated or consolidated pretrial proceedings of civil actions pending in different Districts which involve one or more common questions of fact, and for other purposes.

"II. Further Resolved, That the Section of Antitrust Law is authorized to urge the foregoing views of the American Bar Association on the Committee on the Judiciary."

REPORT OF SECTION OF ANTITRUST LAW TO THE HOUSE OF DELEGATES OF AMERICAN
BAR ASSOCIATION ON H.R. 8276, 89TH CONGRESS

On May 9, 1965, Congressman Celler, Chairman of the Committee on the Judiciary of the House of Representatives, introduced H.R. 8276, a bill to provide for the "temporary transfer to a single District for coordinated or consolidated pretrial proceedings of civil actions pending in different Districts which involve one or more common questions of fact, and for other purposes."

The bill was referred to the Committee on the Judiciary. No hearings have yet been held or scheduled.

The bill would amend Chapter 87 of Title 28 of the United States Code, by inserting provisions of the pending bill as Section 1407 thereof. Subsection (d) of the bill provides for a Judicial Panel on Multi-District Litigation to consist of seven Circuit and District Judges designated by the Chief Justice of the United States, no two of whom shall be from the same District. The concurrence of four members shall be necessary for the taking of any action. Subsection (a) of the bill provides that when civil actions involving one or more common questions of fact are pending in different Districts, the actions may be transferred to any District for coordinated or consolidated pretrial proceedings by the Judicial Panel on Multi-District Litigation, upon its determination that such transfers will promote the just and efficient conduct of such actions. While no such action may be transferred without the consent of the District Court in which it is pending, Subsection (e) of the bill provides that no District Court refusing such consent may make any order for or permit any discovery in conflict with the discovery proceedings in the transferred actions. At the conclusion of the pretrial proceedings, the bill provides each action shall be remanded back to the District from which it was transferred.

Subsection (b) of the bill provides that such coordinated or consolidated pre-trial proceedings shall be by a judge or judges to whom such actions are assigned by the Judicial Panel on Multi-District Litigation.

The bill originated with the Judicial Conference of the United States. The bill, introduced by Congressman Celler, was transmitted to the Speaker of the House of Representatives on April 12, 1965 by the Deputy Director of the Judicial Conference of the United States. The Speaker was advised by that letter that:

"This proposal has grown out of the practical experience of the Judicial Conference Co-Ordinating Committee for Multiple Litigation in conducting pretrial proceedings in the current electrical equipment antitrust litigation and would provide appropriate procedure to meet the problems involved in conducting pretrial deposition and discovery proceedings efficiently and economically in the event of the filing of similar connected actions in diverse districts in the future. Under the express terms of the proposed legislation, the procedure would be invoked only if the judicial panel determined that its use would promote the just and efficient conduct of such actions. A comment by the Co-Ordinating Committee for Multiple Litigation on this proposed legislation is appended hereto."

The proposal was submitted to the Judicial Conference by a Coordinating Committee whose report stated in part:

"As directed by the March 1964 resolution of the Judicial Conference of the United States, the Co-Ordinating Committee for Multiple Litigation (a subcommittee of the Committee on Pre-Trial Procedure and Practice) has examined

the need for legislation and rules to treat the special problems presented by multi-district litigation. During the past year the Committee has analyzed its experience in the electrical equipment litigation, consulted with the judges and lawyers who participated in the *ad hoc* coordination program for those cases, and appraised numerous proposals designed to expedite proceedings when related civil actions are pending in more than one district. Proposed § 1407 is recommended as an important step in improving judicial administration for this class of cases."

This report noted that Section 1404(a) of the Judicial Code already permits consolidated pretrial procedures in related cases, stating at page 7:

"Benefits from consolidated pretrial procedures for related cases have been recognized as grounds for transfer under Title 28, U.S.C. § 1404(a). In *Popkin v. Eastern Air Lines, Inc., et al.*, 204 F. Supp. 426, 431 (E.D. Pa.); *mandamus granted sub nom., Barrack, Administratrix, et al., v. Van Dusen U.S. District Judge, et al.*, 309 F. 2d 953 (1962), *rev'd. and remanded*, 376 U.S. 612 (1964), the district court granted defendants' § 1404(a) motions to transfer 55 personal injury and wrongful death actions to another district 114 cases which arose from the same crash were pending, stating that:

"The interest of justice requires the transfer of these cases to the transferee District for these reasons, among others: (1) Consolidation of all the cases arising from this accident for *purposes of proceedings before trial* is likely to procure fairer and more orderly trials for all litigants and save needless time and expense for the public, including jurors, and other litigants whose cases are awaiting trial."

The *Eastern Airlines* case involved an airplane crash in Boston which resulted in approximately 100 lawsuits in the United States District Court in Massachusetts and approximately 40 lawsuits in the District Court for the Eastern District of Pennsylvania. The Supreme Court held that such cases could be transferred to a common forum where to do so would not deprive the plaintiffs in the transferred cases of the benefits of applicable law in the District where the case was brought (for example the statute of limitations).

Significantly the proposed legislation is applicable whenever two civil actions are filed in different Districts which involve one or more common questions of fact.

While the claim for need for this legislation is said to arise out of the experiences in the electrical cases, where approximately 2,000 lawsuits were filed throughout the country as an aftermath to a series of criminal antitrust cases in Philadelphia, the procedure provided for by this legislation is applicable whenever there are as few as two cases filed with a common question of fact.

The District Courts have shown in the electrical cases that they now have adequate authority under existing statutes and the Rules of Civil Procedure to accomplish consolidated pretrial proceedings when appropriate. In the electrical cases the District Courts provided for a single series of national pretrial depositions and discovery of documents.

It has been suggested, as justifying the need for this legislation, that that procedure was successful in that instance only because each of the District Judges involved consented to the consolidated pretrial discovery: and that the entire proceedings might have failed if but one judge before whom one or more of those cases was pending had objected. Yet the proposed legislation provides that no such transfer may be made without the consent of the Court before which each such case is pending. And where such consent is withheld the bill provides that there may be no discovery inconsistent with that of the consolidated discovery; which in practice may mean no discovery at all.

RECOMMENDATION

The Section of Antitrust Law of the American Bar Association recommends that the Congress not enact H.R. 8276 for the following reasons:

1. It is always in the interest of the administration of justice that, whenever possible, the same judge preside over the pretrial proceedings who is to preside at the trial of the case. Absent unusual circumstances, all pretrial proceedings should be in the District in which the case is pending. It is generally a hardship to both the litigants and their counsel to participate in pretrial proceedings in the city at a great distance from the District in which their case is pending.

One asserted justification for consolidated pretrial is that this procedure "does not affect the actual trial of any case" (Comments on Proposed Title 28 U.S.C. sec. 1404(e) p. 26). This is a misconception. Pretrial, particularly in the cases contemplated by the proposed bill, controls subsequent proceedings by defining the issues and the scope of permissible discovery. It follows that if a case is

pretried in a distant forum by other parties in other cases under the procedures followed by a different court injustice may well result.

The problem is aggravated by the proposed bill under which portions of a case may be pretried in different districts. The bill (subparagraph (a)) states that the judicial panel "may separate any claim, cross-claim, counterclaim or third party claim and remand any of such claims before the remainder of the action is remanded." Pretrial proceedings and discovery should be conducted in the context of the entire controversy. Rule 13 of the Federal Rules of Civil Procedure specifically requires that all claims arising out of the same transaction or occurrence must be made part of the case at the pleading stage. The same considerations apply even more forcibly during the subsequent course of complex litigation. Rule 16 providing for broad discretion during pretrial is designed to further this objective.

Even if a case is not actually segmented for purposes of pretrial in another district, serious problems remain if a case is transferred under the proposed bill. Pretrial and discovery in the transferee district would undoubtedly be primarily concerned with the particular issues common to all cases. As a result, pretrial orders, which are customarily designed to set the framework for all issues to be tried, may not deal with some of the major problems in an individual case or may limit the issues so as to prejudice the rights of the parties.

2. The proposed bill fails to recognize that the parties may incur substantial expense when pretrial and discovery proceedings are held in a distant forum. The bill would result in particular hardship whenever the amount in controversy is relatively small or the common issues to be consolidated for pretrial represent a relatively small portion of an individual case. Under these circumstances, participation in all of the proceedings might not be necessary; yet few clients or lawyers would be willing to run the risk of having an issue decided adversely in their absence.

3. The proposed bill would have an adverse effect upon transfers under sections 1404 and 1406 of 28 U.S.C. Under these sections, cases can be transferred to another district for all purposes, thereby eliminating the problem of having cases shuttled back and forth between districts and assuring the advantage that both pretrial and trial are held in the one district which is in the best position to hear the case. Although the proposed bill does not prevent such transfers, it seems less likely that they will occur since the expedient of separating a case for purposes of pretrial and trial is available.

4. The electrical cases were an unusual situation not common in civil litigation to this date. While we think it is perhaps too early to assess the relative merits and disadvantages of pretrial proceedings utilized in the electrical cases, the fact remains that under existing statutes and applicable Rules the District Judges were able to provide for common and coordinated pretrial proceedings in those cases. Assuming that the lessons of the electrical cases show this unified and coordinated pretrial procedure to be desirable, the practice should in any event be limited to the exceptional situation in which there are a very substantial number of cases pending in various Districts involving common questions of fact.

5. In any event the proposed bill goes much too far for it would authorize consolidated pretrial proceedings for as few as two actions in different Districts, with theoretically one common question of fact. We do *not* suggest that the Judicial Panel on Multi-District Litigation would ever construe the statute, if enacted, so liberally as to permit two cases in different Districts with but one question of fact to be consolidated for pretrial proceedings, but such a broad granting of authority would appear to be an indication that Congress intended the liberal use of the statute to consolidate pretrial procedures in instances where there were but perhaps several cases with some common questions of fact. We think this unusual procedure should be confined to the unusual cases, such as the 2,000 electrical equipment cases arising out of the Philadelphia indictments, and for which inadequate procedures were shown to presently exist.

6. Wholly aside from the merits of this proposal, it is a mistake to amend the law relating to judicial procedures on a piecemeal basis. The Supreme Court currently has under study certain proposed amendments to the Federal Rules of Civil Procedure which were presented to it by the Judicial Conference in September. Those revisions of course represent an attempt to deal in a broad and comprehensive way with possible shortcomings in current Federal procedures. In addition, the Advisory Committee on Civil Rules is understood currently to have under study various other possible changes in the Civil Rules specifically relating to pretrial discovery. Piecemeal, statutory revision of Federal pretrial procedures is inappropriate.

This recommendation and report was approved at a meeting of the Council of the Section of Antitrust Law on April 13, 1966. We would appreciate your placing this matter on the agenda for the August Meeting of the House of Delegates.

MARCUS MATTSON,
Chairman.

Mr. DONOHUE. Are there any questions of Judge Becker?

Mr. MACGREGOR. No, I have no question of Judge Becker or Dean Neal. I wish to thank them for their preparation and presentations here.

Mr. DONOHUE. We will be pleased to hear from Judge Robson.

Judge ROBSON. In conclusion I will make it very brief, that our committee stands willing and able to meet with any members or with the counsel for this committee to explain any part or portion of the bill, the reasons or the background for it. This bill has also been submitted to the Senate and is pending before Senator Tydings' subcommittee and they are considering it. It has not been introduced in the Senate as yet.

There will be a hearing in Chicago on the bill and I understand that two or three other hearings are contemplated by the Senate in connection with the consideration of the drafting of the bill.

If there are any questions, I will be happy to answer them.

Mr. DONOHUE. Are there any questions?

Mr. MACGREGOR. No, thank you.

Mr. DONOHUE. There being no question of you, Judge Robson, we wish to thank you and your associates for being with us this morning to assist us in considering this measure

Judge BECKER. Thank you.

Mr. DONOHUE. This will conclude our hearing this morning. If there is no further business, the committee is adjourned.

(Whereupon, at 12 o'clock noon, the subcommittee adjourned, subject to call of the Chair.)

