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Complex-Litigation Reform and the Legislative Process

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Complex-Litigation Reform
and the Legislative Process

Charles Gardner Geyh*

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gathered in my former capacity as counsel to the Subcommittee on Courts, Intellectual
Property, and the Administration of Justice, United States House of Representatives, Com-
mittee on the Judiciary.

I would like to express my appreciation to my former subcommittee chairman, Con-
gressman Robert W. Kastenmeier, without whom this Article would not have been pos-
sible for the simple reason that there would not have been legislation about which to
write. It is with pride that I served one of the greatest members of Congress ever to
have occupied the office; and it is with sadness that I witnessed his departure at the close
of the 101st Congress, after 32 years of service. Thanks also to my former Chief Counsel,
Mike Remington, for his suggestions on an earlier draft of this paper.
I. Introduction

Complex-litigation legislation, specifically legislation affecting mass-tort litigation, has been lurking about the House Judiciary Committee in one form or another for more than a decade. In the late 1970s, Congressman George E. Danielson (D-California), sponsored a bill that would have created federal-question jurisdiction over airplane-crash litigation.1 Thereafter, in four consecutive Congresses in the 1980s, Congressman Robert W. Kastenmeier (D-Wisconsin), introduced legislation that would have expanded diversity jurisdiction in mass-tort cases, thereby facilitating the consolidation of such cases in the federal courts.2 Early incarnations of the Kastenmeier legislation would have conferred this special jurisdiction over a wide range of mass torts. The 1983 and 1986 variations of the bill, for example, proposed to extend diversity jurisdiction to all cases "arising out of a single event, transaction, occurrence, or course of conduct" that resulted in injury to twenty-five or more people.3 These early versions of the legislation would have reached not only mass accidents, but toxic exposures, product defects, and other mass torts as well; subsequent legislative versions, however, were limited to mass accidents, such as airplane crashes and hotel fires.4 Because the Kastenmeier mass-accident bill was the only complex-litigation proposal active in the 101st Congress, this Article will focus on it.

Congressman Kastenmeier's mass-accident bill represented his subcommittee's best efforts to achieve consensus and compromise

3. H.R. 3690, 98th Cong., 1st Sess. (1983); H.R. 4315, 99th Cong., 2d Sess. (1986). The 1987 legislation was even broader, applying to cases "arising out of the same transaction, occurrence, or series of related transactions or occurrences," which were alleged in good faith to have resulted in injury to 25 or more people. H.R. 3152 § 401(a), 100th Cong., 1st Sess. (1987).
4. H.R. 4807 § 301, 100th Cong., 2d Sess. (1988); Court Reform and Access to Justice Act: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary on H.R. 3152, 100th Cong., 1st and 2d Sess. 624 (1988) [hereinafter CRAJ Act: Hearings]. Compare H.R. Rep. No. 515, 101st Cong., 2d Sess. 1 (1990) (to eliminate any doubt that the reform was to apply only to mass accidents, the House Judiciary Committee revised the bill to reach actions arising "from a single accident, where at least 25 natural persons have either died or incurred injury in the accident at a discrete location").
among diverse and divergent interests. At least three factors justify his preference for proceeding by compromise and consensus in processing the mass-torts legislation. First, the benefits derived from sound mass-torts legislation tend to be systemic in nature. Because the potential gains from this type of legislation are diffused system wide, no one group may have a stake in the legislation that is sufficient to justify an active campaign in support of the bill. Conversely, the perceived costs of mass-torts legislation may not be as evenly dispersed; isolated groups may regard a mass-torts proposal as disproportionately burdensome. For such groups, there is ample incentive to wage an active campaign against the bill. Without compromise to neutralize this opposition, and without energetic sources of support to counterbalance it, representatives may receive only negative constituent correspondence on the legislation, making them reluctant to act upon it favorably.

Second, legislation on which a consensus exists can be processed without risk of amendment on the floor of the House. In the House, bills may be scheduled on the "Suspension Calendar," which suspends many of the rules of the House—most notably, the rules permitting floor amendments. The net effect is that a bill on the Suspension Calendar is presented to the House members as a take-it-or-leave-it proposition. Because bills taken up under a suspension of the rules must receive two-thirds majority support, the Suspension Calendar is an inappropriate vehicle for passing partisan or otherwise controversial legislation. The Suspension Calendar is an attractive vehicle, however, for processing complex, noncontroversial legislative proposals; it ensures that the statutory text, which has been carefully developed by a Congressional Committee with expertise on the subject matter of the legislation, is not amended on the House floor at the urging of well-meaning legislators who may lack such expertise.

Third, when the subject matter is complicated, dull, and low-profile, as is often the case with complex-litigation reform, proceeding by consensus and compromise may be the only reasonable alternative to not proceeding at all. As near and dear as issues in complex litigation are to the writers and readers of the articles collected in this symposium, they can be incomprehensible and dreary for the average member of Congress. Even representatives assigned to Committees with jurisdiction over complex-litigation reform may have insufficient time and interest to become
thoroughly acquainted with matters as arcane and difficult as minimal diversity, multifactor choice-of-law analysis, and reverse removal. If consensus or compromise cannot be reached among the interested parties who do have the requisite knowledge and expertise, Congress, which does not, may be ill-equipped to arbitrate their differences. As long as complex-litigation reform maintains a low political profile, and pressure to pass legislation of some sort is therefore limited, the most likely outcome—in the absence of a consensus as to how best to proceed—will be in a decision not to move forward, for want of time, interest, and expertise.

The remainder of this Article will describe the forces that helped to shape the Kastenmeier mass-accident bill and explain why, despite achieving general consensus, the bill did not become law.

II. The Development of H.R. 3406: Achieving Compromise and Consensus Among the Participants in the Legislative Process

A single issue dominated debate on the bill: To what class or classes of mass tort should the consolidation mechanism created by the bill apply? Mass accidents alone? Toxic exposures? Product defects? Other important issues were raised and considered relating to choice of law, punitive damages, the jurisdictional basis for consolidation, and the threshold number of victims, but were, for all except perhaps the academic community, secondary in their relative significance.5

Outside participants in the development of the Kastenmeier legislation fell into one of three groups: (1) public-sector participants, (2) private-sector participants, and (3) academic or scholarly participants.

A. Public-Sector Participants

Public-sector participants in the development of the Kastenmeier legislation included the federal judiciary and the federal executive, and to a lesser extent, state judges and state legislators.

5. See Kastenmeier & Geyh, The Case in Support of Legislation Facilitating the Consolidation of Mass-Accident Legislation: A View From the Legislature, 73 Marq. L. Rev. 535 (1990) (discussing the various issues that surfaced during the development of the Kastenmeier legislation and how the subcommittee responded to them).
1. The Federal Judiciary.—The Judicial Conference of the United States has approached the increased aggregation of mass torts with caution. When the 100th Congress first held hearings on the Kastenmeier legislation, the Judicial Conference’s support was conditional. The Conference acknowledged the logic of expanding diversity jurisdiction to permit greater consolidation of mass-tort cases in the federal system, because state courts often cannot aggregate related cases to the extent that federal courts can.\(^6\) Still, because of the burden that the numerous diversity cases placed on the federal courts, the Judicial Conference had long favored the abolition of general diversity jurisdiction. Consequently, the Conference would not support any expansion of diversity jurisdiction in the mass-tort context without corresponding restrictions on general diversity jurisdiction.\(^7\)

Even after the jurisdictional threshold for all diversity cases was increased, the Judicial Conference’s support for expanding diversity jurisdiction in mass-tort cases stopped at mass accidents; again, primarily out of concern for the courts’ caseloads, the Conference’s support did not extend to other kinds of mass torts.\(^8\)

Whether the Conference would agree to making minimal diversity jurisdiction available in a broader range of mass-tort cases if general diversity jurisdiction were further restricted, so as to be available only in mass-tort cases, remains unclear. Even if diver-

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7. See id. To avoid creating the misimpression that the Judicial Conference’s sole concern is the federal judiciary’s workload, I should add that its interest in abolishing diversity jurisdiction is further fueled by the firm belief that the *raison d’etre* for diversity jurisdiction—state court bias against out-of-state litigants—is no longer the threat it was when Congress created the jurisdiction in 1789. Prepared statement of the Hon. Charles Clark, Chairman of the Executive Committee of the Judicial Conference, before the Subcommittee on Intellectual Property and Judicial Administration, Committee on the Judiciary, U.S. House of Representatives 5-6 (March 21, 1991) (on file with *The Review of Litigation*).

sity jurisdiction is retained, the Conference might support narrowly-targeted efforts to streamline the disposition of mass-tort litigation such as asbestos cases—though not necessarily through the minimal diversity mechanism contemplated by the Kastenmeier bill.9

The Judicial Conference, however, does not speak for all federal judges. A number of judges believe that the federal courts should take the mass-tort bull by the horns: some because they think that the federal courts are better positioned than the state courts to consolidate and resolve nationwide mass-tort cases,10 and some simply because they do not share the Conference’s opposition to diversity jurisdiction.11 These judges have supported the Kastenmeier mass-accident legislation as far as it goes, but believe that more ambitious legislation is needed to address the major products-liability and toxic-exposure cases.12 Predictably, several of these judges are deeply involved in adjudicating mass-tort cases.

2. The Federal Executive.—In response to a request from Congressman Kastenmeier, Professor Daniel J. Meador, then an assistant attorney general in the Carter administration, developed the first legislative proposal to facilitate the consolidation of mass-tort cases by expanding diversity jurisdiction.13 The Meador proposal would have applied to “any civil action arising out of a single event, transaction, occurrence or course of conduct that results in personal

11. See, e.g., Federal Courts Study Committee, Working Papers and Subcommittee Reports, v. 1 at 421 (July 1, 1990) (acknowledging the presence of some support for diversity jurisdiction within the judiciary).
12. See, e.g., Multiparty Act of 1989: Hearing, supra note 8, at 283 (letter from U.S. District Judge Jack Weinstein to Congressman Kastenmeier (Nov. 9, 1988)) (complimenting the Kastenmeier legislation as a “laudable step towards resolving some of the difficulties that arise in the context of complex disaster litigations,” but criticizing the “rather limited scope of jurisdiction”).
injury or injury to the property of twenty-five or more persons, thus encompassing a wide range of mass torts.

When Congressman Kastenmeier introduced legislation adopting the Carter administration’s approach, the Reagan Department of Justice opposed its scope on the grounds that offering a federal forum for general mass-tort litigation would overburden the federal judiciary. The Department of Justice indicated that it would support the legislation only if its application were limited to mass accidents, and like the Judicial Conference, the Department further conditioned its support upon additional restrictions being placed upon general diversity jurisdiction. In 1988, after those restrictions were included in the legislation, the Department went on record as supporting the legislation, a position it reiterated in 1989.

3. State Judges and State Legislators.—From the states’ perspective, the Kastenmeier legislation need not be viewed as diminishing their sovereignty. Rather, the bill sought to facilitate the federal consolidation of cases that could not be efficiently consolidated in the state courts because of constitutional limits on the states’ ability to exercise personal jurisdiction over all of the parties. The intended effect, therefore, was not for the federal courts to usurp a traditional state-court function, but for the federal courts to accomplish what the state courts could not.

Nevertheless, some groups expressed concern that the bill would impermissibly restrict the states’ right to adjudicate cases involving state law. The Conference of Chief Justices was one such group. The Chief Justices have long supported the abolition of diversity jurisdiction because they view adjudication of state-

14. Id.
15. CRAJ Act: Hearings, supra note 4, at 224 (testimony of Assistant Attorney General Stephen J. Markman).
16. Id. at 224-29.
17. Multiparty Act of 1989: Hearing, supra note 8, at 28-32 (prepared statement of Deputy Assistant Attorney General Stephen C. Bransdorfer). Two other changes requested by the Department of Justice were also made: one, clarifying the nature of the injuries triggering the bill’s jurisdiction and another, establishing a presumption in favor of applying a single source of law to the entire action. See Kastenmeier & Geyh, supra note 5, at 222.
law disputes as the exclusive province of the state courts and, for the same reason, oppose consolidation of mass-tort cases in the federal courts. Another group—the American Legislative Exchange Council (ALEC)—has expressed similar concern over the implications of the bill for state sovereignty.

This opposition, however, must not be overstated. The Conference of Chief Justices did not comment on the measure after it was proposed by the Carter administration in 1979 or after it was introduced in 1983 and 1986. Nor did the Conference oppose the legislation in comments they submitted to the subcommittee after the bill had been introduced for a third time in 1987. In fact, the Conference of Chief Justices did not formulate its position until 1990, after the bill had passed the House in two successive Congresses. In short, the Conference's extended delay in formulating a position on the legislation calls into question the strength of its opposition. ALEC, on the other hand, is a relatively small association of conservative state legislators with a membership of 2,300. The National Association of State Legislatures, which represents all fifty state legislatures, and, indirectly, all 7,461 state legislators, has taken no position on the bill.

B. Private-Sector Participants

The most interesting participants in the mass-torts legislative process have been the litigants and their lawyers.


22. Letter from Vincent L. McKusick, supra note 19.

23. ENCYCLOPEDIA OF ASSOCIATIONS (24th ed. 1990). Although self-described as the "nation's largest individual membership organization of state legislators," Multiparty Act of 1989: Hearing, supra note 8, at 247 (letter from Samuel A. Brunelli, Executive Director, ALEC, to Congressman Henry J. Hyde (Nov. 22, 1989)), ALEC's numbers pale in comparison to the National Association of State Legislatures, which represents the legislatures themselves, rather than their individual members.

1. **Defendants.**—The positions of the defense bar are the most difficult to ascertain; four sources of information illuminate the diverse range of its views.

(a) *The American Bar Association Mass Torts Commission.*—Before the Kastenmeier bill was introduced in October of 1989, the American Bar Association (ABA) Commission on Mass Torts issued its preliminary report supporting comprehensive consolidation of mass-tort cases in the federal courts. Although it would be inaccurate to characterize the report as the work of the defense bar, the Commission was chaired by a defense lawyer, and of the eleven commissioners who joined in the report, five represented defendants and only one represented plaintiffs. This is not to imply that the commissioners were anything less than public spirited in their recommendations; rather, it simply suggests that the five defense and corporate attorneys on the Commission would be sensitive to the defendants’ interests and would be unlikely to support recommendations antithetical to those interests.

The chairman of the Mass Torts Commission submitted testimony to the subcommittee strongly supporting Congressman Kastenmeier’s mass-accident bill as a sound first step toward addressing the mass-tort problem. Other members of the Commission provided technical support, testified, and recommended changes. Commissioner Barbara Wrubel, for example, testified that the court to which all related litigation is transferred, rather than the several courts in which the individual actions are first filed, should be directed to assess punitive damages, so as to eliminate the risk of multiple punitive-damages determinations. Wrubel’s suggestion was adopted by the House Judiciary Committee.

(b) *The American Bar Association.*—To date, the ABA has made no official contribution, positive or negative, to the

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26. The remaining five were either judges or special masters. The biographies of the Commissioners are included as Appendix B to the Commission’s Report. *Id.* at 203.

27. *Id.* at 49 (summary of Statement of Robert W. Hanley (Nov. 15, 1989)).

28. *Id.* at 55 (statement of Barbara Wrubel on behalf of the ABA Commission on Mass Torts).

development of the Kastenmeier mass-tort legislation. At its 1990 mid-year meeting, the ABA withdrew a proposal to adopt the Mass Tort Commission’s report and rejected a resolution to support legislation similar to the Kastenmeier bill. The net effect is that the ABA’s position on the consolidation of mass torts is that it has no position.\(^30\)

\((c)\) The Lawyers for Civil Justice.—The ABA’s actions at its 1990 mid-year meeting may be attributed, in part, to the Lawyers for Civil Justice (LCJ), a trade association of defense lawyers and corporate counsel. In testimony before the Courts Subcommittee, the LCJ offered two objections to the Kastenmeier bill: (1) The bill’s twenty-five victim threshold was so low that it would flood the federal courts with mass-accident cases; and (2) a single, federal choice-of-law standard would precipitate a race to the courthouse, allowing the winner to control the choice of law applicable to all cases in the action.\(^31\)

At the ABA mid-year meeting, the LCJ circulated letters, white papers, and draft law review articles opposing the proposed mass-tort resolutions. The white papers abandoned the two points raised at the hearing in favor of five new objections: (1) The legislation was unnecessary, (2) the legislation was unfair to plaintiffs, (3) the legislation was unfair to defendants, (4) the legislation threatened state sovereignty, and (5) a single choice-of-law rule would yield rigid and irrational results.\(^32\)

Of the seven cumulative points the LCJ raised before the Subcommittee and at the ABA convention, only one was uniquely relevant to the trade association: The Kastenmeier bill was unfair to defendants. Three reasons were offered: (1) Mass consolidation creates “inescapable pressure” to focus on common issues and ignore the individual differences between cases, (2) “every consolidated proceeding would be a ‘bet your company’ case for defendants,” and (3) the pressure to settle would encourage plaintiffs with marginal claims to file against defendants.\(^33\)

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31. Id. at 95-97 (statement of James A. Dixon, Jr.).
33. Id. at 3-5.
Not one of these three concerns has any particular relevance in the mass-accident context. In the average airplane-crash case, what "individual differences" between passengers affect the airline's liability? None. How many airlines would be put out of business by a single crash? None. How many more marginal claims, over and above those generated under current law, will consolidation of the average plane crash generate? None. Rather, these are concerns that acquire relevance only in the context of products-liability and toxic-exposure litigation.

Overall, LCJ's primary concern with the Kastenmeier legislation related not to the impact of the bill on mass-accident cases, but to the bill's present and future implications for products-liability and toxic-exposure cases. These implications were two-fold. First, the bill, as introduced in 1989, would have applied to litigation arising out of a "single event or occurrence" that injured at least twenty-five people. Arguably, the decision to design a product in a particular way might be considered a "single event," and a continuous, long-term exposure to a toxic substance might be labeled a "single occurrence." Because the Committee did not intend such a result, it revised the bill to apply only to "single accidents." With that clarification, the LCJ ceased its active opposition to the bill. Second, the mass-accident bill would have put the camel's nose in the mass-tort tent. Once enacted, legislation consolidating mass-accident proceedings could serve as precedent for, and thereby facilitate, future legislative undertakings seeking to consolidate other categories of mass-tort cases. Although the Committee could not legislatively preclude future Congresses from using the mass-accident bill in this way, in explaining its decision to limit the bill's application to mass accidents, the Committee report emphasized the widespread opposition to more expansive consolidation.

(d) Defendants Directly Affected by the Legislation.—In contrast to the LCJ, prospective defendants in mass-accident cases, such as the Boeing Corporation and the American Insurance

35. Kastenmeier & Geyh, supra note 5, at 224.
37. Id. at 6-7.
Association, supported the legislation for at least four reasons. First, consolidation would reduce the transaction costs associated with hiring lawyers to try duplicative lawsuits. Second, authorizing the transforee court to resolve punitive-damages issues would eliminate the risk that such punitive damages could be assessed against the same defendant more than once. Third, a legislative framework for the litigation of these cases would regularize the process and make the ultimate outcome more predictable. Finally, the federal forum would more adequately accommodate most suits commonly involving plaintiffs and defendants from all over the country, if not the world.

Perhaps the strongest conclusion that can be drawn about defendants' position on the relative merits of increased consolidation is that it is likely to be situation specific. Whether the benefits touted by mass-accident defendants will be perceived as outweighing the costs underscored by the LCJ may vary from industry to industry, company to company, or product to product. Consequently, the defense bar may continue to offer divergent perspectives into the foreseeable future.

2. Plaintiffs.—A prospective plaintiff viewing the mass-torts system from behind a Rawlsian veil of ignorance might well favor legislation that promoted efficient and evenhanded compensation of negligently injured victims, so as to ensure similar treatment of similarly situated plaintiffs. Unlike defendants, however, plaintiffs are rarely repeat players in mass-tort actions and, therefore, have no incentive to develop an institutional voice in the legislative process.

This is not the case with the plaintiffs' bar. The President of the Association of Trial Lawyers of America (ATLA) strenuously opposed the recommendations of the ABA Commission on Mass Torts. ATLA objected that the Commission had developed a solution in search of a problem and that the proposed solution

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39. Perhaps for these reasons, the Public Citizen Litigation Group strongly supported the bill. Multiparty Act of 1989: Hearing, supra note 8, at 279 (letter from Alan Morrison to Charles Geyh (Nov. 14, 1989)).
would handicap plaintiffs. "Unfortunately," concluded ATLA's president, "the recommendations of the ABA Mass Torts Commiss-
ion in general may shape a 'tort system' that will be just what
the drug companies, chemical companies, and toxic polluters or-
dered." 41

Without calling attention to ATLA's characterization of the
Commission's recommendations as pro-defendant, the LCJ noted
ATLA's opposition to the recommendations in materials it circu-
lated at the ABA convention. 42 More specifically, the LCJ's white
papers offered a three-fold explanation for characterizing the
Commission's recommendations and the Kastenmeier mass-
accident bill as "unfair to plaintiffs": (1) increased consolidation
would cost plaintiffs their right to litigate in a local forum, (2)
with consolidation, "plaintiffs would lose control over their cases,"
and (3) consolidation would limit plaintiffs (or, more accurately,
their lawyers) to a single opportunity to establish their case. 43

As with LCJ's reasons for why the resolutions were unfair to
defendants, the reasons for finding them detrimental to plaintiffs
make more sense in the context of products-liability and toxic-tort
litigation than in the context of mass-accident actions. First, given
the extent to which mass-accident litigation can be consolidated
under current law, plaintiffs cannot be assured of litigating in a
local forum. Second, while the products liability or toxic exposure
plaintiff understandably may complain about losing control of
litigation when its suit is consolidated with thousands of others,
the mass-accident plaintiff is unable to make as persuasive a case,
given that the number of claimants in mass-accident cases rarely
exceeds the hundreds. Finally, whatever the virtues of permitting
duplicative litigation where the factual and scientific issues are so
complex that several unfruitful efforts often precede the first suc-
cessful suit, such issues are far less common in the mass-accident
context. 44

ATLA's position on the Kastenmeier legislation remains un-
clear. It declined invitations from the Courts Subcommittee in the

41. Id.
42. Letter from James C. Rinaman, Jr., President, Lawyers for Civil Justice, to Mem-
43. Memorandum in Opposition, supra note 32, at 5-6.
44. Kastenmeier & Geyh, supra note 5, at 232.
House to comment on the legislation in the 100th and 101st Congresses, and did not submit a letter or other written statement to the Courts Subcommittee in the Senate, although there are indications that ATLA representatives orally communicated certain reservations about the bill. Because ATLA was quick to criticize the Report of the Mass Torts Commission, but offered no comparable resistance to the Kastenmeier legislation, it may be that, as with the LCJ, the implications of the bill for products-liability and toxic-exposure cases give ATLA the greatest cause for concern.

C. Academic Participants

Academics are unique participants in the development of court-reform legislation. First, although critics may question whether academic thinking is colored by the desire for tenure, notoriety, or consulting fees, scholars enter the court-reform process unencumbered by the appearance of institutional bias. In contrast, public- and private-sector participants are more vulnerable to the accusation that their recommendations to improve the judicial system are driven, whether consciously or not, more by an interest in improving their station within the judicial system than by an interest in improving the judicial system itself.

Second, unlike the public- and private-sector participants, the political significance of the scholar's viewpoint is limited. Non-academic participants wield authority beyond the persuasive force of their respective positions: the federal executive enjoys veto power; the federal judiciary communicates the views of one thousand judges to Congress in a single voice; and the organized bar, in addition to speaking as one, speaks in a chorus hundreds-of-thousands strong. In contrast, scholars speak only as individuals and, when taken together, produce a sound more often cacophonous than harmonious. As a result, the scholar's viewpoint, apart from being that of a respected constituent to three members of Congress, is limited to the intrinsic worth of the ideas communicated.

45. CRAJ Act: Hearings, supra note 4, at 419. In 1989, ATLA submitted no statement in response to a letter inviting comments that was signed by the author on behalf of the chairman (letter from Charles Geyh to Alan Parker (Oct. 10, 1989)).

46. The nature and extent of ATLA's communications with the Senate subcommittee were ascertained through informal communications between the author and Senate staff.
Academics, therefore, are uniquely situated to become trusted, expert advisors, both on hotly contested issues where a more detached view is desirable, as well as on complicated, technical issues that might otherwise go unaddressed. Consequently, scholars play a potentially critical role in the development of mass-tort proposals, which are among the most complicated and difficult forms of court-reform legislation. In the 101st Congress alone, Congressman Kastenmeier’s subcommittee received invaluable insights and advice on the mass-accident bill from Professors Stephen Burbank, Richard Freer, Mary Kay Kane, Francis McGovern, Arthur Miller, Linda Mullenix, Judith Resnik, Thomas Rowe, Robert Sedler, Stephen Subrin, and Aaron Twerski.

Nevertheless, few scholars have embraced the mass-accident bill as the optimal solution to the mass-tort problem; most have harbored misgivings, either about any increased aggregation or, conversely, about anything short of global aggregation of all mass torts.\(^\text{47}\) For all but the most ardent proponents of these disparate views,\(^\text{48}\) however, the Kastenmeier legislation represented an acceptable compromise: most critics of aggregation conceded the utility of consolidated trials where all plaintiffs are injured in the same place, at the same time, and in the same event, while most advocates of complete aggregation accepted the Kastenmeier bill as a good first step toward more ambitious initiatives in the future.

III. A Post-Mortem of H.R. 3406: Why Achieving Consensus and Compromise May Be Necessary But Nonetheless Insufficient

Congressman Kastenmeier’s preference for legislating in the mass-torts area through consensus and compromise produced a bill that attracted widespread support and no virulent opposition. The

\(^{47}\) Compare Sedler & Twerski, The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain, 73 Marq. L. Rev. 76 (1989) (concluding that the objectives of increased consolidation sought by the ABA Mass Torts Commission and the Kastenmeier bill “cannot be achieved in our federal system with its constitutional constraints, without doing serious violence to long-standing principles of state sovereignty and progressive trends in choice of law,” id. at 76-77) and Mullenix, Complex Litigation Reform and Article III Jurisdiction, 59 Fordham L. Rev. 169 (1990) (concluding that the Kastenmeier legislation “will not make a substantial contribution toward solving the procedural problems that the truly complex cases of the past decade have generated,” and given that most mass-accident cases are “handled efficiently” under existing law, “one wonders why the Congress has bothered at all.” id. at 195).

\(^{48}\) Such ardent proponents include the authors cited supra note 47.
administration, the judiciary, and the defendants affected by the legislation supported the bill. The defense bar discontinued its opposition after its primary concerns were addressed, and the plaintiff's bar offered only belated and passive opposition to the bill.

So why was no law enacted? H.R. 3406 passed the House of Representatives on June 5, 1990, without objection. It was then transmitted to the Senate, where it was referred to the Senate Committee on the Judiciary, which held no hearings on the bill. Late in the Congress, virtually identical language was proposed for inclusion in a judicial-improvements package positioned to move through the Senate by unanimous consent. The Senate informally circulated the proposed language to all its members to ascertain if the requisite unanimity was present. Senator Howell Heflin, who chaired the Senate Subcommittee with jurisdiction over the bill, objected. In a letter to Congressman Kastenmeier, Senator Heflin explained, "I simply wish to take a thorough review of this legislation before I can endorse it." The letter offered no insights into what, if any, substantive concerns animated his interest in scrutinizing the legislation more closely. Because Senator Heflin would have blocked the unanimous consent package had the mass-tort provisions remained, the judicial-improvements legislation went to the Senate floor without them.

In short, proceeding by consensus and compromise may be pivotal to the success of mass-torts legislation in both the House and Senate, but achieving consensus and compromise in legislation passed by one body of Congress provides no guarantee that the other body will process the legislation. Issues surrounding the consolidation of mass torts present philosophical and technical questions of enormous difficulty and staggering complexity. Thus, the Senate, not having confronted these questions in a bill or hear-

51. Letter from Robert W. Kastenmeier to Senator Howell Heflin, supra note 38.
52. Senator Heflin is Chairman of the Senate Judiciary Subcommittee on Courts and Administrative Practice, which had jurisdiction over the Kastenmeier bill.
ings of its own, might understandably be reluctant to sign off on House-passed legislation. The real issue is why the Senate never confronted these questions in a bill or hearing of its own.

Encouraging one house of Congress to act on a bill that the other house has passed may not depend on consensus or compromise among interested parties. Rather, it may hinge on other considerations ranging from the obvious to the obscure: (1) Whether key legislators reviewing the bill passed by the other body think that the legislation merits pursuit; (2) whether the time remaining in the Congress after the first body passes the bill is sufficient to permit action in the other body; (3) whether outside supporters of the legislation communicate their views as actively to the body that considers the measure second as they did to the body that considered it first; (4) whether outside opponents of the legislation communicate their views as passively to the body that considers the measure second as they did to the body that considered it first; (5) whether the House and Senate maintain open and effective channels of communication among the relevant members, committees, and their staffs; (6) whether companion committees in both houses of Congress consider separate pieces of legislation initiated and passed by the other, giving each an added incentive to process the other's work; and (7) a host of political, personal, tactical, procedural, and substantive considerations that may come into play in any given case.

In the case of the Kastenmeier legislation, time constraints appear to have caused the Senate's inaction. As Senator Heflin explained, "This legislation arrived in my subcommittee during the middle of this summer, and I simply have not had the time to study the full effects of this legislation." He added, however, that he wished to "put in writing [his] promise to thoroughly review this legislation and conduct hearings at the start of the next Congress."

The next Congress, to which Senator Heflin referred, is now upon us. Congressman William J. Hughes, Mr. Kastenmeier's successor as Chair of the Court's Subcommittee (renamed the Subcommittee on "Intellectual Property and Judicial Administra-

54. Id.
55. Id.
tion”), has already reintroduced the legislation and held hearings upon it. Although Congressman Kastenmeier’s bill did not become law in the 101st Congress, the experience with that legislation offers some insights to the problems and opportunities awaiting legislative forays into the mass-torts arena in the 102d Congress and beyond.

56. H.R. 2450. A subcommittee hearing was held on June 19, 1991.