

## Online Essay

### MDL v. TRUMP: THE PUZZLE OF PUBLIC LAW IN MULTIDISTRICT LITIGATION<sup>†</sup>

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**ABSTRACT**—Litigation against the Trump Administration has proliferated rapidly since the inauguration. As cases challenging executive actions, such as the “travel ban,” multiply in federal courts around the country, an important procedural question has so far not been considered—Should these sets of cases be consolidated in a single court under the Multidistrict Litigation Act? Multidistrict litigation, or MDL, has become one of the most prominent parts of federal litigation and offers substantial benefits by coordinating litigation pending in geographically dispersed federal courts. Arguably, those benefits would also accrue if “public law” cases were given MDL treatment. There also are some underappreciated strategic reasons why both plaintiffs and the government might want to invoke the MDL process in these cases—and we suspect that, sooner rather than later, one of these parties might give MDL a try.

In this Essay, we argue that although the MDL statute would allow for consolidation of these public law cases, there are prudential reasons why the judges in charge of MDL should stay their hands. In our view, these cases rarely achieve the efficiencies of most MDLs, and there is value to these cases undergoing scrutiny in multiple trial and appellate courts before they percolate upward to Supreme Court review. Moreover, consolidation of these cases would raise the political profile of the MDL process and thus might politicize the MDL itself as well as the selection of its judges. This politicization could undermine MDL’s primary role in mass tort litigation—and, indeed, it risks harming the national tort system more generally.

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## INTRODUCTION

While running for the presidency, Donald Trump campaigned on a platform promising jobs to the American people.<sup>1</sup> So far, however, perhaps his biggest success on that score has been creating work for lawyers suing him and his Administration.<sup>2</sup> Lawsuits challenging the new President's actions have proliferated throughout the federal courts, including the high-profile suits contesting the "travel ban" Executive Order,<sup>3</sup> contending that the President's business entanglements violate the Emoluments Clauses of the Constitution,<sup>4</sup> and asserting that his plan to punish so-called "sanctuary cities" is unconstitutional.<sup>5</sup>

The travel ban litigation, in particular, has been notable for its speed and multiplicity. Almost immediately after the ban was announced, lawyers

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<sup>1</sup> See, e.g., Alexander Burns et al., *Donald Trump Vows to Create 25 Million Jobs Over Next Decade*, N.Y. TIMES (Sept. 15, 2016), <https://www.nytimes.com/2016/09/16/us/politics/donald-trump-economy-speech.html> [https://perma.cc/SC5N-GEK5].

<sup>2</sup> Representative Denny Heck also joked that the hiring of lawyers by members of the Trump Administration was part of an "attorney full employment act." See Julia Manchester, *Dem: Trump Has 'Incredible Emphasis on Jobs, Jobs, Jobs'—for Lawyers*, THE HILL (June 16, 2017), <http://thehill.com/homenews/house/338180-dem-trump-has-incredibly-emphasis-on-jobs-jobs-jobs-for-lawyers> [https://perma.cc/4UPS-5ECS].

<sup>3</sup> See *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2080 (2017) (granting certiorari).

<sup>4</sup> See, e.g., Complaint, *Citizens for Responsibility and Ethics in Washington v. Trump*, No. 1:17-CV-00458, 2017 WL 277603 (S.D.N.Y. Jan. 23, 2017); see also U.S. CONST. art. I, § 9, cl. 8; *id.* art. II § 1, cl. 7.

<sup>5</sup> See *Santa Clara v. Trump*, 250 F. Supp. 3d 497, 497 (N.D. Cal. 2017); *City of Seattle v. Trump*, No. 17-497, 2017 WL 4700144 (W.D. Wash. Oct. 19, 2017).

fanned out across the country both to aid affected individuals and to challenge the order in multiple federal courts.<sup>6</sup> What resulted was a panoply of rulings and overlapping injunctions, followed by several appellate decisions and, inevitably, cert. petitions and Supreme Court review.<sup>7</sup> As these cases wended their way through various federal courts around the country, a question occurred to us, as procedure scholars—Why haven’t these cases—and the other sets of cases challenging the Administration—been made the subject of multidistrict litigation (MDL)? And, if they were, would that be preferable to the free-for-all of the status quo?

The MDL statute, 28 U.S.C. § 1407, allows for consolidation of pretrial proceedings in a single federal district of all cases sharing a common question of fact. Any party to any of the allegedly related cases may make a motion for consolidation.<sup>8</sup> This motion triggers consideration by the Judicial Panel on Multidistrict Litigation (JPML, or the Panel), the panel of seven federal judges that decides whether cases should be consolidated into MDL and where the MDL should be assigned.<sup>9</sup> The MDL statute’s goal is to prevent duplication of similar litigation in multiple federal courts across the country. The basic idea is that it is more efficient to conduct pretrial proceedings in cases involving the same questions only one time and before only one judge, rather than over and over again before many.

For many years, the 1968 MDL statute was relatively little noticed, even by most procedure scholars,<sup>10</sup> but that is emphatically no longer the case. Quite the opposite is true: MDL is now in the spotlight, if for no other reason than the surprising statistic that MDL cases currently make up more than one-third of the pending federal civil docket, an astonishing increase over the last two decades.<sup>11</sup> Over the last few years, it has become accepted wisdom that virtually any tort controversy of national import will inevitably become an MDL proceeding consolidated before a single judge.

<sup>6</sup> See generally *Litigation Documents & Resources Related to Trump Executive Order on Immigration*, LAWFARE, <https://lawfareblog.com/litigation-documents-resources-related-trump-executive-order-immigration> [<https://perma.cc/2V5V-NS87>] (listing all of the litigation brought against Trump in different jurisdictions).

<sup>7</sup> *Id.*

<sup>8</sup> See 28 U.S.C. § 1407(a) (2012).

<sup>9</sup> See *Overview of Panel*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., <http://www.jpml.uscourts.gov/overview-panel-0> [<https://perma.cc/4W6M-N8VN>].

<sup>10</sup> See, e.g., Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 552 (2013) (describing MDL as a “disfavored judicial backwater” until the 2000s); Judith Resnik, *From Cases to Litigation*, 54 LAW & CONTEMP. PROBS. 5, 47 (1991) (describing MDL as a ““sleeper”—having enormous effect on the world of contemporary litigation but attracting relatively few critical comments”).

<sup>11</sup> See *infra* Part I.

Examples include the BP oil spill, the Volkswagen “clean diesel” fraud, and the NFL concussion litigation, all of which were “MDL-ed” and assigned by the JPML to handpicked judges in New Orleans, San Francisco, and Philadelphia, respectively.<sup>12</sup> And all have been resolved relatively successfully through massive settlements, though not without hiccups. In short, MDL is now a central and mostly well-regarded aspect of the federal legal system when it comes to litigation of national scope, largely because it facilitates a unitary, nationwide proceeding and, potentially, a global settlement.

While it is true that MDL is best known for consolidating mass torts, it is not confined to those cases. The small group of judges who developed the MDL statute wanted it to be as open-ended as possible, so that its application would not be limited to particular subject matters.<sup>13</sup> As a result, there is no language in the statute preventing the MDL device from being deployed in what we might think of as “public law” cases,<sup>14</sup> such as those pending against the Trump Administration. There also are some good reasons why participants in these cases—and the judges hearing them—might find MDL attractive. For one thing, the same sort of efficiencies that motivate a typical MDL may exist in public law cases—Why litigate the same question, take the same discovery, and file the same briefs multiple times when one will do, particularly in cases that are destined for Supreme Court review? Although MDL is best known as a mass tort mechanism, it is not difficult to imagine how its benefits might translate to public law cases.

Moreover, parties on either side of the “v” might see MDL as a way out of a courtroom they find unfriendly. That is, should a lawyer not be satisfied with the luck of the draw in any particular district, she might roll the dice with the JPML in hopes of getting a preferable judicial assignment. The possibility of getting a more favorable draw from the JPML may be especially tempting for plaintiffs if they expect, rightly or wrongly, that they will get more favorable treatment from a JPML dominated, six to one, by Clinton appointees.

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<sup>12</sup> See *In re Oil Spill, Gulf of Mex.*, on April 20, 2010, 731 F. Supp. 2d 1352 (J.P.M.L. 2010); *In re Volkswagen “Clean Diesel” Litig.*, 148 F. Supp. 3d 1367 (J.P.M.L. 2015); *In re Nat’l Football League*, 842 F. Supp. 2d 1378 (J.P.M.L. 2012).

<sup>13</sup> See Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 869 (2017) (noting that in March 1964, the drafters began “in earnest to develop a proposal intended to apply broadly to all litigation pending in multiple districts, including ‘contract, fraud, negligence, antitrust, and civil rights’”).

<sup>14</sup> See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

Given the opportunities that MDL consolidation offers, we expect that it will not be long before some party dissatisfied with a random judicial assignment will take a crack at MDL consolidation in a public law case. In this Essay, we hope to provide some perspective about whether such consolidation is consistent with the purposes of the MDL statute, preferable as a matter of procedural policy, and desirable as a matter of procedural politics. In other words—May these cases be sent to MDL, and, if so, should they be?

In brief, we argue that, while MDL treatment of these cases would be permissible under the terms of the statute, the JPML should usually avoid consolidation of public law cases for two sets of reasons. First, we think the traditional arguments for consolidation based on efficiency and consistency are weakened in these cases and, to the contrary, there is some benefit to percolation of these issues in multiple district courts. Moreover, in most of these cases, the major disputes likely involve questions of statutory and constitutional interpretation to be resolved on motions for preliminary injunction or motions to dismiss, not after lengthy discovery or after trials to resolve disputes of material fact. As a result, in these cases, one of the primary benefits of MDL—the ability to minimize expensive, time-consuming, and potentially duplicative discovery—is less important.

The second reason to avoid use of MDL in the public law context is that there is real danger in politicizing the panel by involving it in these sorts of cases. Introducing litigation like the travel ban cases would enmesh the JPML in selecting the judge who will write *the* district court opinion resolving the matter, likely on a motion for preliminary injunction. That assignment decision will be both fraught and well publicized, and it may risk the credibility of the panel in all of its judicial assignments. Moreover, this new role may create an incentive for the Chief Justice, who has unfettered statutory discretion to appoint the members of the JPML, to stack the committee with philosophical fellow travelers—an allegation that has been leveled against the Chief Justice’s more politically noteworthy assignments.<sup>15</sup>

In this Essay, we will first briefly introduce MDL, where it came from, and how it works. We will then discuss why it might appear to be an appealing option in public law litigation. After giving those potential benefits serious consideration, we then turn to explaining why in most cases we believe that the JPML should presumptively refuse to consolidate these cases, on the ground that the risks outweigh the benefits.

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<sup>15</sup> See *infra* Section III.B.

## I. MDL BACKGROUND

For a long time, multidistrict litigation flew under the radar. It was perceived as a wonkish, technical procedural device designed to coordinate discovery in related cases.<sup>16</sup> All that has changed: MDL has gone from bit part in the federal litigation scheme to a starring role, at least in the context of mass torts.<sup>17</sup>

In order to understand MDL's current prominence, it is necessary to understand the statute's origins and the power it grants to the Judicial Panel on Multidistrict Litigation and transferee judges. Although its roots go back even further, the proximate progenitor of the MDL statute was the massive civil antitrust litigation that arose from revelations of price-fixing in the electrical-equipment industry.<sup>18</sup> That scandal—unprecedented in its size and scope—threatened to overwhelm the federal courts with thousands of complex and resource-consuming cases.<sup>19</sup> In an attempt to mitigate the threat posed by the deluge of litigation, Chief Justice Earl Warren created a Judicial Conference committee called the Coordinating Committee on Multiple Litigation. The Committee, initially chaired by Chief Judge Alfred P. Murrah of the Tenth Circuit, was composed of nine federal judges, all of whom were assigned at least one of the electrical-equipment cases and who had previously demonstrated their enthusiasm for the then-novel but burgeoning concept of judicial management.<sup>20</sup>

The Coordinating Committee had no formal power, but its goal was to encourage cooperation between the federal judges and parties to the litigation scattered around the country. Perhaps because of the scale of the nationwide litigation, there was almost complete cooperation by all involved.<sup>21</sup> Ultimately, the Committee's efforts were remarkably

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<sup>16</sup> See Bradt, *supra* note 13, at 832 (calling MDL a “second banana” to class actions).

<sup>17</sup> Thomas Metzloff, *The MDL Vortex Revisited*, 99 JUDICATURE 36, 40 (2015) (explaining that MDL is “in fact dominated by mass tort cases at a remarkable level”); William B. Rubenstein, *Procedure and Society: An Essay for Steve Yeazell*, 61 UCLA L. REV. DISCOURSE 136, 144 n.40 (2013) (“In the wake of *Amchem* and *Ortiz*, however, MDLs have become *the* form for resolution of mass tort matters.”).

<sup>18</sup> See Bradt, *supra* note 13, at 838.

<sup>19</sup> See, e.g., *The Impact of the Electrical Anti-Trust Cases Upon Federal Civil Procedure*, in PROCEEDINGS OF THE TWENTY-EIGHTH ANNUAL JUDICIAL CONFERENCE OF THE THIRD JUDICIAL CIRCUIT OF THE UNITED STATES, 39 F.R.D. 375, 515 (1965) (statement of Judge Thomas Clary) (describing the nationwide civil antitrust actions as an “avalanche”).

<sup>20</sup> See Bradt, *supra* note 13, at 852–53, 860–61.

<sup>21</sup> Among other innovations, the Coordinating Committee made use of nationwide conferences and depositions, uniform national pretrial orders, and national document depositories to streamline pretrial proceedings. See Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621 (1964); see also MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION 6 (1969) (“If it had not been for the monumental effort of the nine judges on this

successful: although at least some of the defendants felt railroaded to settlement by the pace of the litigation, it succeeded in its efforts to resolve the entirety of the litigation quickly.<sup>22</sup>

The legacy of the Coordinating Committee goes beyond the electrical-equipment suits. While those cases were ongoing, the Committee—with the backing of Chief Justice Warren and the Judicial Conference—turned its attention to creating a permanent mechanism for consolidating litigation pending in multiple districts around the country. The two primary drafters of the statute, Coordinating Committee member Judge William H. Becker and reporter Phil C. Neal of the University of Chicago Law School, had the insight that the kind of cooperation exhibited in the electrical-equipment cases would be unlikely to recur, in large part because of defendants’ dissatisfaction with aggregated proceedings and federal judges’ chafing under the control exercised by the Committee. As a result, in cases of national import, the power of the federal courts needed to be centralized in the hands of a single judge, and preferably one committed to the principles of active case management.<sup>23</sup> Indeed, as Judge Becker memorably put it, a single judge must be in control of the pace of discovery and other pretrial proceedings, or else the “litigants would run cases.”<sup>24</sup> The ultimate result of Neal and Becker’s efforts, the details of which are chronicled elsewhere, was the MDL statute, passed by Congress without a single dissenting vote in 1968.<sup>25</sup>

The statute itself is relatively barebones. It provides that “[w]hen civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings” by the Judicial Panel on Multidistrict Litigation, a panel of seven federal judges selected by the Chief Justice.<sup>26</sup> The statute provides that consolidation should be “for the convenience of parties and witnesses” and “promote the just and efficient conduct of such actions.”<sup>27</sup> Either the JPML on its own motion or any party

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Committee of the Judicial Conference and the remarkable cooperation of the 35 district judges before whom these cases were pending, the district court calendars throughout the country could well have broken down.” (quoting Earl Warren, Chief Justice, U.S. Supreme Court, Address to the Annual Meeting of the American Law Institute (May 16, 1967))).

<sup>22</sup> See CHARLES A. BANE, *THE ELECTRICAL EQUIPMENT CONSPIRACIES: THE TREBLE DAMAGE ACTIONS* 379 (1973) (noting that “practically all of the remaining pending cases had been disposed of” by the end of 1966); Bradt, *supra* note 13, at 860–63.

<sup>23</sup> See Bradt, *supra* note 13, at 865–66.

<sup>24</sup> *Id.* at 878.

<sup>25</sup> *Id.* at 906.

<sup>26</sup> 28 U.S.C. § 1407(a) (2012).

<sup>27</sup> *Id.*

in any pending case may move for consolidation.<sup>28</sup> Decisions about whether cases will be consolidated, and where they will be transferred, are to be made by the JPML.<sup>29</sup> At the conclusion of pretrial proceedings, the cases are to be remanded to the districts where they were filed for trial.<sup>30</sup>

There are almost no real limits on the JPML's discretion when it comes to the all-important conclusions about whether cases should be consolidated into an MDL and to whom the MDL will be assigned. For one thing, the statute applies anytime there are civil actions involving a common question of fact pending in multiple districts—there is no limitation as to subject matter.<sup>31</sup> This was important to the drafters of the statute, who perceived a coming “litigation explosion” arising out of new technology, population growth, and expanded rights of action.<sup>32</sup> Traditional limitations on venue and personal jurisdiction also have been thought not to apply to MDL.<sup>33</sup> The only real barrier to the MDL's selection of a transferee judge is that both the proposed MDL judge and the chief judge of her district must consent to the assignment.<sup>34</sup> But none of these limitations on the JPML's discretion are practically enforceable because the statute provides that review of an order of the panel may be had only by

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<sup>28</sup> *Id.* § 1407(c).

<sup>29</sup> *Id.* § 1407(a). Federal district courts have their own procedures for consolidating related cases within the district.

<sup>30</sup> *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998) (citing *Multidistrict Litigation: Hearings on S. 3815 and S. 159 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 90th Cong., 1st Sess., pt. 2, 110 (1967) (statement of Sen. Joseph Tydings)).

<sup>31</sup> The statute's drafters were careful to keep the scope of consolidated actions broad, including, in the vision of one of the statute's backers, “air crash multiple litigation, several aspects of antitrust litigation, patent and trade-mark multiple litigation, products liability multiple litigation, litigation relating to corporate management, securities and stock brokerage fields and potential multi-litigation in the fields of water and air pollution.” JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, SEPTEMBER 21–22, 1967, at 86 (1967); see also Bradt, *supra* note 13, at 869.

<sup>32</sup> *Judicial Administration: Hearing Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. 26–27 (1966) (statement of C.J. William H. Becker, Western District of Missouri) (“We feel that there is a litigation explosion occurring in the Federal courts along with the population explosion and the technological revolution; that even with the addition of many new judges, the caseload, the backlog of cases pending, is growing; and that some new tools are needed by the judges in order to process the litigation . . .”).

<sup>33</sup> *In re FMC Corp. Patent Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.L. 1976) (“[T]ransfers under Section 1407 are simply not encumbered by considerations of in personam jurisdiction and venue.”).

<sup>34</sup> 28 U.S.C. § 1407(b).



extraordinary writ.<sup>35</sup> In the first fifty years of the JPML's existence, such a writ has never been granted.<sup>36</sup>

Moreover, the seemingly important limit of MDLs to "pretrial proceedings" has proved illusory—or, at least, overstated. It is true that, under the statute, "[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred."<sup>37</sup> But that command comes with an important condition: "unless it shall have been previously terminated."<sup>38</sup> Previously terminated cases include those decided on dispositive motion or settled. Most readers will no doubt be familiar with the vanishing trial in American civil litigation, whereby barely any civil cases make it all the way to trial, instead ending after summary judgment or settlement.<sup>39</sup> That same trend extends to MDL. Virtually all consolidated cases are resolved in the MDL district without any substantive contribution from the originating courts.<sup>40</sup> As a result, many MDL decisions are insulated from both appellate review and review by other district judges.

Although the MDL statute has not changed since it was passed fifty years ago, its prominence has expanded rapidly during the last fifteen years.<sup>41</sup> Now with nearly 40% of the pending federal civil cases as part of an MDL,<sup>42</sup> the MDL process is impossible to ignore.<sup>43</sup> Today, it is nearly a

<sup>35</sup> *Id.* § 1407(e). The JPML's decision not to consolidate cases is not subject to appellate review.

<sup>36</sup> Paul M. Janicke, *The Judicial Panel on Multidistrict Litigation: Now A Strengthened Traffic Cop for Patent Venue*, 32 REV. LITIG. 497, 512 (2013). More generally, it is fair to say that the MDL system is in large respect insulated from both appellate review and the meddling of rulemakers, as are MDL judges who have wide discretion to manage cases to resolution. See Andrew D. Bradt, *The Stickiness of the MDL Statute*, REV. LITIG. (forthcoming 2018).

<sup>37</sup> 28 U.S.C. § 1407(a); see also *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998).

<sup>38</sup> 28 U.S.C. § 1407(a).

<sup>39</sup> See, e.g., Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

<sup>40</sup> The Administrative Office of U.S. Courts reported the following about MDL cases:

Since its creation in 1968, the Panel has centralized 593,711 civil actions for pretrial proceedings. By the end of fiscal year 2016, a total of 16,221 actions had been remanded for trial, 398 actions had been reassigned within the transferee districts, 440,174 actions had been terminated in the transferee courts, and 136,918 actions were pending throughout 55 transferee district courts.

*Judicial Panel on Multidistrict Litigation—Judicial Business 2016*, U.S. COURTS, <http://www.uscourts.gov/statistics-reports/judicial-panel-multidistrict-litigation-judicial-business-2016> [https://perma.cc/93DL-LZWG]. And the trend, it seems, is toward even fewer trials. See, e.g., Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 400–01 (2014).

<sup>41</sup> See Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 72 (2017) (noting that "from 2002 to 2015, multidistrict proceedings leapt from sixteen to thirty-nine percent of the federal courts' entire civil caseload").

<sup>42</sup> Emery G. Lee III et al., *Multidistrict Centralization: An Empirical Examination*, 12 J. EMPIRICAL LEGAL STUD. 211, 221–22 (2015) (describing statistical increase in MDL cases).

foregone conclusion that mass tort litigation will be considered for MDL treatment,<sup>44</sup> and indeed the major tort controversies of recent years have found themselves in front of MDL judges.<sup>45</sup> And to the extent that we limit ourselves to the goals of the statute's drafters—centralized control over dispersed litigation—MDL has been a massive success because it creates ideal conditions for resolution: a single decisionmaker who can gather all involved parties in a single courtroom.<sup>46</sup>

## II. MDL'S PUBLIC LAW PUZZLE

Given its open-ended mandate, MDL is a conceivable vehicle for public law cases that share a common question of fact. On rare occasion, a public law-like case has reached the JPML. The panel consolidated some 9/11-related litigation,<sup>47</sup> the BP oil spill Cases,<sup>48</sup> various suits against telecommunications providers that allegedly participated in NSA surveillance,<sup>49</sup> and the occasional administrative law dispute.<sup>50</sup> But these

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<sup>43</sup> What explains MDL's emergence? Most scholars peg the recent growth of MDL to the decline in availability of the mass tort class action. *See, e.g.*, Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339, 1346 (2014) ("As reliance on Rule 23 diminished, MDL has ascended as the most important federal procedural device to aggregate (and settle) mass torts.").

<sup>44</sup> Thomas E. Willging & Emery G. Lee, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 798 (2011) (noting the "massive increase in MDL aggregate litigation").

<sup>45</sup> *See supra* note 12 and accompanying text.

<sup>46</sup> Admittedly, MDL has generated its own set of controversies, but on its own terms, it is a success. *See* JOHN C. COFFEE, JR., *ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE* 155 (2015) (describing the MDL statute as "[t]he most successful step in the administration of aggregate litigation in the United States").

<sup>47</sup> *See, e.g., In re Terrorist Attacks on Sept. 11, 2001* (Asat Trust Reg., et al.), 714 F.3d 659 (2d Cir. 2013); *In re Terrorist Attacks on September 11, 2001* (Saudi Joint Relief Committee, et al.), 714 F.3d 109 (2d Cir. 2013); *In re Terrorist Attacks on September 11, 2001*, 295 F. Supp. 2d 1377 (J.P.M.L. 2003).

<sup>48</sup> *See In re Oil Spill, Gulf of Mex.*, on April 20, 2010, 731 F. Supp.2d 1352 (J.P.M.L. 2010). *See generally MDL - 2179 Oil Spill by the Oil Rig "Deepwater Horizon,"* U.S. DISTRICT CT., EASTERN DISTRICT OF LA., <http://www.laed.uscourts.gov/OilSpill/OilSpill.htm> [<https://perma.cc/LW5W-WEKR>] (collecting relevant court documents).

<sup>49</sup> *See In re NSA Telecomms. Records Litig.*, 444 F. Supp. 2d 1332 (J.P.M.L. 2006). These cases were separate from overlapping suits against government officials. *See, e.g., Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013). Note also that the MDL cases were resolved not with the transferee judge issuing (or denying) nationwide relief but with Congress stamping out the litigation entirely. *See* FISA Amendments Act of 2008, Pub. L. No. 110-261, § 201, 122 Stat. 2436, 2468-70 (2008) (codified at 50 U.S.C. § 1885(a) (2012)); *Hepting v. AT&T Corp.*, 539 F.3d 1157 (9th Cir. 2008).

<sup>50</sup> *In re Endangered Species Act Section 4 Deadline Litig.*, 716 F.Supp.2d 1369 (J.P.M.L. 2010) (consolidating lawsuits under the Endangered Species Act seeking to require the government to list certain species as threatened or endangered); *In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litig.*, 588 F. Supp. 2d 1376, 1378 (J.P.M.L. 2008) (consolidating Administrative Procedures Act cases regarding endangered species). The Panel has also denied consolidation in some

examples are not the prototypical public law cases that we address in this Essay.<sup>51</sup> Perhaps more importantly, these cases are outliers—they are the best examples we could find among the 2,782 MDLs that have been created during the fifty-year lifetime of the statute. Instead, the list of MDLs is dominated by classic private law claims: products liability, mass torts, antitrust, commercial law, and consumer law.<sup>52</sup> As if to make our point, the government has sought consolidation of FOIA litigation related to the travel ban but not for the travel ban litigation itself.<sup>53</sup> To be sure, the line between “public” and “private” law cases is blurry; MDLs involving private law claims against private defendants have intensely public consequences. Cases in these areas—and particularly ones involving a nationwide set of litigants—may be of national importance. Nevertheless, there is a difference between these cases, which typically involve tort claims against corporate defendants, and challenges to federal government action, which have not been consolidated.

There have been plausible candidates for MDL among recent public law cases. During the Obama Administration, the Supreme Court entertained public law litigation with national consequences involving issues from immigration (deferred action)<sup>54</sup> to marriage equality (DOMA)<sup>55</sup>

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administrative law cases. See *In re Clean Water Rule: Definition of “Waters of the United States,”* 140 F. Supp. 3d 1340, 1341 (J.P.M.L. 2015) (denying consolidation of related suits challenging EPA rule); *In re Removal From U.S. Marine Corps Reserve Active Status List Litig.*, 787 F. Supp. 2d 1350, 1351 (J.P.M.L. 2011) (denying consolidation of Administrative Procedure Act cases). The Panel denied a series of MDL requests in IRS subpoena cases as well. See, e.g., *In re Cybil Fisher Litig.*, 987 F. Supp. 2d 1376, 1376 (J.P.M.L. 2013).

<sup>51</sup> The 9/11 litigation and the BP case involved major issues of national concern, but they lacked the classically public law character in their claims or proposed remedies. See Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 401 (2014) (noting that the BP Oil Spill’s “mass harms take on the quality of public law litigation, even if played out in thousands of claims for private recompense” (footnote omitted)). Although the Endangered Species Act cases sought declaratory and injunctive relief against a government agency in an area of public law, they lack the *je ne sais quoi* of the cases at issue in this Essay.

<sup>52</sup> The current totals are: Air Disaster: 3; Antitrust: 51; Common Disaster: 3; Contract: 6; Employment: 4; IP: 10; Miscellaneous: 39; Products Liability: 72; Sales Practices: 30; and Securities: 15. See *MDL Statistic Reports—Docket Type Summary*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. (Apr. 17, 2017), [http://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MD\\_Litigation\\_By\\_Type-April-17-2017.pdf](http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MD_Litigation_By_Type-April-17-2017.pdf) [https://perma.cc/GK42-A56X]. Almost all of the miscellaneous MDLs involve consumer and/or privacy litigation. *Id.*

<sup>53</sup> See *In re American Civil Liberties Union Freedom of Information Act (FOIA) Requests Regarding Executive Order 13769*, 2017 WL 3296361 at 1–2 (J.P.M.L. Aug. 2, 2017) (denying consolidation).

<sup>54</sup> See *United States v. Texas*, 136 S. Ct. 2271 (2016), *affirming by an equally divided Court*, 809 F.3d 134 (5th Cir. 2015). *Texas* was not the only challenge to deferred action. See, e.g., *Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015).

<sup>55</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013). *Windsor* was not the only case challenging DOMA at that time. See, e.g., *Golinski v. U.S. Office of Pers. Mgmt.*, 724 F.3d 1048, 1049 (9th Cir.

to healthcare (ACA)<sup>56</sup>—all of which had been litigated in multiple district courts.<sup>57</sup> In the first few months of the Trump Administration, we have seen parallel litigation on immigration<sup>58</sup> and environmental policy,<sup>59</sup> and all signs suggest that the federal courts will remain centers of public law activity for the foreseeable future.<sup>60</sup>

In all of these cases, multiple suits had the capacity to raise overlapping questions of fact, and convenience and justice may have justified their consolidation.<sup>61</sup> For a clear illustration, observe that many recent national public law disputes have turned on intent or animus—classic questions of fact for which one resolution might be more convenient than many.<sup>62</sup> In short, therefore, § 1407 could have been satisfied.<sup>63</sup> And yet, the JPML did not (at least formally) even consider consolidation in these cases. Commentators, too, seemed uninterested in consolidation. Prior to the motion to consolidate the travel ban/FOIA cases,<sup>64</sup> a search in

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2013); *Massachusetts v. U.S. Dep't. of Health & Human Services*, 682 F.3d 1, 5 (1st Cir. 2012) (resolving two cases); *Pedersen v. Office of Pers. Mgm't*, 881 F. Supp. 2d 294, 298 (D. Conn. 2012).

<sup>56</sup> See, e.g., *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (both Supreme Court cases involving consolidated MDL).

<sup>57</sup> See *supra* notes 53–55. For an example of an issue that has not reached the Supreme Court, consider the multiple courts addressing the Department of Education's "Dear Colleague" letter as it relates to restroom access. See, e.g., *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016); *Students v. U.S. Dep't of Educ.*, No. 16-cv-4145, 2016 WL 6134121 (N.D. Ill. 2016).

<sup>58</sup> See, e.g., *Litigation Documents & Resources Related to Trump Executive Order on Immigration*, *supra* note 6 (collecting documents from more than fifty cases).

<sup>59</sup> See, e.g., Complaint for Declaratory and Injunctive Relief, *California v. Zinke*, No. CV-17-42-GF-BMM, 2017 WL 1862941 (D. Mont. May 9, 2017); Complaint for Declaratory and Injunctive Relief, *Citizens for Clean Energy v. U.S. Dep't of the Interior*, No. 4:17-cv-00030-BMM, 2017 WL 1173696 (D. Mont. Mar. 29, 2017).

<sup>60</sup> See, e.g., Tina Nguyen, *The Swamp Fights Back: Donald Trump Is Fueling an Explosion of New Lawsuits*, VANITY FAIR (Mar. 30, 2017), <https://www.vanityfair.com/news/2017/03/donald-trump-new-lawsuits> [<https://perma.cc/B2FG-UCFY>]; *After 2 Weeks in Office, Trump Faces More Than 50 Lawsuits*, NPR (Feb. 2, 2017, 4:34 PM), <https://www.npr.org/2017/02/02/513045408/after-2-weeks-in-office-trump-faces-more-than-50-lawsuits> [<https://perma.cc/2QJ5-TQSU>].

<sup>61</sup> See *supra* notes 55–59 (collecting cases). Many of these cases sound in the debates about nationwide injunctions. See generally Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017).

<sup>62</sup> See, e.g., *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 558–59 (2017); *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013); *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973); see generally Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 554–58 (2016) (discussing legislative intent in constitutional cases); Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71 (2017) (discussing evidence of presidential intent).

<sup>63</sup> See 28 U.S.C. § 1407(a) (2012).

<sup>64</sup> Specifically, this search was conducted on May 18, 2017, prior to the media attention on a proposed MDL in travel ban-related FOIA litigation. See *In re American Civil Liberties Union Freedom of Information Act (FOIA) Requests Regarding Executive Order 13769*, No. 2786, 2017 WL 3296361, at \*1–2 (J.P.M.L. Aug. 2, 2017).

Westlaw's law review and all-news databases revealed *zero* relevant results for "multidistrict" or "MDL" within the same sentence as immigration, "Dream Act," "deferred action," DACA, DAPA, DOMA, "gay marriage," "marriage equality," "Affordable Care Act," "Obamacare," "executive order," "Travel Ban," "Muslim ban," or "Trump."<sup>65</sup>

This lack of interest is all the more puzzling because MDL would seem to have been in the interest of the some of the players in these cases.<sup>66</sup> Most obviously, MDL seems like it would have been in the interest of the government defendants. For the federal government, MDL appears to solve two key problems: a multiple-plaintiff problem<sup>67</sup> and a forum-shopping problem.<sup>68</sup> First, the government might turn to MDL because it believes that it has a better chance of success arguing before a single judge rather than many. Consider the travel ban litigation. When these cases were being litigated in district courts, the problem for the government was that, in order for the ban to remain in place, it needed to win every single case challenging the ban. From the plaintiffs' perspective, if even one suit succeeded in obtaining a preliminary injunction, the ban would be halted nationwide.<sup>69</sup> But had all of the cases been consolidated in a single MDL proceeding, then the government would have needed to win only once to avoid a preliminary injunction. Indeed, the Administration was successful before Judge Nathaniel M. Gorton in Massachusetts.<sup>70</sup> If he had been the MDL judge, the government would not have had to continue litigating other district court cases around the country.

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<sup>65</sup> Technically, there were two potentially relevant results. One was a blog post we wrote previewing this article. Andrew Bradt & Zachary Clopton, *MDL v. Trump*, DORF ON LAW (Feb. 13, 2017), <http://www.dorfonlaw.org/2017/02/mdl-v-trump.html> [<https://perma.cc/5NLC-83GY>]. The other was a discussion of litigation against Donald Trump and others arising from the failed Taj Mahal Casino. See *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357 (3d Cir. 1993).

<sup>66</sup> Recall that the JPML may consider consolidation upon the motion of any party in any action proposed for consolidation, or upon the JPML's own initiative. 28 U.S.C. § 1407(c).

<sup>67</sup> The challenge resonates with the "multiple-claimant anomaly" in the law of preclusion. See generally CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 4465.3 (2d ed. 1987); Brainerd Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965); Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957). Though the government is not subject to offensive nonmutual issue preclusion, *United States v. Mendoza*, 464 U.S. 154, 162 (1984), the availability of nationwide injunctions replicates this anomaly.

<sup>68</sup> See, e.g., *Atlantic Star*, [1974] AC 436 (HL) 471 (Eng.) ("'Forum shopping' is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favourably presented: this should be a matter neither for surprise nor for indignation.").

<sup>69</sup> See *supra* note 67 and accompanying text (discussing multiple-claimant anomaly).

<sup>70</sup> *Louhghalam v. Trump*, 230 F.3d 26, 38 (D. Mass. 2017).

The second reason the government might turn to MDL is as a tool to fight forum shopping. Many people have been critical of the recent spate of nationwide injunctions allowing plaintiffs to forum shop for courts likely to issue judgments in their favor that apply nationwide.<sup>71</sup> In Samuel Bray's excellent treatment of these injunctions, he collected numerous such injunctions issued against the Obama Administration from federal courts in Texas and against the George W. Bush Administration from federal courts in California.<sup>72</sup> Although, in theory, the JPML could send the government to an unfavorable district every time, it seems unlikely that the JPML would be so uniformly plaintiff friendly—and even if it were, the government would be left no worse off.

Plaintiffs also might see a strategic advantage in MDL. Recall that *any* party to *any* action may request consolidation.<sup>73</sup> If even one plaintiff in one of these cases were unhappy with her draw of a district judge,<sup>74</sup> she might be intrigued by a JPML on which six of seven judges were appointed to the bench by President Clinton.<sup>75</sup> Such a plaintiff would hope that a friendly JPML might pick and choose cases to send to friendly MDL judges. Even if this would not be the interest of the entire collection of plaintiffs, it might be sufficiently in the interest of a single plaintiff (or her lawyers) to motivate a motion to consolidate.<sup>76</sup>

Yet another reason that either plaintiffs or defendants might be interested in MDL is as a means to hasten Supreme Court review. Sometimes the Supreme Court will wait to resolve an issue until there has

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<sup>71</sup> See, e.g., Bray, *supra* note 61, at 2. This problem is exacerbated by the long-standing practice of according home-state senators a role in the selection of judicial nominees. See generally LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* (2005).

<sup>72</sup> See Bray, *supra* note 61, at 8–10.

<sup>73</sup> See 28 U.S.C. § 1407(a) (2012).

<sup>74</sup> Even a plaintiff forum shopping for a favorable judicial district might be unhappy with the particular judge within that district.

<sup>75</sup> See *Current and Former Panel Judges of the United States Judicial Panel on Multidistrict Litigation*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., [http://www.jpml.uscourts.gov/sites/jpml/files/Current\\_Former\\_Judges\\_of\\_the%20Panel-10-9-2015.pdf](http://www.jpml.uscourts.gov/sites/jpml/files/Current_Former_Judges_of_the%20Panel-10-9-2015.pdf) [<https://perma.cc/3AXV-N8AG>].

<sup>76</sup> See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (noting that the inquiry into adequacy of representation “serves to uncover conflicts of interest between named parties and the class they seek to represent”); Bruce Hay & David Rosenberg, “*Sweetheart*” and “*Blackmail*” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1377 (2000) (noting “the problem of ‘sweetheart’ settlements, in which the class members’ interests are compromised by class counsel”). Plaintiffs’ lawyers also might use MDL to cut off other plaintiffs’ lawyers’ independent management of their cases. See, e.g., Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 80 (2015) (discussing attorney incentives in MDL).

been an opportunity for percolation.<sup>77</sup> Were a party interested in taking its argument straight to the Supreme Court, it could use MDL as an antipercolation device. In that situation, the Supreme Court could not delay consideration of an important case on the grounds of percolation because all potentially percolating cases would have been consolidated and resolved in the MDL court.

Public law MDL also might pique *judicial* interests. It is possible that one of the district judges hearing a major public law case might be inclined to pass the hot potato,<sup>78</sup> or that some of the JPML judges might be eager to snatch these high-profile cases.<sup>79</sup> Judges are people too, and thus they might have preferences (in either direction) about their roles in high-profile cases. Yet, they too have seemingly declined to propose MDL in public law-like cases.

In short, parties and judges have had opportunities to request MDL in public law cases—and they have had reasons to do so. Despite these reasons, however, they have demurred. The explanation may be as simple as the parties’ risk aversion when it comes to rolling the dice with the JPML.<sup>80</sup> Or, there may be some path dependence—lawyers on both sides, often repeat players, may simply intuit that public law MDL is not done because it has not been done so far.<sup>81</sup> Whatever the explanation, the public law MDL has remained an anomaly.

Observing that multidistrict litigation has been available but unused in major public law cases sounds like the set up for a pitch for more public law MDL. Yet, as explained in the next part, there are sound reasons to oppose any such expansion—and to implore the JPML to resist any such temptation.

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<sup>77</sup> See SUP. CT. R. 10(a) (suggesting among the factors auguring in favor of certiorari would be that “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter”).

<sup>78</sup> Technically the transferor judge may not order JPML consideration *sua sponte*, but it would not be hard for a motivated judge to gently suggest that a party should make such a motion.

<sup>79</sup> 28 U.S.C. § 1407(c)(i) (2012).

<sup>80</sup> Plaintiffs may prefer a multitude of cases and are happy to take their chances by forum shopping in districts where a majority of the judges seem amenable to their position; the government may prefer the opportunity to litigate over and over again, immune to collateral estoppel in individual cases it loses.

<sup>81</sup> This argument might be especially compelling because the types of lawyers familiar with MDL (e.g., mass tort lawyers) are not usually involved in public law cases. Or, to put it another way, we might be more likely to see a public law party invoke MDL when represented *pro bono* by one of these MDL-familiar private lawyers.

### III. WHY THE JPML SHOULD USUALLY DECLINE TO CONSOLIDATE PUBLIC LAW CASES

The previous Part explained that MDL is a plausible tool for public law cases. This Part explains why we nevertheless oppose the use of that tool. First, the kind of public law cases that may be candidates for MDL would not benefit from the usual strengths of consolidated resolution: reducing discovery costs, providing singular resolution, and facilitating settlement. And any such consolidation deprives the federal courts of potentially meaningful percolation. Second, despite superficial appeal, MDL would not be an effective bulwark against forum shopping in these cases. Indeed, any attempt to use MDL to check forum shopping may have the dynamic effect of undercutting MDL as a tool for resolving complex civil disputes.

#### A. *Efficiency v. Percolation*

One reason to be dubious of MDL in public law cases is that those cases likely would not obtain the traditional efficiency benefits of consolidation.

First of all, one major benefit of MDL is that it can reduce potentially massive discovery costs in complex cases.<sup>82</sup> A single judge overseeing consolidated cases is in a better position to police duplicative discovery requests than scores of judges hearing hundreds of separate cases. A single judge also could resolve each of the many inevitable discovery disputes only once—a major savings for court and lawyer resources. On the expert side, *Daubert* motions, which are often very expensive and central to the resolution of mass tort cases, can be centralized too.<sup>83</sup>

But while these issues are significant for complex civil cases, they are not so pressing in public law litigation. In many public law cases, discovery is minimal or nonexistent.<sup>84</sup> Indeed, the fact that preliminary injunctions are so central in these cases suggests that much of the legal work can be done

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<sup>82</sup> Civil discovery costs have been central to many of the important fights in civil procedure in the last few decades. See, e.g., Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1, 44 (2016) (discussing discovery amendments to the Federal Rules); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558–60 (2007) (discussing relationship between pleading standards and discovery costs).

<sup>83</sup> See, e.g., *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, 524 F. Supp. 2d 1166, 1170 (N.D. Cal. 2007) (citing *Daubert* motions in an MDL); *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 593 F. Supp. 2d 549, 563 (S.D.N.Y. 2008). See generally *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

<sup>84</sup> Even questions of fact, such as intent, often may be resolved on the public record or thin discovery. See *supra* note 62 and accompanying text.



on a thin record.<sup>85</sup> The travel ban cases provide an excellent example—much of the crucial legal work was done at the preliminary injunction stage without any fact discovery. Consolidating discovery, therefore, would be of little use.

Second, MDL’s ability to facilitate global settlement is likely to be of less utility in public law cases.<sup>86</sup> If available, class action treatment may allow parties to efficiently settle all related claims.<sup>87</sup> But when class treatment is unavailable—which is increasingly the case given the federal courts’ hostility to Rule 23<sup>88</sup>—MDL is an important vehicle to make non-class settlement less burdensome. The MDL judge can manage settlement negotiations and play a highly important information-forcing role among parties.<sup>89</sup> Consider the yeoman’s work of the BP oil spill MDL, in which hundreds of cases involving thousands of individual claims were settled without the aid of a global class action.<sup>90</sup>

Here again, however, public law MDLs look different. Although certainly public law cases may be voluntarily dismissed based on amicable resolution, those resolutions do not look like private law settlements. The issues in these cases are of public concern, and “settlement” would be the result of a political process that seems like a poor candidate for “managerial judging.”<sup>91</sup> The problem in the travel ban cases, for example, is not that the President has been unable to get in a room with representatives of the various affected groups in order to demonstrate the art of the deal. And any change in immigration policy is not likely to result from an MDL judge ordering court-sponsored mediation or enlisting the services of a high-profile special master<sup>92</sup> but from political deal making or electoral turnover.<sup>93</sup>

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<sup>85</sup> See *supra* notes 71–72 and accompanying text (discussing nationwide injunctions). Moreover, to the extent that some public law cases will turn on specific factual evidence—think, for example, proof of the harm on different classes of citizens—that evidence will be case specific and thus not susceptible to consolidation. And, again, even those costs likely will be low compared to complex private law litigation.

<sup>86</sup> See Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1291 (2017) (describing how MDL is a “superb vehicle for the development of information in modern mass-tort litigation”).

<sup>87</sup> *Id.*

<sup>88</sup> See Zachary D. Clopton, *Class Actions and Executive Power*, 92 NYU L. REV. 878, 880–84 (2017).

<sup>89</sup> See Bradt & Rave, *supra* note 86, at 1259.

<sup>90</sup> See *supra* note 51 and accompanying text (discussing BP).

<sup>91</sup> See generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

<sup>92</sup> See, e.g., Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1038–41 (2016) (discussing appointments of Ken Feinberg in BP, Robert Mueller in Volkswagen/clean diesel, and others). For an unusual (and non-MDL) counterexample, see *United States v. AT&T*, 567 F.2d 121,

Finally (and relatedly), MDL may promote singular resolution by resolving all cases on the merits<sup>94</sup> or resolving important issues that can lead to settlement.<sup>95</sup> The idea of consolidating some public law cases is not new—indeed, consolidated litigation for injunctive relief in civil rights cases was the animating purpose of Federal Rule of Civil Procedure 23(b)(2).<sup>96</sup> Mandatory classes for injunctive relief not only offer the efficiency benefits of consolidation, but they also insulate the government from having to comply with potentially inconsistent obligations imposed by different courts.<sup>97</sup>

However they are litigated, public law cases can produce singular judgments too—but we might not be so eager to reach that result at the trial court level and, potentially, even on a motion for a preliminary injunction.<sup>98</sup> In cases like those addressed in this Essay, there may be systemic benefits from multiple decisions by multiple judges arising from arguments by multiple lawyers.<sup>99</sup> Since cases of this magnitude are likely to wind up before the Supreme Court,<sup>100</sup> the quality of justice may improve with even a

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123–25 (D.C. Cir. 1977), describing court-sponsored mediation of interbranch dispute over executive privilege as it related to congressional subpoenas.

<sup>93</sup> See, e.g., Maggie Haberman & Yamiche Alcindor, *Pelosi and Schumer Say They Have Deal with Trump to Replace DACA*, N.Y. TIMES (Sept. 13, 2017), <https://www.nytimes.com/2017/09/13/us/politics/trump-dinner-schumer-pelosi-daca-obamacare.html> [https://perma.cc/F8NF-PG6W].

<sup>94</sup> See 15 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3866 (4th ed. 2017) (citing examples).

<sup>95</sup> See *supra* note 83 and accompanying text (discussing *Daubert*).

<sup>96</sup> See generally David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 702–08 (2011).

<sup>97</sup> D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1242–43 (2013) (describing the potential benefits of settlements in mandatory class actions for injunctive relief).

<sup>98</sup> While the existence of the Rule 23(b)(2) class action recognizes that a single answer in public law litigation may be desirable, it does not preempt the question of whether MDL treatment is appropriate in the cases we discuss—especially when many of these cases seek preliminary relief, which could be accorded prior to decisions about class certification. Instead, the question becomes whether MDL treatment of multiple (b)(2) class actions makes sense at the outset. For reasons described here, we think not.

Moreover, we think it is significant that the standard for class certification is much higher than the low bar for MDL consolidation. Arguments for a single resolution are stronger when there is numerosity, commonality, typicality, adequacy, and the government has acted on grounds applicable to the class as a whole. See FED. R. CIV. P. 23(a), (b)(2). And, in contrast to MDL (as described in the next Section), a decision by a single district judge to certify a Rule 23(b)(2) class does not pose any special risk of politicizing the JPML or undermining the ability of the federal courts to resolve mass tort cases.

<sup>99</sup> See, e.g., Burch, *supra* note 76, at 86 (discussing effects of appointing lead lawyers in MDL).

<sup>100</sup> See, e.g., *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2080 (2017) (granting certiorari).

little bit of percolation in the lower courts.<sup>101</sup> And even if the benefits of percolation are weak, the countervailing costs to efficiency from foregoing consolidation are not significant either.

### B. *Forum Shopping v. Judicial Politicization*

Even if MDL does not provide the usual benefits when applied to public law cases, we suggested above that the government might find MDL attractive for a different reason: as a check on forum shopping.<sup>102</sup> Lawsuits against the federal government for matters of national policy often can be litigated anywhere, and rational plaintiffs select districts that will give them the best chances to succeed.<sup>103</sup> Especially when the district judge may issue relief with national or universal scope,<sup>104</sup> the government should be wary of a plaintiff's handpicked district.

Although our earlier discussion was framed as a reason that the government might be inclined to seek consolidation, the same arguments may be relevant to the broader public policy question.<sup>105</sup> Certainly, there is disagreement about how much forum shopping should be permitted,<sup>106</sup> but we suspect that there is wide agreement that the U.S. legal system should have some way to check unbridled court selection. In individual cases, federal courts can cut back on plaintiff forum shopping in the interest of justice with a horizontal venue transfer under § 1404(a).<sup>107</sup> Perhaps MDL

<sup>101</sup> See, e.g., *Maryland v. Balt. Radio Show, Inc.*, 338 U.S. 912, 918 (1950) ("It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening."); Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 719 (1984) ("A managerial conception of the Court's role embraces lower court percolation as an affirmative value. The views of the lower courts on a particular legal issue provide the Supreme Court with a means of identifying significant rulings as well as an experimental base and a set of doctrinal materials with which to fashion sound binding law."). But see, e.g., Paul Bator, *What Is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 689 (1990) ("First, we must always remember that perpetuating uncertainty and instability during a process of percolation exacts important and painful costs.").

<sup>102</sup> See *supra* notes 71–73 and accompanying text.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*; see also Bray, *supra* note 61, at 8–10 (discussing these injunctions and collecting examples).

<sup>105</sup> In future work, we intend to explore more deeply the role of the MDL process in forum shopping generally, and the significant power wielded by the JPML in this regard.

<sup>106</sup> See, e.g., Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 583, 587 (2016) (highlighting "unappreciated virtues of global forum shopping" and collecting sources arguing that forum shopping is "often a neutral practice").

<sup>107</sup> See 28 U.S.C. § 1404(a). See generally Edmund W. Kitch, *Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice?*, 40 IND. L.J. 99 (1965). Removal achieves this effect vertically, 28 U.S.C. § 1441(a) (allowing removal from state to federal court), and forum non conveniens is available intersystemically. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 261 (1981) (granting forum non conveniens motion to dismiss in favor of litigation in Scotland).

also can achieve an anti-forum-shopping function—much like § 1404(a), the MDL statute gives the JPML the power to move cases based on considerations of justice.<sup>108</sup>

Furthermore, using MDL to fight forum shopping rather than § 1404(a) might avoid some of the biases inherent in that latter procedure.<sup>109</sup> By statute, § 1404(a) transfers are at the discretion of the potential transferor judge.<sup>110</sup> Presumably, some judges are disinclined to give away high-profile cases,<sup>111</sup> and as such they would be disinclined to grant § 1404(a) motions.<sup>112</sup> This seems especially likely if the plaintiff is successful in landing a politically friendly judge, who may be wary of transferring a case to the less friendly district requested by defendant.<sup>113</sup> Avoiding the transferor-judge bias of § 1404(a), the MDL statute assigns the transfer decision to the independent judgment of the JPML.<sup>114</sup>

In spite of these advantages to using MDL to limit forum shopping, there are a number of reasons it may be a poor response in the public law context. First, while § 1404(a) transfers typically identify the transferee *district*,<sup>115</sup> JPML orders typically identify the transferee *judge*.<sup>116</sup> This approach might make some sense when trying to identify a judge capable of handling a truly complex piece of litigation<sup>117</sup> or trying to build up a

<sup>108</sup> See 28 U.S.C. § 1407(a) (suggesting that consolidation should, among others, “promote the just . . . conduct of such actions”). Section 1407 consolidations are for pretrial purposes only, but especially when a TRO or preliminary injunction is a significant goal, then pretrial purposes become more prominent than the name suggests.

<sup>109</sup> MDL also might be better at checking forum shopping because while § 1404(a) transfers are limited to the districts where the case might have been brought, the JPML may transfer to “any district.” Compare 28 U.S.C. § 1404(a), with *id.* § 1407(a).

<sup>110</sup> See § 1404(a).

<sup>111</sup> One need not be a student of the “endowment effect” to recognize that judges might have an attachment to cases before them. See Daniel Kahneman, et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1332–35 (1990) (summarizing studies).

<sup>112</sup> Clermont and Eisenberg found that the success rate of § 1404(a) transfer motions was close to (but less than) 50%. Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1529 (1995). Their study does not identify the baseline for the right number of transfers, nor does it address high-profile cases in particular.

<sup>113</sup> Of course, some judges might want to duck high-profile cases or they might have a “preference for leisure,” either of which would result in an overuse of § 1404(a) transfers. See RICHARD A. POSNER, *HOW JUDGES THINK* 36 (2008). Whatever the direction of the bias, in all cases transferor-judge bias will be introduced.

<sup>114</sup> It is also possible that the group decisionmaking of the Panel improves outcomes. See generally JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2004).

<sup>115</sup> See 28 U.S.C. § 1404(a).

<sup>116</sup> *Id.* § 1407(b). See generally WRIGHT & MILLER, *supra* note 94, § 3864.

<sup>117</sup> See WRIGHT & MILLER, *supra* note 94, § 3864 (citing examples).

cadre of judges capable of doing so.<sup>118</sup> But when it comes to high-profile, public law cases, the selection of a transferee judge is necessarily fraught. Every federal district judge was appointed to her seat by a president from one party or the other. Every federal district judge has a record that may trouble one or more parties.<sup>119</sup> In other words, for the JPML, every choice in these cases is one that might attract criticism, whether warranted or not.<sup>120</sup>

Moreover, once the JPML is recognized as a powerful political agent, there will be a temptation to use it politically. Empirical studies have demonstrated that appointments to the JPML do not have a strong ideological edge.<sup>121</sup> Indeed, as of this writing, of the fifty judges to have served on the JPML, exactly twenty-five were appointed to the bench by Republican presidents and twenty-five by Democratic presidents.<sup>122</sup> But one could imagine Chief Justice John Roberts (or a future Chief Justice) responding to an increasingly political JPML by appointing judges more amenable to his own political philosophy. Indeed, the Chief has been criticized on exactly this score for his selections for the Civil Rules

<sup>118</sup> See, e.g., *In re* TD Bank, N.A., Debit Card Overdraft Fee Litig., 96 F. Supp. 3d 1378, 1379 (J.P.M.L. 2015); *In re* Lidoderm Antitrust Litig., 11 F. Supp. 3d 1344, 1345–46 (J.P.M.L. 2014) (noting that selection of transferee district allows assignment of case to a district that “has the necessary judicial resources and expertise to efficiently manage this litigation.”).

<sup>119</sup> An additional consideration may be governing law. In MDL cases, lower federal courts have long held that, for federal question cases, the law of the transferee circuit applies to cases transferred into the MDL. See *In re* Korean Air Lines Disaster of September 1, 1983, 829 F. 2d 1171, 1176 (D.C. Cir. 1987) (noting that law of transferor forums do not hold stare decisis). This practice stands in contrast with state law cases under the diversity jurisdiction transferred to MDLs, in which the MDL court must apply the law that the transferor court would have applied. See Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 793 (2012). As a result, the selection of the MDL judge may include selection of the circuit law that would apply both in the MDL court and on appeal. See Richard Marcus, *Conflict Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677 (1984). This, too, might be a source of backlash.

<sup>120</sup> Although our goal in the Essay is to discourage the use of MDL for public law cases, were the JPML inclined to get involved, the foregoing analysis suggests a few potential options: (i) random assignment, which is the JPML’s practice for a certain class of administrative law cases, see *id.* § 2112(a)(3); (ii) assignment to a district (rather than a specific judge) with an instruction for that district to use random assignment; or (iii) assignment to multiple judges, (see 28 U.S.C. § 1407(b) (referring to “judge or judges to whom such actions are assigned”)).

<sup>121</sup> See, e.g., Tracey E. George & Margaret S. Williams, *Designing Judicial Institutions: Special Federal Courts and the U.S. Judicial Panel on Multidistrict Litigation* (2013) (unpublished manuscript), <https://www.vanderbilt.edu/csdi/events/George.pdf> [<https://perma.cc/GWZ7-DFXL>].

<sup>122</sup> We provide a list of every member of the JPML and the party of the appointing president in the Appendix. See *Current and Former Panel Judges*, U.S. PANEL ON MULTIDISTRICT LITIG., [http://www.jpml.uscourts.gov/sites/jpml/files/Current\\_Formal\\_Judges\\_of\\_the%20Panel-10-9-2015.pdf](http://www.jpml.uscourts.gov/sites/jpml/files/Current_Formal_Judges_of_the%20Panel-10-9-2015.pdf) [<https://perma.cc/RA79-4G9G>]. Note too that every JPML judge was appointed by a Chief Justice appointed by a Republican president.

Advisory Committee<sup>123</sup> and the Foreign Intelligence Surveillance Court.<sup>124</sup> Even if the current JPML could act apolitically in these cases, it may be only a matter of time before a new set of panel judges might break that norm.<sup>125</sup>

The selection of judges for political reasons also might have spillover effects for more traditional MDL cases. Currently, the JPML is made up of judges who are well versed in managing complex private litigation. But if the panel starts being involved in more controversial cases, a Chief Justice might be inclined to consider ideological priorities in making appointments that may not line up with efficient resolution of mass torts. This would be an especially inauspicious outcome because, even if the government routinely brought public law suits to the JPML, they would be substantially outnumbered by the tens of thousands of private MDL cases each year.<sup>126</sup> For those of us who think that the JPML has done a commendable job in managing complex litigation, it would be a pity to see it give up that expertise.<sup>127</sup>

Finally, not only might a political JPML attract the attention of the Chief Justice, it also might attract the attention of Congress (or interested parties lobbying Congress). MDL is already in the political crossfire over aggregate litigation generally. For example, a recent House bill proposed reining in some of the advantages plaintiffs are thought to have in MDL proceedings.<sup>128</sup> Again, it would be disappointing to lose the ability to

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<sup>123</sup> See, e.g., Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559, 1571–76 (2015); Elizabeth Thornburg, *Cognitive Bias, the “Band of Experts,” and the Anti-Litigation Narrative*, 65 DEPAUL L. REV. 755, 765–66 (2016).

<sup>124</sup> See, e.g., Maxwell Palmer, *Does the Chief Justice Make Partisan Appointments to Special Courts and Panels?*, 13 J. EMPIRICAL LEGAL STUD. 153, 153 (2016); Charlie Savage, *Roberts’s Picks Reshaping Secret Surveillance Court*, N.Y. TIMES (July 25, 2013), <http://www.nytimes.com/2013/08/21/us/roberts-varies-pattern-in-choice-for-spy-court.html> [<https://perma.cc/82HM-SHDF>]; Charlie Savage, *Newest Spy Court Pick Is a Democrat but Not a Liberal*, N.Y. TIMES (Aug. 20, 2013), <http://www.nytimes.com/2013/08/21/us/roberts-varies-pattern-in-choice-for-spy-court.html> [<https://perma.cc/82HM-SHDF>]. After those articles were written, two judges originally appointed by President Clinton were added to the court. See *Current Membership*, U.S. FOREIGN INTELLIGENCE SURVEILLANCE CT., <http://www.fisc.uscourts.gov/current-membership> [<https://perma.cc/NNL3-UGBG>].

<sup>125</sup> The MDL statutes does not expressly authorize or prohibit the Chief Justice from removing members of the panel, but at a minimum the Chief can fill any vacancies with as he sees fit. See 28 U.S.C. § 1407.

<sup>126</sup> See *supra* notes 41–43 and accompanying text.

<sup>127</sup> See *supra* note 45 and accompanying text.

<sup>128</sup> Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. (2017) (passed by House of Representatives on Mar. 9, 2017).

consolidate tens of thousands of private law disputes because of a few public law ones that did not really need consolidation in the first place.

#### CONCLUSION

There is nothing doctrinal or statutory standing in the way of MDL treatment of the sorts of public law cases being brought against the Trump Administration. And our suspicion is that, sooner or later, a party to one of these cases is going to give it a shot by filing a motion for consolidation of pretrial proceedings with the Judicial Panel on Multidistrict Litigation. It might be the government, which may prefer fighting on one front, rather than all around the country. Or it might be a plaintiff, who might believe that consolidated treatment will allow for economies of scale and provide an opportunity to take the lead on the nationwide litigation. Even more strategically, it might be a plaintiff or defendant who would rather take her chances with a judicial assignment by the JPML than with the judge to whom her case has been assigned.

But while the idea of efficiently consolidating public law cases might be superficially attractive, we think it would be a mistake for the JPML to wade into these cases and contrary to the statutory requirement that the use of MDL “promote the just and efficient conduct of such actions.” Any such move is unlikely to bring considerable benefits, and it risks politicizing the Panel and undermining its core function. Instead, for the reasons described in this Essay, we urge the JPML to consider the limited efficiency MDL offers in public law cases as compared to its substantial risks, and we hope that MDL remains primarily the province of mass torts—and our Civil Procedure classroom hypotheticals.

# NORTHWESTERN UNIVERSITY LAW REVIEW

## APPENDIX

JPML JUDGES APPOINTED BY DEMOCRATIC PRESIDENTS		JPML JUDGES APPOINTED BY REPUBLICAN PRESIDENTS	
Alfred P. Murrah	Robert Merhige, Jr.	John Minor Wisdom	Morey L. Sear
Edward Weinfeld	Barefoot Sanders	Edwin A. Robson	Bruce M. Selya
William H. Becker	Royal Furgeson, Jr.	Andrew A. Caffrey	Julia Smith Gibbons
Joseph S. Lord III	Frank C. Damrell, Jr.	Murray J. Gurfein	D. Lowell Jensen
Stanley A. Weigel	David G. Trager	Robert H. Schnacke	J. Frederick Motz
Roy W. Harper	Barbara S. Jones	Sam C. Pointer	Robert L. Miller, Jr.
Charles R. Weiner	Marjorie O. Rendell	John F. Nangle	Kathryn H. Vratil
Edward S. Northrop	Charles R. Breyer	William B. Enright	David R. Hansen
Fred Daugherty	Lewis A. Kaplan	Clarence A. Brimmer	Anthony J. Scirica
Hugh S. Dillin	Sarah S. Vance	John F. Grady	John G. Heyburn II
Milton Pollack	Ellen Segal Huvelle	Louis C. Bechtle	Paul J. Barbadoro
Louis H. Pollak	Catherine D. Perry	John F. Keenan	R. David Proctor
Halbert Woodward		Wm. Terrell Hodges	