

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: LEXECON, INC., ET AL., Petitioners v. MILBERG,
WEISS, BERSHAD, HYNES & LERACH, ET AL.
CASE NO: No. 96-1482 c/1
PLACE: Washington, D.C.
DATE: November 10, 1997
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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 LEXECON, INC., ET AL., :

4 Petitioners :

5 v. : No. 96-1482

6 MILBERG, WEISS, BERSHAD, HYNES :

7 & LERACH, ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Monday, November 10, 1997

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:02 a.m.

14 APPEARANCES:

15 MICHAEL K. KELLOGG, ESQ., Washington, D.C.; on behalf of
16 the Petitioners.

17 JEROLD S. SOLOVY, ESQ., Chicago, Illinois; on behalf of
18 the Respondents.

C O N T E N T S

	PAGE
ORAL ARGUMENT OF MICHAEL K. KELLOGG, ESQ. On behalf of the Petitioners	3
ORAL ARGUMENT OF JEROLD S. SOLOVY, ESQ. On behalf of the Respondents	26
REBUTTAL ARGUMENT OF MICHAEL K. KELLOGG, ESQ. On behalf of the Petitioners	51

1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 96-1482, Lexicon, Inc. v.
5 Milberg, Weiss, Bershad, Hynes & Lerach.

6 Mr. Kellogg.

7 ORAL ARGUMENT OF MICHAEL K. KELLOGG

8 ON BEHALF OF THE PETITIONERS

9 MR. KELLOGG: Mr. Chief Justice, and may it
10 please the Court:

11 Congress passed the multidistrict litigation
12 statute in 1968 as an experiment for a limited purpose.
13 It wanted to allow cases with common facts filed around
14 the country to be consolidated in a single district for
15 coordinated pretrial proceedings. Such coordinated
16 pretrial proceedings promote judicial efficiency as well
17 as the efficiency of the parties by allowing for single
18 rounds of discovery and single rounds of document
19 requests.

20 But Congress was quite specific that at the
21 conclusion of those coordinated pretrial proceedings the
22 case must be remanded to the original district. I quote
23 here from section 1407(a), which is set forth at page 2 of
24 our brief. Each action so transferred shall be remanded
25 by the panel at or before the conclusion of such pretrial

1 proceedings, unless it shall have been previously
2 terminated.

3 QUESTION: Well, there is a line you omitted, is
4 there -- it doesn't say by the -- from the district to
5 which it was transferred, or --

6 MR. KELLOGG: That is section 1404(a), which is
7 the general transfer statute, pursuant to which the
8 District of Arizona transferred this case to itself. This
9 case originated in the Northern District of Illinois. It
10 was transferred pursuant to 1407(a) for coordinated
11 pretrial proceedings in the District of Arizona.

12 QUESTION: Now, Mr. Kellogg, under your theory
13 when should this -- your suit have been remanded?

14 MR. KELLOGG: It should have been remanded at
15 the time specified in the statute, which is at or before
16 the conclusion of such pretrial proceedings.

17 QUESTION: Well, was that when the Lincoln
18 Savings litigation ended, when the consolidated
19 proceedings ended, after summary judgment was entered,
20 when? I don't know --

21 MR. KELLOGG: The appropriate time --

22 QUESTION: -- when under your theory --

23 MR. KELLOGG: The appropriate time in this case
24 is at the time that Lexicon made its motion to remand,
25 because the various factors cited --

1 QUESTION: And what had happened at that time?
2 I mean, which of these events had already occurred?

3 MR. KELLOGG: Well, the multidistrict panel
4 cited three factors as reasons for sending this case to
5 Arizona. One was the pendency of the potentially related
6 appeal. The second was the existence of a document
7 depository in Arizona, and the third was the fact that
8 there was an unfinished settlement in the Lincoln Savings
9 litigation.

10 Each of those three factors had been eliminated.
11 The appeal had been dismissed, the document depository had
12 been shut down, and Lincoln Savings had final judgment --

13 QUESTION: But no determination had been made on
14 summary judgment in your case.

15 MR. KELLOGG: That is correct. At the time we
16 made our motion --

17 QUESTION: Now, maybe --

18 MR. KELLOGG: -- no determination had been made.

19 QUESTION: Maybe the district court, pursuant to
20 that original transfer, could go ahead and decide that,
21 could it not?

22 MR. KELLOGG: Not pursuant to the statute, Your
23 Honor. The statute specifically states that at or before
24 the conclusion of a consolidated pretrial proceeding the
25 case must be remanded, and we made our motion at that --

1 QUESTION: So when the consolidated proceedings
2 had ended you say it had to go back.

3 MR. KELLOGG: That's correct, Your Honor.

4 QUESTION: And, in fact, it did not, and a jury
5 trial was held, and it was -- the jury determined that
6 against your client.

7 MR. KELLOGG: That's correct.

8 QUESTION: And at that point, what's the remedy?
9 Why shouldn't we just leave things be? Even if you read
10 it right, why should we upset that now?

11 MR. KELLOGG: Well, because venue is like
12 subject matter jurisdiction in the sense that if it is not
13 waived the case must be reversed afterwards. That was
14 the --

15 QUESTION: What is your authority for that?

16 MR. KELLOGG: That was the holding of this Court
17 in the Olberding case. It was repeated again in the
18 Schnell case.

19 QUESTION: But those were cases of wrong venue,
20 Mr. Kellogg, were they not? This is a case -- the
21 District of Arizona, as I understand it, is a place where
22 personal jurisdiction existed as to all defendants, and it
23 was a place of proper venue. Olberding involved a wrong
24 venue.

25 MR. KELLOGG: This is a case of wrong venue,

1 Justice Ginsburg, even though respondents argued that we
2 could have filed the case in the District of Arizona, but
3 the fact remains, we did not file the case in the District
4 of Arizona. Exercising a long-held right, we decided to
5 file this case in the Northern District of Chicago.

6 QUESTION: Illinois.

7 MR. KELLOGG: At the time it was transferred to
8 the Northern District -- to Arizona, it was transferred
9 only for coordinated and consolidated pretrial proceedings
10 pursuant to 1407(a), and the statute specifies that at the
11 conclusion of those proceedings the case must be remanded.
12 That means venue was improper in the District of Arizona.

13 QUESTION: May I go back over your initial
14 answer to Justice O'Connor about summary judgment. Do I
15 understand you right to say, not in this case but as a
16 general matter, summary judgment is a pretrial thing, so
17 it could be had, where I think your position is that the
18 multidistrict forum has no authority ever to grant 140 --
19 to deal with 1404(a), is that right?

20 MR. KELLOGG: That's correct.

21 QUESTION: So summary judgment sometimes,
22 1404(a) never.

23 MR. KELLOGG: Summary judgment in appropriate
24 circumstances could be granted by the transferee court.
25 In this instance --

1 QUESTION: And what are those circumstances?

2 MR. KELLOGG: Pardon?

3 QUESTION: And what are the appropriate
4 circumstances?

5 MR. KELLOGG: In the appropriate circumstances
6 where it's part of coordinated, consolidated pretrial --

7 QUESTION: You mean if every single case
8 involves the same summary judgment motion?

9 MR. KELLOGG: Right. For example, if there's a
10 common issue of law that spans across all the cases, or a
11 common issue of fact, the court might well, pursuant to
12 coordinated and consolidated pretrial proceedings, grant
13 summary judgment.

14 QUESTION: So you're saying consolidated means
15 that which is common to all, rather than referring to
16 simply a collection of cases which are consolidated for
17 whatever pretrial proceedings there might be involving
18 common issues?

19 MR. KELLOGG: The statute says consolidated and
20 coordinated, so the cases are brought together. They are
21 consolidated, but the idea is to connect coordinated
22 pretrial proceedings, and the statute's absolutely
23 explicit that at the conclusion of those proceedings the
24 case has to go back.

25 QUESTION: But I'm sure there are many

1 multidistrict litigation instances where the trial court
2 said, now, there's three different kinds of cases. We're
3 going to have discovery -- three different subclasses of
4 cases. We're going to have discovery of one sort in one,
5 another in another. I don't see that there has to be a
6 determination of commonality before you can make that
7 ruling.

8 MR. KELLOGG: The key point for our case is that
9 there is a durational limitation built into 1407(a). It
10 says that the transferee court gets the case for a limited
11 period of time to conduct coordinated or consolidated
12 pretrial proceedings. Now, in my view, that means it's
13 specific proceedings that cover all those various cases,
14 that span across the cases, but the key point for this
15 case is that there's a durational limitation.

16 No one disputes that at the time Lexecon made
17 its motion to remand there was no prospect of any future
18 coordinated or consolidated pretrial proceedings in this
19 case. The statute therefore is quite explicit that the
20 case has to be remanded.

21 QUESTION: Mr. Kellogg, do you agree that under
22 the rule, 14(b), what the district court did here was
23 proper?

24 MR. KELLOGG: I agree that the JPML rule --

25 QUESTION: Yes.

1 MR. KELLOGG: -- allows for it. What --

2 QUESTION: But you say, though, the rule is
3 unauthorized.

4 MR. KELLOGG: The rule is directly contrary to
5 the statute. What the JPML has done is taken a statute
6 with a single specific exception -- it says, the case
7 shall be remanded unless it has been previously
8 terminated, and what the JPML has done is said, well, it
9 has to be remanded unless it's been terminated or unless
10 the district court has transferred the case to itself
11 pursuant to 1404(a).

12 So they've read a second exception into the
13 statute that completely swallows the rule, because
14 essentially what they've done is says, the case has to be
15 remanded unless the district court decides not to remand
16 it.

17 QUESTION: Well, the district court is -- does
18 not have total freedom in its options even under the rule,
19 but it can assign it to itself, I guess, because it's not
20 the transferee court.

21 MR. KELLOGG: The transferee court, in this case
22 the District of Arizona, was not free to assign the case
23 to itself, for two reasons.

24 QUESTION: Even under the rule?

25 MR. KELLOGG: Under the rule it is, but the rule

1 is invalid.

2 QUESTION: Oh.

3 MR. KELLOGG: And that's for two reasons. First
4 it makes nonsense of the shall-be-remanded language, and
5 second, the invocation of 1404 was itself improper,
6 because 1404 specifies that a case may be transferred to
7 any other district court.

8 QUESTION: Yes, but your opponent say other --
9 when they're referring to other district courts the base
10 of reference is the Northern District of Illinois.

11 MR. KELLOGG: Well, if you read the language
12 closely, and it's set out at page 2 of our brief, it says
13 specifically, for the convenience of parties and witnesses
14 in the interests of justice a district court may transfer
15 any civil action to any other district or division where
16 it might have been brought.

17 Now, the only way to make sense of that language
18 is that the district court that does the transferring, the
19 subject of the sentence, is other than the district that
20 receives the case, the other district which is the
21 indirect object of that sentence.

22 QUESTION: No, it doesn't have to be district.
23 Or division.

24 MR. KELLOGG: It says district or division.

25 QUESTION: It could be a different division

1 within the same district.

2 MR. KELLOGG: It could be --

3 QUESTION: Yes.

4 MR. KELLOGG: -- to a different division within
5 the same district, that's correct, Justice Stevens, but in
6 the absence --

7 QUESTION: You think Congress might be -- might
8 have been willing to allow a court to deny itself
9 jurisdiction over the case but not allow a court to obtain
10 jurisdiction that it otherwise wouldn't have.

11 MR. KELLOGG: I believe that's correct. I'm not
12 sure I followed the import of that.

13 Under 1404 a self-transfer is in our view
14 oxymoronic, because no transfer is taking place. The
15 District of Arizona is simply asserting continued
16 authority over the case.

17 QUESTION: The import is that transferring to
18 yourself is grasping jurisdiction. Transferring to
19 someone else is denying yourself jurisdiction, a much --
20 it's not as likely to be motivated by bad reasons.

21 MR. KELLOGG: That's correct, Justice Scalia.
22 There's a built-in safeguard there.

23 QUESTION: Well, why -- I don't know that I
24 quite follow that. Why is a judge who doesn't transfer
25 necessarily less worthy than a judge who does transfer?

1 MR. KELLOGG: It's only a question that, under
2 the strict language of 1404 the transfer has to be to some
3 other district.

4 A court who merely asserts jurisdiction over the
5 course -- case and says, I'm going to keep it for all
6 purposes, is not transferring the case within the meaning
7 of 1404, and there's no reason to distort the language of
8 1404, which was passed in 1947 at a time when the prospect
9 of self-transferring did not even exist, because the
10 multidistrict litigation statute was not passed until
11 1968, in which case a court for the first time could get a
12 case for limited purposes, but expressly has to remand
13 that at the conclusion of those purposes and cannot
14 bootstrap that authority by holding onto a case --

15 QUESTION: Mr. Kellogg, I want to bring you back
16 to the possible remedy, because even if I were to agree
17 with you on your reading of the statutes, I'm not sure
18 that you're entitled to have the jury verdict set aside
19 now.

20 MR. KELLOGG: Well, first of all, let me point
21 out that we sought mandamus before the trial in the Ninth
22 Circuit. Respondents specifically took the position that
23 we were not entitled to mandamus because we had a complete
24 remedy on appeal, and the Ninth Circuit agreed with that
25 position. They said specifically this issue can be raised

1 and the problem corrected on direct appeal.

2 We obviously invoked that right, under the
3 Court's cases, under Olberding and Schnell, specifically
4 have a right to invoke our venue rights, and then you
5 can --

6 QUESTION: Well, Caterpillar points the other
7 way. There was no subject matter jurisdiction there, and
8 the Court admitted as much, but said we're not going to
9 upset this verdict.

10 MR. KELLOGG: Well, I think Caterpillar actually
11 plays very well into our argument, Justice O'Connor.
12 First of all, of course, Caterpillar had nothing to do
13 with venue. It had, as you said, to do with subject
14 matter jurisdiction. Secondly, and more importantly, the
15 flaw in Caterpillar was cured at the time of the trial.
16 Subject matter jurisdiction did adhere because the
17 nondiverse party had been dismissed.

18 Here, the venue flaw was not corrected at the
19 time of trial. It continued throughout the entire case,
20 and continues to affect the case on appeal.

21 QUESTION: Is this issue comprised within the
22 question that we granted certiorari? Couldn't we just
23 remand to the district court if we agree with -- to the
24 court of appeals if we agree with you on this point?

25 MR. KELLOGG: If you agree with us --

1 QUESTION: Or is it crucial to deciding whether
2 we have a case or controversy?

3 MR. KELLOGG: I don't think you actually need to
4 reach the question of whether the error is harmless or
5 not. You granted certiorari to determine whether the
6 practice of self-transfer is permitted under 1407(a) and
7 under 1404(a). All you have to do is vindicate the
8 precise language of those statutes and remand the case to
9 the court of appeals.

10 QUESTION: There's not much of a policy if the
11 district court can assign all of the cases to a second
12 district court. If the district courts in the country
13 thought it was very, very important for them to continue
14 business almost as usual they could assign it to the
15 second best district court --

16 MR. KELLOGG: Well --

17 QUESTION: -- and so we'd have the second best
18 district courts trying these cases all over the country.

19 MR. KELLOGG: Actually, that's not true. He
20 could not assign it to a second district court. Under the
21 language of 1404, sure, it would be a transfer to another
22 district court, but it would still violate the express
23 mandate of 1407(a) that the case shall be remanded to the
24 original court where it was filed.

25 See, 1404 and 1407 are alternative mechanisms.

1 They're strategic choices that a defendant can make at the
2 time that a case is filed. If they think they can satisfy
3 the requirements for a 1404 transfer for all purposes,
4 then they can make such a motion. If not, and they think
5 coordinated proceedings would be appropriate, they can
6 make a 1407 motion.

7 What they can't do is what happened here, is
8 make a 1407 motion and then bootstrap it into being held
9 for all purposes under 1404(a).

10 QUESTION: Mr. Kellogg, I think you answered in
11 response to my question earlier that 1404(a) is not
12 available at all to this multidistrict forum, not to
13 itself and not to another forum.

14 MR. KELLOGG: No, but it is available to the
15 original court when the case is filed, so it was
16 available --

17 QUESTION: To the Northern District of Illinois,
18 but your position is the District of Arizona could not
19 have transferred it to California any more than it could
20 have transferred it to itself.

21 MR. KELLOGG: That's correct. That would be a
22 direct violation.

23 QUESTION: So 14 -- and to what extent are you
24 relying on -- you said 1404(a) came in in the forties, and
25 this is much later legislation. 1404(a) when it came in

1 envisioned only a transferor that would ship out, so are
2 you saying that because that was the world at the time
3 1404 came in, that is to allow a forum to send something
4 out, that it can't be applied in tandem with --

5 MR. KELLOGG: No, I think I'm making a somewhat
6 different point, Justice O'Connor. First of all, I'm
7 making the point that 1407 --

8 QUESTION: Justice Ginsburg.

9 MR. KELLOGG: Justice Ginsburg. I apologize.

10 The first point I'm making is that section 1407
11 specifically says that the case shall be remanded. That's
12 a later statute, a specific statute dealing with this
13 instance, and therefore the case has to be remanded.

14 The second point about 1404 is, this sort of
15 self-transfer doesn't fit the language of 1404, and my
16 point is that you should not jerry rig these two statutes
17 together, which were never intended to work in tandem, to
18 reach a result that Congress clearly did not intend.

19 Not only is the language of 1407 clear, the
20 legislative history, if one needs to resort to that, is
21 absolutely clear.

22 QUESTION: So supposing, Mr. Kellogg, that the
23 Arizona District Court had remanded, as you say it had to,
24 to the district of -- then could the District of Illinois
25 have granted a motion for change of venue to the District

1 of Arizona?

2 MR. KELLOGG: Yes, it could have. In this case
3 that never would have happened. None of the parties to
4 this case were from Arizona. None of the witnesses were
5 in Arizona. None of the lead counsel were in Arizona,
6 none of the documents.

7 QUESTION: You say it might not have been
8 brought there, or just as a matter of discretion that the
9 District Court in Illinois wouldn't have done it.

10 MR. KELLOGG: As a matter of discretion a 1404
11 transfer would never have been granted in this case.

12 QUESTION: Am I -- to go back to remedy for a
13 minute, am I right that there is no authority -- I
14 couldn't find any. I don't see any in the briefs, but you
15 might tell me there is some, in which case -- on the
16 following two related questions.

17 Question 1, a district court makes a mistake
18 about venue and holds the trial. Is that harmless, or
19 isn't it? There's just no authority. Caterpillar had to
20 do with jurisdiction.

21 The second related question is, let's assume
22 that harmless error applies. A court of appeals makes a
23 mistake about mandamus. It says you have an adequate
24 remedy, but you don't because of harmless error. Then,
25 given that fact, should, later on, you get an appeal,

1 whereas otherwise you wouldn't?

2 On those two questions -- I would assume the
3 answer to the second is no, you're just out of luck, but
4 maybe I'm wrong.

5 MR. KELLOGG: Well, let me --

6 QUESTION: And I assume that the answer to the
7 first question is, I don't know.

8 In other words, those seem to be the two cases
9 where I look for authority, the two key matters on your
10 harmless error point. I couldn't find any authority.

11 MR. KELLOGG: We've cited, actually, the
12 relevant harmless error cases in our brief.

13 QUESTION: Which one do you think is the best,
14 closest one?

15 MR. KELLOGG: In the reply brief --

16 QUESTION: Which one do you want me to specially
17 look at?

18 (Laughter.)

19 QUESTION: I'll look at them all, but which one
20 do you think is right on point?

21 MR. KELLOGG: There are a number of cases
22 holding that venue errors are not harmless error.

23 There's the Olberding case, when the Court quite
24 specifically -- and I'm quoting here from Olberding.
25 Unless the defendant has also consented to be sued in that

1 district, he has a right to invoke the protection that
2 Congress has afforded.

3 In the Schnell case, 8 years later, the Court
4 reiterated that point and said, look, there are some
5 people who thinks that's exalting form over substance, but
6 it's not.

7 QUESTION: Why not? Why not? I mean, he's
8 had -- they've had a complete trial. They had --

9 MR. KELLOGG: We've had a trial --

10 QUESTION: Nobody says it's unfair trial.
11 There's certainly jurisdiction. It just happened to be at
12 a place that the statutes don't provide venue, venue after
13 all being a matter of convenience for the parties, rather
14 than the nature of the fairness of the proceeding, it's --
15 or jurisdiction or something.

16 So the reason why it's important is --

17 MR. KELLOGG: The reason why it's important is
18 that the venue was improper. The defect in the trial,
19 unlike Caterpillar, was never cured. This trial was
20 held --

21 QUESTION: Well, I know, but what were -- the
22 reason why that's such an important defect that, even
23 though there was a totally fair trial, et cetera,
24 nonetheless we should do this all over again.

25 MR. KELLOGG: It's an important defect in this

1 case for two reasons, first of all because respondents
2 tried so hard to get this case to the District of Arizona
3 because of popular prejudice and strong feelings about the
4 Lincoln Savings matter and Charles Keating in particular,
5 and were relying on the fact that anyone associated with,
6 or alleged to be associated with Charles Keating was
7 essentially going to get lynched by a jury in Arizona, and
8 as Judge Kozinski said, they peppered their trial
9 arguments with references to Keating's misdeeds and with
10 references to the Lincoln Savings debacle.

11 A second reason is that Judge Zagel, to whom
12 this case had been assigned in the Northern District of
13 Illinois, had specifically rejected their argument that
14 Judge Bilby's orders in the Lincoln Savings case somehow
15 had a preclusive effect on parts of this litigation.

16 When the case was transferred to Arizona, Judge
17 Bilby's colleague immediately gave preclusive effect to
18 Judge Zagel's ruling, so in this case there was
19 substantial prejudice.

20 QUESTION: But are you -- is your position that
21 you must show that sort of prejudice, or that --

22 MR. KELLOGG: No.

23 QUESTION: -- a venue error is always
24 reversible?

25 MR. KELLOGG: No. It's always good to have a

1 fallback --

2 QUESTION: Yes.

3 MR. KELLOGG: -- and as a fallback we can show

4 prejudice, but we do not require to. Venue is always --

5 QUESTION: Mr. Kellogg, I assume that if it's

6 not reversible, then we would have to allow interlocutory

7 appeals on venue questions. Do you know whether

8 interlocutory appeals are possible on venue questions?

9 MR. KELLOGG: My understanding is that they are

10 not, that you only have resort to mandamus --

11 QUESTION: Even under 1292(b) they wouldn't be?

12 MR. KELLOGG: Sorry.

13 QUESTION: Even under 1292(b) they would not be

14 possible? Why not?

15 MR. KELLOGG: 1292 being --

16 QUESTION: The interlocutory appeals statute.

17 QUESTION: Well, they'd be appealable if they

18 were not reviewable on appeal. I mean --

19 QUESTION: You would have to have the

20 certification first from the trial judge. You'd have to

21 agree --

22 MR. KELLOGG: You'd have to, and it would have

23 to be not reviewable on appeal, which means that you would

24 end up with a lot of appeals raising this issue on an

25 interlocutory status and therefore delaying --

1 QUESTION: Well, mandamus.

2 QUESTION: It seems to me we have to allow it to
3 be reviewed at some point, or you may as well throw the
4 statute away. It's either reviewable interlocutorily, or
5 it's reviewable now.

6 MR. KELLOGG: That's exactly the point, and it's
7 another source of difference from the Caterpillar
8 decision, Justice Ginsburg, where the Court said we're not
9 concerned that wrongful removals are going to proliferate
10 in that instance because the chances of the defect being
11 cured by the time of trial are so small that nobody's
12 going to take the chance.

13 QUESTION: Well, there are many trial errors,
14 aren't there, where judges -- the only way to review them
15 is through mandamus, or you lose them. This would be one
16 of those, presumably.

17 MR. KELLOGG: Well --

18 QUESTION: If it's a close question the judge
19 certifies it. If it's not, you'd have to rely on
20 mandamus.

21 MR. KELLOGG: But the Court has specifically
22 held that this one is reviewable, unless you want to
23 overrule --

24 QUESTION: The Olberding --

25 MR. KELLOGG: -- Olberding and Schnell as well

1 as distorting what I think was the clear import of the
2 opinion in Caterpillar. Again --

3 QUESTION: Is it correct that the -- I don't
4 have it in front of me, but there's a specific provision
5 for review by extraordinary writ on this venue issue?

6 MR. KELLOGG: No. There is a specific provision
7 in the JPML statute, the multidistrict statute that says
8 orders of the panel are only reviewable via mandamus.

9 QUESTION: Any order of the panel.

10 MR. KELLOGG: Any order of the panel.

11 QUESTION: So we cannot say, then, on that basis
12 that this is necessarily made in effect a final order for
13 purposes of interlocutory appeal, because certainly the
14 statute would not be construed that broadly. Not every
15 issue that the panel makes would be --

16 MR. KELLOGG: Well --

17 QUESTION: -- presumably was intended by
18 Congress to be a final order.

19 MR. KELLOGG: In this instance, of course, we're
20 not challenging an order of the panel.

21 QUESTION: And you don't claim it's a final
22 order, do you? I take it you claim that it would be
23 reviewable only if it in fact, it is certified, is that
24 right --

25 MR. KELLOGG: If it is --

1 QUESTION: Reviewable on an interlocutory basis,
2 that's your claim.

3 MR. KELLOGG: That's correct.

4 As Professor Wright explained in his amicus
5 brief, this is like subject matters jurisdiction except
6 that it's waivable, but where it's not waived the decision
7 has to be reversed on appeal. Let me --

8 QUESTION: A rule couldn't change the statutes
9 governing appealability anyway, could it?

10 MR. KELLOGG: That's correct.

11 QUESTION: If you had gotten your certification
12 and it had been reviewed on the merits on an interlocutory
13 basis and you had lost, you then at the conclusion of the
14 case, I presume, would not claim that you had a right to a
15 second crack at review on that issue, would you?

16 MR. KELLOGG: If we had had an interlocutory
17 appeal and lost?

18 QUESTION: Yeah.

19 MR. KELLOGG: I guess that's -- I'm not quite
20 sure what the general rule is on interlocutory appeals and
21 review afterwards.

22 QUESTION: There's such a thing as law of the
23 case, isn't there? I mean, if you've gotten the issue
24 decided on the way up, they --

25 MR. KELLOGG: But in any event, in this case we

1 were specifically told by the court of appeals to raise it
2 on direct appeal. We did so.

3 I just want to take 30 seconds to give one more
4 reason why a Caterpillar result does not hold here. In
5 Caterpillar the court specifically stressed that the
6 result was in harmony, ultimately, with the subject matter
7 jurisdiction statutes. Here, by contrast, the result is
8 directly contrary to Congress' judgment that even if some
9 efficiency is sacrificed by sending the case back to the
10 original district it still has to be remanded. That was
11 the direct command of Congress, and to set aside that, to
12 say it's harmless error because it would be more efficient
13 to have the case heard just once would be to completely
14 undermine that principle.

15 I'd like to remain -- reserve the remainder of
16 my time for rebuttal.

17 QUESTION: Very well, Mr. Kellogg.

18 Mr. Solovy.

19 ORAL ARGUMENT OF JEROLD S. SOLOVY

20 ON BEHALF OF THE RESPONDENTS

21 MR. SOLOVY: Mr. Chief Justice, and may it
22 please the Court:

23 The position of the respondents that 30 years of
24 multidistrict panel litigation has served the country
25 well, as has -- was intended by the Murrah Committee, and

1 was intended by the judicial conference, and was intended
2 by Congress in enacting this act.

3 I want to dispel one false issue, and that is
4 the issue of prejudice of trying this case in Arizona.
5 This case, of course, did reek of Arizona because it was
6 all about the Lincoln Savings case, which was tried in
7 Arizona, services performed by Lexecon in Arizona, but
8 this prejudice issue that somehow they could not get a
9 fair trial in Arizona is only a concept by Judge Kozinski,
10 because it was never raised by petitioners before Judge
11 Roll in the district court before the trial. Indeed,
12 the --

13 QUESTION: I don't know that they said he
14 couldn't get a fair trial. They just didn't think that
15 was as advantageous a forum for them, and was a much more
16 advantageous forum for you. Do you contest that?

17 MR. SOLOVY: I do contest that, but that's --

18 QUESTION: Really.

19 MR. SOLOVY: That's a different issue, Your
20 Honor.

21 QUESTION: You think the jury there was no more
22 likely to be favorable to your client than it would have
23 been in Chicago, where Lexecon is?

24 MR. SOLOVY: No more favorable, Your Honor, but
25 that issue, Justice Scalia, was never raised. Indeed,

1 they didn't even have the voir dire transcribed, so --

2 QUESTION: The issue of transferring it because
3 there was excess -- so much prejudice that the verdict
4 would be set aside for prejudice is one thing, but whether
5 there was a substantial motive to move it to another forum
6 that was more advantageous, although you couldn't say it
7 would be an unfair trial, is quite a different issue --

8 MR. SOLOVY: Well --

9 QUESTION: -- and it seems to me it's the latter
10 issue that he's raising.

11 MR. SOLOVY: That's what section -- this case,
12 number 1, is supposed to involve 1407 and not 1404. 1404,
13 plaintiff's choice of forum, they tried to elevate the
14 plaintiff's choice of forum as sacrosanct, and they cite
15 Gulf Oil. The trouble with Gulf Oil is that's a forum non
16 conveniens case which was overruled by 1404.

17 QUESTION: What about the Olberding case?

18 MR. SOLOVY: Well, the Olberding case, Your
19 Honor, is a improper venue statute where the improper
20 venue person was the defendant, not the plaintiff.

21 The whole purpose -- this is a case which always
22 could have been brought in Arizona, and there was
23 jurisdiction there. Arizona said this is not an improper
24 venue case.

25 QUESTION: Well, but certainly it could have --

1 perhaps it could have been brought in Arizona, but several
2 of our cases talk about the plaintiff's choice of forum.
3 The plaintiffs did not choose to bring it in Arizona.

4 MR. SOLOVY: But that's what 1404, Mr. Chief
5 Justice, does. 1404 makes the plaintiff's choice of forum
6 a factor to be considered in the discretion of the trial
7 court.

8 QUESTION: By the transferor forum, and you
9 quickly went by Gulf Oil, but 1404(a) wasn't rejecting
10 that decision. It was saying the terrible consequence
11 that the forum would dismiss and then you'd be caught up
12 on the statute of limitations, so Congress provided for
13 transfer to another district.

14 But it envisioned the transferor, which in this
15 case would be the Northern District of Illinois, or
16 plaintiff's choice, that forum deciding to send it some
17 place else, so I think you have to stay a little longer
18 with what 1404(a) was meant to do. It was definitely a
19 shipping out provision when Congress enacted it, not a
20 shipping -- not a retention.

21 MR. SOLOVY: Well, Justice Ginsburg, section
22 1404 involves an Article III judge making a determination
23 of where the case can best be tried. In this case, that
24 determination was made by the Article III judge, Judge
25 Roll in Arizona, and he transferred the case to where it

1 had been filed and otherwise would have been tried from
2 Illinois to Arizona, and I don't --

3 QUESTION: What forum was the transferor forum?
4 We have -- the transferee forum ends up being the district
5 court in Arizona, but who is the transferor?

6 MR. SOLOVY: The transferor -- the case was
7 transferred from the District of Illinois where it would
8 otherwise have been trialed to the District of Arizona.

9 QUESTION: But in the 1404 transfer, the self
10 transfer, do we have a transferor and a transferee? Or do
11 we have only a transferee?

12 MR. SOLOVY: Well, I think, you know, it depends
13 whether you're looking at this in some metaphysical sense.
14 I think within the language of section 1404 you have the
15 case being transferred from the District of -- Northern
16 District of Illinois to the District of Arizona, and it so
17 happens that the person issuing that order is the
18 transferee judge, and I would like to step back --

19 QUESTION: Well, before you get off that --

20 MR. SOLOVY: Yes.

21 QUESTION: If you're relying on the Northern
22 District of Illinois as the starting place, that is the
23 transferor, and now we're in the District of Arizona under
24 the multidistrict panel order.

25 If the District of Alabama is at that moment

1 asking the --

2 QUESTION: Arizona.

3 QUESTION: -- for the Northern District of
4 Illinois, the only transferor in the picture, mustn't it
5 do, in -- consistent with Van Dusen v. Barrett say, we're
6 going to make this decision as though we were the Northern
7 District of Illinois, because that's the only transferor
8 that Congress has given power in this setting.

9 MR. SOLOVY: Well, I think, Justice Ginsburg,
10 your decision in Korean Air Lines is quite to the
11 contrary, because I don't think the transferee court has a
12 duty to put his or her mind into the mind of the
13 transferor court.

14 QUESTION: Mr. Solovy, in -- the KAL case
15 involved a question of what was the substance of the
16 Federal law, what was --

17 MR. SOLOVY: Correct.

18 QUESTION: -- that governed. This is a
19 question of an exercise of discretion.

20 MR. SOLOVY: Correct.

21 QUESTION: So it's quite different in that
22 regard. There is only one Federal law, but in exercises
23 of discretion, reasonable minds can differ.

24 MR. SOLOVY: Well --

25 QUESTION: We were -- Mr. Kellogg told us likely

1 the Northern District of Illinois would have kept it.

2 MR. SOLOVY: Well, we don't know what Judge
3 Zagel would have done. He might have been happy to get
4 rid of this case. I don't know. I mean, I can't read his
5 mind.

6 But let's step back for a moment and look at the
7 purpose of 1407, this statute that has worked so well for
8 the last 29 years, handling over 100,000 cases.

9 QUESTION: Well, Mr. Solovy --

10 MR. SOLOVY: Yes.

11 QUESTION: -- I'd like to look at how well it's
12 worked, too.

13 MR. SOLOVY: Yes.

14 QUESTION: But I think we have to also look at
15 the language of the statute, and I don't think it supports
16 your position very well.

17 MR. SOLOVY: I think, Justice --

18 QUESTION: It does say it's supposed to be
19 transferred back to the original court for trial.

20 MR. SOLOVY: Well --

21 QUESTION: Now, it does say that.

22 MR. SOLOVY: Justice O'Connor --

23 QUESTION: What's your answer to that?

24 MR. SOLOVY: Yes. It says that --

25 (Laughter.)

1 MR. SOLOVY: -- unless the case is otherwise
2 terminated, and I was surprised Mr. Kellogg --

3 QUESTION: Well, but you take the position that
4 the transfer is a termination.

5 MR. SOLOVY: We say --

6 QUESTION: It's not a termination.

7 MR. SOLOVY: Well, but this Court -- you know,
8 termination is -- has to be used in a practical, common
9 sense --

10 QUESTION: Well, it means ended.

11 MR. SOLOVY: It means ended --

12 (Laughter.)

13 MR. SOLOVY: No, it means ended temporally and
14 I'm looking for --

15 QUESTION: Ended temporarily?

16 MR. SOLOVY: Temporally. Temporally. It was
17 suspended --

18 QUESTION: How else is a case ended, other than
19 temporally?

20 MR. SOLOVY: Well, it's ended as a multidistrict
21 litigation. For example, this Court in EEOC v. Commercial
22 Office Products, 48 -- 486 U.S. 107, had to deal with the
23 word terminated in the EEOC case.

24 In order to have -- meet the statute of
25 limitations the question is whether a State, quote,

1 terminated its proceeding when it gave the case back to
2 the EEOC, but it really only suspended, and this Court in
3 that case says you have to use it, that word terminated in
4 a common sense way and give effect to the statute.

5 And by interpreting terminated to mean
6 terminated as an MDL proceeding, we give effect not only
7 to 1407(a), but to 1407(b), because 1407(b) also says in
8 mandatory language that the transferee judge shall conduct
9 pretrial proceedings -- shall conduct pretrial
10 proceedings -- and if we want to know what Congress meant
11 we only have to look at what the Murrah Committee meant,
12 because as Professor Wright says in his amicus brief it's
13 fiction here to say what Congress meant, because this was
14 all engineered by the Murrah Committee in the judicial
15 conference.

16 Congress passed this statute with only two
17 changes suggested by the Department of Justice, one to
18 exempt Government antitrust cases from the statute, and
19 two, originally the Murrah Committee suggested that the
20 transferor court would have to consent to the transfer.
21 They took that out, so any proprietary interest of the
22 transferor court disappears.

23 Now, we have within 8 months after the passage
24 of this act a case called In re Plumbing Fixtures, which
25 we cite at pages 19 and 26 of our brief, and there, Judge

1 Becker, talking for the entire panel, which was a panel,
2 you know, of distinguished jurors, Judge Wisdom, Murrah,
3 Becker, et cetera, in that case the petitioner, like the
4 petitioner here, said that the transferee court could not
5 pass upon class action issues. That had to be passed upon
6 only by the transferor court.

7 And the panel said, well, number 1, let's look
8 at the legislative history. The legislative history
9 rejected the suggestion that only discovery matters be
10 handled by the transferee court. All pretrial proceedings
11 must be handled by the transferee judge.

12 The court said, number 2, look at the House and
13 Senate report. It says that pretrial proceedings means
14 everything a judge does up to a trial. It said, also --

15 QUESTION: What does that have to do with this?
16 I mean --

17 MR. SOLOVY: Well, because, Justice Scalia --

18 QUESTION: The issue is not that the Arizona
19 court terminated the proceeding by granting summary
20 judgment. They didn't do that.

21 MR. SOLOVY: Well --

22 QUESTION: They transferred the proceeding to
23 themselves.

24 MR. SOLOVY: Because In re Plumbing Fixtures
25 says that what this pretrial proceedings means, and it

1 says the plain language of pretrial proceedings means
2 everything up to a trial, which includes a motion to
3 dismiss, a motion for summary judgment, class
4 certification, and it also inexorably means a motion to
5 transfer.

6 QUESTION: Oh, of course it means that. I have
7 no doubt that the court can rule on a motion to transfer.
8 The question is whether it can grant it.

9 MR. SOLOVY: Justice Scalia --

10 QUESTION: You don't get where you want to go by
11 saying that the transfer, that the court to which the
12 panel has given the case may pass upon that question. Of
13 course it may. That's a pretrial question like a lot of
14 other things.

15 MR. SOLOVY: Well --

16 QUESTION: The issue is whether it may grant the
17 motion.

18 MR. SOLOVY: Well, if it can pass upon it,
19 inexorably it has to grant it or deny it. I mean, what's
20 the purpose --

21 QUESTION: Under your view of the case,
22 termination occurs when the district judge makes the order
23 transferring the case to itself?

24 MR. SOLOVY: That's correct, Justice Kennedy.

25 QUESTION: So if that's the first order that it

1 makes, everything after that is not a pretrial order?

2 MR. SOLOVY: It's no longer an MDL proceeding.
3 You see, Rule 14(b) of the MDL panel, the expert body that
4 administers this act, says if a motion to transfer is
5 granted either to some other court or to the transferee
6 court, then no further order of the panel is needed and
7 the case is concluded as an MDL case.

8 QUESTION: But then you give no effect to the
9 statutory language at or before the conclusion of the
10 pretrial proceeding. You say the pretrial proceedings are
11 concluded the second the district court gets the case if
12 that's its first order.

13 MR. SOLOVY: That would be correct, but that
14 would be highly unusual. Let's take the normal case.
15 Let's take an airplane crash case, because that's a normal
16 MDL case. The plane crashes in Iowa. The MDL panel gives
17 it to a judge in Chicago, and they're -- you're going to
18 get all sorts of motions.

19 You're going to get discovery motions, you're
20 going to get statute of limitations issues, you're going
21 to get Hague Convention issues, you're going to get all
22 sorts of issues passed, and somewhere along these
23 proceedings somebody's going to file, say in the 2-year
24 mark, a motion to transfer, and that transferee judge is
25 going to say, okay, number 1, could I transfer this case

1 to myself? Are the provisions of 1404 complied with?

2 In many instances they won't be, because the
3 case could not -- that case could not have been brought in
4 the District of Chicago, so that transferee judge could
5 transfer some of those cases to himself, or he could
6 transfer it to other places.

7 The Pfizer, on which retired Justice Clark sat,
8 said you have to have the transferee judge rule upon
9 motions to transfer, otherwise the transfer issue is going
10 to be in limbo during the entire existence of these MDL
11 proceedings, because --

12 QUESTION: Mr. Solovy, the main problem that I
13 have with using the motion to transfer as a lever to get
14 trial under a statute, 1407, that has pretrial written all
15 over it, the multidistrict panel transfers it to a
16 district for consolidated pretrial proceedings. 1407(b)
17 begins such consolidated pretrial proceedings.

18 Pretrial, pretrial is all over this, and then
19 you're saying, ah, but transfer is a pretrial motion.
20 Therefore, we can use it as a lever to have a trial under
21 a statute that had in mind pretrial.

22 MR. SOLOVY: The debate in Congress, if there
23 was a debate, was not whether a district court could
24 exercise -- a transferee court could exercise traditional
25 1404 powers, because in the electrical equipment cases

1 they issued 1404 orders.

2 The question was whether the panel could have
3 the supertransfer power not only for pretrial but for
4 trial, because remember, the panel can ship the case to a
5 court without jurisdiction and a court without venue.
6 That's entirely different than a 1404 motion, and the
7 debate was never, could the transferee court transfer
8 cases, because the Murrah Committee knew they had done so
9 in the electrical equipment cases. This system can't
10 work --

11 QUESTION: On -- my -- the question for me --

12 MR. SOLOVY: Yes.

13 QUESTION: For me. I'm not speaking for anyone
14 else, is I thought the question that was bothering me is
15 where does the district court get the legal power to
16 transfer a case to himself for trial?

17 It doesn't seem to come out of 1407 for the
18 reason -- in addition to what you say to me it's very
19 important -- that the judicial conference drafted the bill
20 and wrote to conference, wrote to Congress, right in the
21 report the letter from the judges, at or before the
22 completion of the pretrial proceedings the panel would
23 remand each case to the district from which it has
24 originally come.

25 MR. SOLOVY: That's correct.

1 QUESTION: It hasn't finished. And then they
2 have attached a little report from the coordinating
3 committee of judges who said the major innovation proposed
4 is transferred solely for pretrial purposes.

5 Now, if the judges say that to Congress and the
6 language supports it, don't they have to stick to it?

7 MR. SOLOVY: Well, if that's --

8 QUESTION: And the part -- the other place where
9 you try to get your authority from is 1404(a) in the
10 absence of 1407.

11 Well, in the absence of 1407 I become concerned
12 about the language, which does say, other court -- it says
13 a district court may transfer a civil action to any other
14 district, and I don't know how that language in the
15 absence of 1407 can be avoided, and I don't see how 1407,
16 given its language, purposes, and representations by the
17 judges to Congress, can help. That's the problem I'm
18 having with the merits of your argument.

19 MR. SOLOVY: All right. Let's attack it step by
20 step, okay. The first step is on what did the Murrah
21 Committee intend? Well, number 1, you know, we do have
22 the little experiment that you normally wouldn't have.
23 You wouldn't have Congress talking right away, but you
24 have Congress talking through the Murrah Committee almost
25 immediately in the Plumbing Fixtures case. That's 8

1 months after Congress adopted this act, and they say what
2 they mean.

3 Number 2, Justice Breyer, we cite at page --

4 QUESTION: What are you --

5 QUESTION: I'm sorry, I wasn't following you.

6 QUESTION: What are you --

7 QUESTION: How does a court decision 8 months
8 later convey Congress' understanding?

9 MR. SOLOVY: Well, because, Justice Ginsburg, as
10 even Professor Wright says, the fact -- what Congress
11 intended here is fiction. Congress took what the Murrah
12 Committee submitted to them and crafted and adopted it,
13 and so if you want to get at least in the minds of the
14 people who drafted the statute, namely the Murrah
15 Committee, you but have to look at the Plumbing Fixtures
16 case.

17 QUESTION: But Congress passed words in a
18 statute, not -- the Murrah Committee didn't pass anything,
19 and what --

20 MR. SOLOVY: But --

21 QUESTION: -- is troubling me about this, as
22 bright an idea, and as efficient as it is, isn't it the
23 kind of thing that the judges, if they want it, should
24 tell Congress this is it, transfer for trial includes
25 trial, rather than go about it in this rather complicated

1 way?

2 MR. SOLOVY: Justice Breyer, if you'll allow me
3 to defer for a second to Justice Ginsburg's question, what
4 they said was, not only 1407(a) but 1407(b), which
5 mandates that the transferee judge shall conduct pretrial
6 proceedings, in the Plumbing Fixture case there's a sort
7 of a ironic heading which says that construction of the
8 plain meaning of section 1407, which they thought was
9 plain then, and they said that the language of 1407(b) is
10 mandatory, and number 2, it says that in transfer
11 statutes, whether it's 1404(a) or 1407, the transferee
12 judge can issue any order, make any judgment, do anything
13 that the transferor judge could do.

14 You have sort of, in property sense, a livery of
15 Caesar.

16 QUESTION: Well, but I wonder how much that
17 Plumbing Fixtures case should influence us. If you take a
18 cognate situation, we give great weight to things that
19 were enacted by the First Congress, the Judiciary Act of
20 1789, because Members of that Congress sat in the
21 Constitutional Convention, but it's not as if these judges
22 sat in Congress at the time Congress enacted it.

23 MR. SOLOVY: Well, they -- Judge Becker,
24 Judge --

25 QUESTION: Are you telling me that Judge Becker

1 was in Congress?

2 MR. SOLOVY: He was. He wasn't in Congress, but
3 he testified before the --

4 QUESTION: Well, that's quite different.

5 MR. SOLOVY: Well, of course, Chief Justice,
6 it's quite different, but they are the persons that
7 crafted the statute. They are the persons who Congress
8 gave the authority to administer the statute, so I think
9 their views are quite influential and you know, we're
10 dealing with 30 years of precedent where no one ever
11 dreamed up this argument before.

12 QUESTION: Well, it's about as influential as
13 testimony by the Justice Department on a bill that's later
14 adopted and administered by the Justice Department. There
15 are some opinions that refer to that testimony, but it's
16 not overwhelmingly persuasive, is it, even to those who
17 believe that Congress does not act in its statutes but in
18 its committees.

19 MR. SOLOVY: Well, Justice Scalia, I'm a
20 believer here that the Murrah Committee crafted this, that
21 this is quite influential, but you draw from it what you
22 wish, but here is a contemporaneous decision. But let me
23 go --

24 QUESTION: Mr. Solovy, are you going back to
25 Justice Breyer's --

1 MR. SOLOVY: Yes.

2 QUESTION: I have one, but I want to hear your
3 answer to him first.

4 MR. SOLOVY: All right. Justice Breyer, if I
5 can remember your question, it's twofold: a) Is,
6 Mr. Solovy, the Murrah Committee promised it would go
7 back. That is not correct. The Murrah Committee
8 repeatedly said it will go back unless 1404 is utilized,
9 okay, so that's -- I mean, at page 25 of our brief it says
10 1407 would not affect the place of the trial in any case
11 or exclude the possibility of transfer under other Federal
12 statutes. At page 27 of our brief --

13 QUESTION: Transfer by whom?

14 QUESTION: By whom?

15 QUESTION: By whom?

16 MR. SOLOVY: Well, obviously --

17 QUESTION: Isn't that the tough issue?

18 MR. SOLOVY: I don't think it's a tough issue,
19 because it's the transferee judge, 1407(b) says that a
20 transferee judge must conduct pretrial proceedings.

21 QUESTION: But there's nothing either in the
22 report that you were reading or in the text of the statute
23 that affirmatively supports that position.

24 MR. SOLOVY: Well, I don't believe that's
25 correct, Justice Souter, because in the electrical

1 equipment cases which spawned this litigation, section
2 1404 motions were used to expedite these cases, and as
3 Pfizer says, if you don't have the transferee judge have
4 the ability to transfer the case, then you're going to
5 throw this whole statute up in havoc, because now the case
6 inheres -- my air crash case, it inheres in Chicago for 4
7 years.

8 You've got 40 different cases, and the
9 transferee judge says it makes sense to have this case
10 tried in the Northern District of Iowa.

11 QUESTION: And all he's got to do, if that is
12 his conclusion, is follow 1407 prior to the conclusion of
13 his consolidated pretrial proceedings, transfer it back to
14 the original transferor judge, and say, these people want
15 to transfer to some other district. I think it makes
16 sense. I don't have the authority to do it. You do.
17 That's the way out of that conundrum.

18 MR. SOLOVY: Well, but --

19 QUESTION: That's the way out of what Justice
20 Clark referred to as the limbo, isn't it?

21 MR. SOLOVY: No, because in most MDL cases
22 you're going to have to --

23 QUESTION: Well, that can be done, can't it?

24 MR. SOLOVY: Well, you have to ship it back --

25 QUESTION: Excuse me. It can be done, can't it?

1 MR. SOLOVY: Not practically, because in my air
2 crash case, Justice Souter, you've got 24 different cases
3 in different parts of the country, and that's exactly what
4 they are trying to overcome in the electrical equipment
5 cases, because you couldn't get these judges to
6 coordinate.

7 QUESTION: I took it that your argument was
8 basically something like this, that the -- an Illinois
9 judge under 1404(a) could always transfer to Arizona.

10 MR. SOLOVY: Correct.

11 QUESTION: All right. Now, what 1407 does is,
12 it says for purposes of the pretrial proceedings, Arizona
13 judge, you stand in the shoes of the Illinois judge.

14 MR. SOLOVY: Justice Breyer --

15 QUESTION: All right. And since you're standing
16 in the shoes of the Illinois judge you are in effect the
17 transfer court. Therefore, transfer it to yourself.

18 MR. SOLOVY: Correct.

19 QUESTION: All right. Now, what I was looking
20 for in support for that argument is, is there something in
21 the history, or is there something in the law that says --
22 because it's a kind of fiction in an effort to squeeze
23 what's practical into the language of 1404.

24 MR. SOLOVY: Well --

25 QUESTION: Now, is there something that supports

1 that kind of fiction in the legislative history or
2 elsewhere that would be helpful to you?

3 MR. SOLOVY: Yes. Let's talk about that before
4 my time here on Earth elapses, okay.

5 Number 1, we say the 1404 issue is not
6 encompassed in the question presented, because the
7 question presented deals with 1407 and not 14 -- (a),
8 1404(a).

9 But assuming it does, this Court has held in
10 Continental Grain that 1404 is a common sense --

11 QUESTION: Held in what case?

12 MR. SOLOVY: Continental Grain, Your Honor.

13 QUESTION: Continental Grain?

14 MR. SOLOVY: Yes. It's cited in our brief, I
15 hope -- that it's a common sense statute, and number 2, in
16 the Piper Aircraft case, 454 U.S. 235, at 253, 254, this
17 Court said of 1404, Justice Breyer, that it is a Federal
18 housekeeping measure allowing easy change of venue in a
19 unified Federal system, and what we have is a unified
20 Federal system and you want to make changes of venue, if
21 it's in the interest of justice, work well.

22 And to show that this Court was common sense, in
23 the Koehring case, which we also cite in our brief, this
24 Court interpreted the power of the district court to issue
25 a 1404 transfer into the power of an appellate court to

1 issue a 1404 transfer. Now, that's surely not within the
2 literal language of 1404, but it made good common sense.

3 QUESTION: All right. Can I ask you one other
4 quick question? You -- did I hear you correctly that you
5 thought Olberding and Schnell, the cases involving the
6 harmless error, involved venue? This does not involve
7 venue.

8 MR. SOLOVY: This does not involve venue --

9 QUESTION: So in this case jurisdiction and
10 venue are proper in either court.

11 MR. SOLOVY: Absolutely correct, and in either
12 court, and bear in mind, section 1406, let's not forget
13 1406. Even a judge without venue could issue a transfer
14 order, so this --

15 QUESTION: Let's assume that the plaintiff
16 brings an action with proper venue in district A, and the
17 defendant doesn't like district A, so he simply seeks to
18 bring the court in district Z.

19 Now, is it your contention that venue is not
20 involved when he runs to district Z and the court in
21 district Z can take the case if the court in district Z
22 takes the case? So long as venue could have lain there it
23 doesn't matter whether district A transferred it or not,
24 venue is proper, just because the defendant runs over
25 there and says, please take this case.

1 MR. SOLOVY: Well, you have to go through -- you
2 know, you have to go through the hoops. You have to
3 file --

4 QUESTION: And if you don't go through the
5 hoops, venue is improper.

6 MR. SOLOVY: You have to file the motion, but
7 here --

8 QUESTION: Isn't venue improper in district Z so
9 long as it was not properly transferred to district Z,
10 even though it could have been brought there?

11 MR. SOLOVY: Well --

12 QUESTION: Wouldn't you say venue is improper?

13 MR. SOLOVY: Let me answer the question this
14 way, Justice Scalia. I know of no case where they have an
15 error-free trial, as this one, where the court who tried
16 the case had venue and jurisdiction, and the case gets
17 reversed for a new trial --

18 QUESTION: Do you know of any case in which an
19 interlocutory appeal has been allowed where venue is
20 challenged?

21 MR. SOLOVY: Very seldom, Justice Scalia, and
22 for good reason, because you know, venue will seldom be an
23 error -- if it be an error in a 1404 motion it's going to
24 seldom be overturned because it's not substantial.

25 QUESTION: You say very seldom. Do you know any

1 case?

2 MR. SOLOVY: No.

3 QUESTION: I don't, either.

4 MR. SOLOVY: I don't, either, and for good
5 reason, and that's why we get into section 2111, which is
6 also mandatory in terms. This court is directed to give
7 effect to judgment where there has not been any
8 substantial prejudice to the petitioner, and --

9 QUESTION: Well, is it your view that improper
10 venue could never prejudice the petitioner?

11 MR. SOLOVY: It might be, Mr. Chief Justice, but
12 this isn't a case of improper venue. Venue lied in the
13 District of Arizona.

14 QUESTION: Laid.

15 MR. SOLOVY: Laid. Thank you very much, and --

16 QUESTION: Mr. Solovy, can I ask one -- may I
17 ask just one question? In Pfizer was -- did the -- was
18 the transfer to the court itself or to another district?

19 MR. SOLOVY: It was to another district.

20 QUESTION: Yes.

21 MR. SOLOVY: Because Judge Lord was sitting by
22 designation.

23 QUESTION: Yes.

24 MR. SOLOVY: In New York, and that's the other
25 beauty of the statute. The judges can be, you know,

1 shipped around through the country, and in Woops, for
2 example, Judge Browning was designated to sit in Seattle.
3 He transferred the case for trial to himself in Tucson.
4 It made a lot of sense to try that case there.

5 So in Pfizer, it was a transfer to another
6 district because Judge Lord -- but he really transferred
7 it to himself, because he transferred it to himself for
8 trial in Minnesota.

9 Now --

10 QUESTION: In 1406(b), which you -- 1406,
11 subsection (b) that you cited to us, it says, nothing in
12 this chapter shall impair the jurisdiction of a district
13 court of any matter involving a party who does not
14 interpose timely and sufficient objection to venue. That
15 indicates to me a statutory command that improper venue
16 can be jurisdictional just as the petitioners say it is in
17 this case.

18 MR. SOLOVY: Well, but they did not -- they
19 didn't ever do the correct thing, because it's ironic
20 again here, they lay upon the mandatory language of shall
21 remand, but they never went back to the panel and said,
22 please remand the case to Illinois.

23 My time has expired. Thank you very much.

24 QUESTION: Thank you, Mr. Solovy.

25 Mr. Kellogg, you have 4 minutes remaining.

1 REBUTTAL ARGUMENT OF MICHAEL K. KELLOGG

2 ON BEHALF OF THE PETITIONERS

3 MR. KELLOGG: Are you going to respond to Mr.
4 Solovy's last point, that you never went back to the
5 panel?

6 MR. KELLOGG: Yes. I'll respond to that
7 directly.

8 We did exactly what the panel's rules require,
9 which is to go in the first instance to the district
10 court, the transferee court, and ask for a suggestion of
11 remand.

12 When the district court denied that motion, it
13 simultaneously transferred the case to itself, which under
14 the JPML rules deprived the panel of any further
15 jurisdiction over the case, so we had no choice at that
16 point but to seek mandamus in the Ninth Circuit, which we
17 did.

18 Respondents of course at that point argued to
19 the Ninth Circuit mandamus is inappropriate because they
20 have a complete remedy on appeal. The Ninth Circuit
21 accepted that argument and that's why we're here today.

22 QUESTION: Can I ask you this, on that
23 particular point: what's worrying me about -- venue and
24 jurisdiction are proper in both places, not proper, but
25 they lie in both places, so we're really asking the

1 question of whether a 1404 error, a 1404(a) error is
2 reviewable despite the fact that there was a trial.

3 If you're right on that, and it is reviewable
4 after trial, does that mean there'd always be the argument
5 after a fair trial this was not a jurisdiction where it
6 was convenient for the witnesses? This was not a
7 jurisdiction -- there was abuse of discretion on that, and
8 therefore we will have review in the courts of appeals and
9 set aside trials because of a 1404(a) violation on the
10 ground, abuse of discretion in respect to. Do you see
11 what's bothering me?

12 MR. KELLOGG: Yes, exactly, but we're not
13 dealing here with an abuse of discretion action.

14 QUESTION: No, but if you win, don't we also
15 have to say that the trial doesn't cure an abuse of
16 discretion in a transfer in respect to convenience of
17 witnesses?

18 MR. KELLOGG: I don't think you do. First of
19 all, we're asking you to vindicate the mandate of 1407 in
20 the first instance, which is absolutely clear, and says
21 the case shall be remanded.

22 Second, even under 1404 we're not talking about
23 a discretionary balancing of factors. We're talking about
24 a direct violation of the statute. I mean, you had
25 mentioned the polite fiction that somehow the Arizona

1 court stands in the shoes of the Illinois court, but it's
2 really a distortion of the statutory language to say that
3 the court is both the self and the other within the scope
4 of that single sentence, and there's no reason to distort
5 that language in order to reach a result that Congress
6 clearly did not intend --

7 QUESTION: May I ask if you would take the same
8 position if the transfer had been to a different district?

9 MR. KELLOGG: Well, then we would not rely on
10 1404, but our position would be exactly the same under
11 1407. Their position has rendered the language, shall be
12 remanded, into a nullity. It has also turned the unless
13 previously translated language into utter surplusage.

14 QUESTION: So your basic position, and it's
15 consistent with the question presented in the cert
16 petition, doesn't really rely on 1404. Your primary
17 submission is the 1407 submission.

18 MR. KELLOGG: In the first instance, but we also
19 in our cert position said can he transfer it to himself,
20 and that's an independent violation which we were allowed
21 to, and did, raise.

22 Now, I'd like to go back to the issue of remedy,
23 Justice O'Connor, because I think it's quite critical.
24 There are potential cases in which it's going to be
25 difficult for the transferee court to decide when pretrial

1 proceedings have or have not ended, and the JPML's rules,
2 that's why they require you to go to him in the first
3 instance, because he's the one who's going to know.

4 But this case is an easy one, because there's no
5 dispute that any prospect of coordinated and consolidated
6 pretrial proceedings had ended at that point, so the case
7 had to be remanded as of the date that Lexecon made its
8 motion, because that is the triggering event. Venue,
9 unlike subject matter jurisdiction, can be waived, but
10 where it's not waived the statute is absolutely clear, and
11 that's the relevant cut-off date.

12 CHIEF JUSTICE REHNQUIST: Thank you,
13 Mr. Kellogg.

14 The case is submitted.

15 (Whereupon, at 11:02 a.m., the case in the
16 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

LEXECON, INC., ET AL., Petitioners v. MILBERG, WEISS, BERSHAD, HYNES & LERACH, ET AL.
CASE NO: 96-1482

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Don Mari Fedrico

(REPORTER)