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# Speech

## GENERALIST JUDGES IN A SPECIALIZED WORLD

*Diane P. Wood\**

**T**HANK you very much, and good afternoon. It means more to me than I can easily say to be here in Dallas delivering the lecture in honor of one of the greatest people I have ever had the privilege of knowing—and more than knowing, with whom I worked, from whom I learned about the law and about life, and to whom I will always owe a tremendous debt of gratitude. Four days before the Judge passed away, I received a telephone call from the White House informing me that President Clinton intended to nominate me to the vacant position on the United States Court of Appeals for the Seventh Circuit—subject, of course, to the voluminous background checks that had to be completed before he made his final decision and to the advice and consent of the United States Senate. Thrilled and honored, I picked up the telephone, called Dallas, and reached Judge Goldberg, in his office as always. I will never forget his immediate enthusiastic and supportive reaction: “You will be a great judge,” he said, and something in his voice gave me the feeling that he was passing a baton along to me. He brushed away, with that wonderful confidence all of us who knew him had come to count on, my protestations that this was just the first step, that I still had a lot to learn from him, and that only time would tell how well I managed on the bench. Sadly, only a few days later, it turned out that I would have to travel this road on my own, but not without my many rich memories of the Judge’s own example to guide me. Now, a little more than a year and a half into the job, I am here to share with you some of my observations about the amazing institution of the federal judiciary, of which I am now a part.

Ask any federal judge—especially any relatively new federal judge—what impresses him or her about the job, and you are likely to hear something about the remarkable diversity of cases that come before the federal courts. Unless one suffers from the vices of arrogance or

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overconfidence, a little voice might whisper from time to time that there is a risk of winding up "a mile wide and an inch deep" when it comes to legal expertise—jack of all trades but master of none.

Judges in most other countries are often staggered by the breadth of the American federal judge's writ, and we are seeing some movement in our own state courts toward increasing judicial specialization. The question whether the federal courts should, in some fashion or another, become increasingly specialized is obviously not a new one; we already have a few specialized federal courts, and some observers have called for more. Given the pressing caseload, particularly in the lower federal courts, and the increasing complexity of the society whose disputes we resolve, it seems clear that we have not seen the last of the debate. Looking at the subject both historically and comparatively, I will offer my own observations on the way that generalist federal courts and their judges can operate in the specialized world of the waning years of the twentieth century. I conclude, perhaps counterintuitively, that in such a world we need generalist judges more than ever for the United States federal courts.

## I. CONTINUITY IN THE FEDERAL COURTS; CHANGE IN THE OUTSIDE WORLD

Most snapshots of the world two hundred years ago, from about 1789 through 1797, would reveal a place nearly unrecognizable to us today. America at that time had a largely agricultural economy, still influenced by its recent colonial status. The transportation and communication networks that have, over time, become the envy of the world, were in their infancy. Industrialization had begun, following the pattern established in England, but the decades following the War saw leaps and bounds in American industrial capacity as the new country in short order replicated the English Industrial Revolution that had been going on for more than fifty years across the Atlantic. And the economic story is just the beginning. Socially, this was a world that still tolerated human slavery, that gave the vote only to propertied men, and that had not yet heeded Abigail Adams's admonition to "Remember the ladies." Yet there would be elements of the familiar as well. Intellectually, the end of the eighteenth century in America was a time of tremendous creativity. It was the end of the Age of Enlightenment, which had crossed over to the New World, and the genius of James Madison, Thomas Jefferson, Alexander Hamilton, John Adams, and many others had just put in place the fundamental institutions of our country.

One of those institutions was, of course, the Judicial Branch of the new government: the "[S]upreme Court and . . . such Inferior Courts as the Congress may from time to time ordain and establish"<sup>1</sup> (which the First Congress promptly did). What were the earliest federal judges doing, at the dawn of the Republic under the 1789 Constitution? To an astonishing

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1. U.S. CONST. art. III, § 1.

degree, the answer is “the same thing they are doing today.” A brief look at volumes 2 and 3 of Dallas’s Reports eloquently tells the tale of what occupied the Circuit Courts and the Supreme Court of the time. (No pun intended: the first Reporter of Decisions for the U.S. Supreme Court was A.J. Dallas.) Volume 1 of the *U.S. Reports* covers the period before 1789 and is devoted exclusively to cases from the courts of Pennsylvania. The bulk of Volume 2 (also known as 2 Dallas) is also devoted to Pennsylvania cases, but it includes eight admiralty cases from the Federal Court of Appeals established under the Articles of Confederation, covering the years from 1781 through 1787. Most importantly for our purposes, it reports both the decisions of the U.S. Circuit Court for the Pennsylvania District from the April Term 1792 through the April Term 1798 and the first reported decisions from the U.S. Supreme Court, starting with the Court’s first rules issued in the February Term 1790 and going through *Chisholm v. Georgia*.<sup>2</sup> By the time we get to the third volume of Dallas’s Reports, the ratio has shifted overwhelmingly in favor of the U.S. Supreme Court’s own decisions, although there are still a few Pennsylvania Supreme Court decisions and U.S. Circuit Court decisions in the volume.

A wide variety of subjects occupied the Circuit Court for the District of Pennsylvania. Of the twenty-nine reported decisions, at least ten dealt with traditional common law topics, such as the enforceability of contracts,<sup>3</sup> recording of mortgages,<sup>4</sup> land title and rights,<sup>5</sup> tort,<sup>6</sup> and bills of exchange.<sup>7</sup> At the same time, the court was entertaining some of the first federal criminal law matters, mostly arising out of Shays’ Rebellion, under a new federal treason statute.<sup>8</sup> Another federal crime that shows up a few times is the unauthorized conversion of a merchant vessel into a warship.<sup>9</sup> A number of the decisions dealt with various points of procedure, as the federal court began to develop its own rules independently from the state courts (in spite of the Conformity Act).<sup>10</sup> And finally, the court was beginning to construe the U.S. Constitution, in cases dealing with the naturalization power,<sup>11</sup> jurisdiction over cases affecting foreign

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2. 2 U.S. (2 Dall.) 419 (C.C.D. Pa. 1793).

3. *Livingston v. Swanwick*, 2 U.S. (2 Dall.) 300 (C.C.D. Pa. 1793); *Parasset v. Gautier*, 2 U.S. (2 Dall.) 330 (C.C.D. Pa. 1795).

4. *Brudenell v. Vaux*, 2 U.S. (2 Dall.) 302 (C.C.D. Pa. 1794).

5. *Vanhorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (C.C.D. Pa. 1795).

6. *Hulsecamp v. Teel*, 2 U.S. (2 Dall.) 358 (C.C.D. Pa. 1796).

7. *Wilkinson v. Nicklin*, 2 U.S. (2 Dall.) 396 (C.C.D. Pa. 1798).

8. *See United States v. The Insurgents of Pa.*, 2 U.S. (2 Dall.) 335 (C.C.D. Pa. 1795); *United States v. Stewart*, 2 U.S. (2 Dall.) 343 (C.C.D. Pa. 1795); *United States v. Porter*, 2 U.S. (2 Dall.) 345 (C.C.D. Pa. 1795); *United States v. Vigol*, 2 U.S. (2 Dall.) 346 (C.C.D. Pa. 1795); *United States v. Mitchell*, 2 U.S. (2 Dall.) 348 (C.C.D. Pa. 1795).

9. *United States v. Guinet*, 2 U.S. (2 Dall.) 321 (C.C.D. Pa. 1795).

10. *See, e.g., Symes’s Lessee v. Irvine*, 2 U.S. (2 Dall.) 383 (C.C.D. Pa. 1798); *Hollingsworth v. Adams*, 2 U.S. (2 Dall.) 396 (C.C.D. Pa. 1798); *Anonymous*, 2 U.S. (2 Dall.) 382 (C.C.D. Pa. 1797); *United States v. Parker*, 2 U.S. (2 Dall.) 373 (C.C.D. Pa. 1797); *The Insurgents*, 2 U.S. (2 Dall.) at 335.

11. *Collet v. Collet*, 2 U.S. (2 Dall.) 294 (C.C.D. Pa. 1792) (concurrent with states).

consuls,<sup>12</sup> the full faith and credit clause as it related to recognition and enforcement of judgments from other states,<sup>13</sup> and the limited jurisdiction of the federal courts.<sup>14</sup> The court had cases at law and in equity. In short, although the details obviously vary, the Circuit Court for the District of Pennsylvania had a caseload that would be quite recognizable to a federal judge today. The same pattern appears when we look at the cases before the Supreme Court itself, although there were only eight reported in 2 Dallas.

I am not saying, of course, that there have been no changes in the workload of the federal courts since the late eighteenth century. Plainly, that is not the case. The courts began with diversity jurisdiction and the specific grounds of federal question jurisdiction that Congress chose to implement. Not until 1875 did they acquire general federal question jurisdiction, and the judicial role in the administrative state again permanently and profoundly changed the business of the courts. Notwithstanding these important changes, what is striking is that the *scope* of business has remained remarkably consistent. The Chief Judge of the U.S. Court of Appeals for the Seventh Circuit, Richard Posner, has pointed out in his book, *The Federal Courts: Challenge and Reform*,<sup>15</sup> the considerable growth in federal caseloads over the period between 1904 and 1995—from a total of 33,376 cases in the district courts in 1984 to 283,688, and from only 1160 appeals in the courts of appeals to 1995's 49,625. That period of time has not, however, seen major changes in the organization of the lower federal courts. The key change for the Supreme Court has been the move toward nearly total discretion over its docket, first in 1925 and then in 1988—a change that allows the Court to choose what kinds of cases it will hear, but that certainly does not diminish the variety of subject matters and legal questions it receives in its 7000 some petitions for certiorari each year.

During the October Term 1996, the Supreme Court decided seventy-five cases with full opinions—an unusually low number, but even so one in which the continued diversity of the docket was apparent. Aside from the high-profile constitutional cases, like *Seminole Tribe of Florida v. Florida*,<sup>16</sup> *Romer v. Evans*,<sup>17</sup> *United States v. Virginia*,<sup>18</sup> and *Shaw v. Hunt*,<sup>19</sup> the Court was deciding cases in considerably less glamorous areas—equally important to the parties, naturally, but less likely to grab headlines. To name only a few, it decided that a creditor-bank could place an administrative freeze on a Chapter 13 bankrupt's checking account without violating the automatic stay provision of the bankruptcy

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12. *United States v. Ravara*, 2 U.S. (2 Dall.) 297 (C.C.D. Pa. 1793).

13. *Armstrong v. Carson's Executors*, 2 U.S. (2 Dall.) 302 (C.C.D. Pa. 1794).

14. *United States v. Worrall*, 2 U.S. (2 Dall.) 384 (C.C.D. Pa. 1798) (no general federal criminal jurisdiction).

15. RICHARD POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* (1996).

16. 116 S. Ct. 1114 (1996).

17. 116 S. Ct. 1620 (1996).

18. 116 S. Ct. 2264 (1996).

19. 116 S. Ct. 1894 (1996).

laws,<sup>20</sup> it decided that the domestic law of a signatory state of the Warsaw Convention governs the harm that is legally cognizable in a wrongful death action arising out of the shooting down of Korean Airlines flight 007,<sup>21</sup> and it decided that a finding that the extraordinary negligence of the captain of an oil tanker was the sole proximate cause of its grounding on a reef, after it broke away from a mooring facility, was enough to cut off the liability of the owner of the facility on breach of warranty grounds.<sup>22</sup>

My own experience on the court of appeals thus far, as well as my experience more than twenty years ago working for Judge Goldberg, has illustrated the "generalist" hypothesis only too well. I have participated in the decision of cases about First Amendment rights,<sup>23</sup> about the constitutionality of the new Antiterrorism and Effective Death Penalty Act,<sup>24</sup> about the scope of qualified immunity for city officials in a variety of circumstances,<sup>25</sup> about the use of psychiatric expert witnesses in criminal trials,<sup>26</sup> and about a death row prisoner's access to habeas corpus when counsel was ineffective.<sup>27</sup> I have also considered the placement of piers in Wisconsin,<sup>28</sup> salesmen at local building supply stores who may have violated state consumer protection laws,<sup>29</sup> lawyers who would not pay referral fees,<sup>30</sup> the allocation of costs for environmental clean-up,<sup>31</sup> and the trust relationship between an ERISA plan administrator and a company employee.<sup>32</sup> The list goes on and on, but I am struck by the continuity between the nature of my work and that of my predecessors so many years ago.

As the federal courts have stayed the same, the rest of the world has changed profoundly. I will confine these observations to economic developments, because they have the greatest direct effect on our cases, but we could as well mention social developments such as the emancipation of the slaves, the universal franchise, elaboration of equal protection concepts, religious and moral developments, and the intractable problems of race, poverty, and family breakdown from which we are now suffering. From an economic standpoint, however, we all know what remarkable developments took place during the nineteenth and twentieth centuries. The Industrial Revolution itself was far from over in 1789, when the first

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20. *Citizens Bank of Maryland v. Strumpf*, 116 S. Ct. 286 (1996).

21. *Zicherman v. Korean Air Lines Co.*, 116 S. Ct. 629 (1996).

22. *Exxon Co. U.S.A. v. Sofec, Inc.*, 116 S. Ct. 1813 (1996).

23. *Brown v. Disciplinary Committee*, 97 F.3d 96 (7th Cir. 1996).

24. *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996), *cert. granted*, 117 S. Ct. 726 (1997).

25. *Erwin v. Daley*, 92 F.3d 521 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 958 (1997); *Sledd v. Lindsay*, 102 F.3d 282 (7th Cir. 1996), *Clash v. Beatty*, 77 F.3d 1045 (7th Cir. 1996).

26. *United States v. Hall*, Nos. 96-2085, 96-2206, 96-2142, 1997 WL 144433 (7th Cir. Mar. 31, 1997).

27. *Hall v. Washington*, 106 F.3d 742 (7th Cir. 1997).

28. *Lopardo v. Fleming Cos.*, 97 F.3d 921 (7th Cir. 1996).

29. *Thacker v. Menard, Inc.*, 105 F.3d 382 (7th Cir. 1996).

30. *Freeman v. Mayer*, 95 F.3d 569 (7th Cir. 1996).

31. *Rumpke of Ind. Inc. v. Cummins Engine Co.*, 107 F.3d 1235 (7th Cir. 1997).

32. *Ramsey v. Hercules Inc.*, 77 F.3d 199 (7th Cir. 1996).

federal judges sat. The modern corporation began its development in the early nineteenth century, allowing unprecedented accumulations of capital, which in turn made possible both industrial and managerial innovations at a rate theretofore unseen. This led to industrial specialization and productivity on a scale commensurate with the needs of the "manifest destiny" of the expanding nation. Technological advances grew, one giving rise to the next, in part because labor was never as plentiful as capital and resources in the United States, in part because the frontierspeople seem to have been natural "tinkerers," and in part because economic growth itself was so strong (particularly in the period after the Civil War). Industrialization itself led not only to growing functional specialization, but also to increasing differentiation in the economy's product mix.<sup>33</sup> With the introduction of the assembly line, interchangeable products, and mass production in the early twentieth century, economic specialization reached a new high point.<sup>34</sup>

Not surprisingly, the legal profession has followed suit. As Chief Judge Posner has written in his book *Overcoming Law*,<sup>35</sup> the legal profession in England had become recognizable by the end of the thirteenth century, and it resembled in many ways the craft guilds common to that time. He notes that "by the time of our Revolution the English legal profession had assumed something remarkably like its present form."<sup>36</sup> A small, elite group of barristers who alone were entitled to appear in court, coupled with a larger group of solicitors who handled the rest of legal business, constituted "the profession." The judges in turn were drawn entirely from the ranks of the more successful barristers (as they still are today). In the United States, not surprisingly, many of the more rigid forms of the English legal profession never took hold, like the barrister-solicitor distinction. For a time, entry into the profession was quite open, but by the last quarter of the nineteenth century standards "tightened" (or, as some would say, the cartel began to restrict entry more vigorously). Not until the latter half of the twentieth century, however, did the legal profession begin to experience anything like the degree of specialization that industry had attained long before. Huge firms, with highly specialized departments, are a phenomenon of the 1960s and beyond. Today, although there are certainly still many solo practitioners who hang out a shingle and handle any and all cases that come along, few if any of these entrepreneurs could responsibly retain exclusive responsibility for a major antitrust case, or a toxic tort defense, or a complex overseas joint venture. Without specialization, how could one be sure she had found every relevant "in and out" of the Internal Revenue Code for her client,

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33. HAROLD G. VATTER, *THE DRIVE TO INDUSTRIAL MATURITY: THE U.S. ECONOMY 1860-1914* (1975).

34. Some have wondered more recently if it was too "high," as they have studied Japanese industrial methods and looked for ways around the crushing monotony extreme specialization can bring.

35. RICHARD POSNER, *OVERCOMING LAW* (1995).

36. *Id.* at 47.

or that she understood the way the Superfund laws (CERCLA and SARA) interact with the Bankruptcy Code, or that the copyright on certain computer software had been infringed?<sup>37</sup> If not only the economy has opted for specialization, but the legal profession itself has followed suit, this makes the judges seem odder than ever. How can they continue to stand apart?

## II. A COMPARATIVE PERSPECTIVE

Outside the United States, judges do not stand apart. We must, in this connection, speak separately of the systems based on the great civil codes (principally the French and German codes) and those based on our Mother Country's common law, but the embrace of specialization in both groups is more enthusiastic than we have seen at home in our federal courts.

One of the most influential articles written on this subject was published more than ten years ago by my former colleague, Professor John H. Langbein, who was then at the University of Chicago Law School and who is now at Yale Law School. In *The German Advantage in Civil Procedure*,<sup>38</sup> Professor Langbein argued that the "striking shortcomings" of American procedure, including the costly and time-consuming pre-trial phase of cases, the difficulty of gleaning the "truth" from competing hired-gun expert witnesses, and other flaws of the adversary system, both would and could be ameliorated by borrowing a page or two from Germany. The role of the German judge was one thing he singled out for praise, because the judge has far greater power to direct the case, to narrow the issues, to engage experts responsible only to the court, and to bring matters to a close. Much of this is possible because of the career judiciary Germany uses, which is typical also of other civil law, Continental-style systems. Competent judges are promoted; others are not. These judges sit in either "ordinary" courts or the specialized court systems for administrative law, tax and fiscal matters, labor and employment law, and social security. There is also a separate constitutional Supreme Court, the *Bundesverfassungsgericht*, to which the other courts may refer constitutional matters. Even the ordinary courts have special divisions for matters like crime, probate, and domestic relations. Commercial matters have their own specialized chambers, in which both laypersons and professional judges play a role. One statistic underscores dramatically how different the German courts are from our own. The Federal Supreme Court, or *Bundesgerichtshof*, is at the top of the ordinary court system. It alone has 110 judges, who are organized in divisions or senates devoted to particular subject matters. This is a far cry from our nine Supreme Court justices, and bear in mind the German Federal Supreme Court does not hear constitutional cases!

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37. See generally *id.*

38. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U CHI. L. REV. 823 (1985).



In France, we see a somewhat different division of responsibility, but one reflecting a similar degree of specialization. It has two separate court systems, the ordinary courts and the administrative courts. The administrative system has two levels: the Regional Councils or Administrative Tribunals (*Tribunaux Administratifs*), and the Council of State (*Conseil d'Etat*), which has original jurisdiction over some very important cases and appellate jurisdiction over most others. The ordinary courts begin with the 172 Courts of First Instance (*Tribunaux de Grand Instance*), which are located in the various departments of the country. There are also separate police courts, correctional or criminal courts (*Tribunaux Correctionnels*), the Assize Court (*Cour d'Assise*) for the most serious criminal cases, and a special criminal appellate court. In addition, there are twenty-seven courts of appeal, and finally the Supreme Court of Appeal, or *Cour de Cassation*. Like Germany, France also uses specialized commercial courts, in which the judges are not lawyers but businessmen, elected for two-year terms by the businesspersons and corporations in the district.

Even in the United Kingdom, the trend toward more specialization in the courts is clear. First, the distinction between civil and criminal jurisdiction appears in the court system (and hence, for the judges sitting on those courts). On the civil side, the courts with original jurisdiction are the High Court and the county courts. The High Court is divided into three divisions: the Queen's Bench Division, the Chancery Division, and the Family Division. Appeals go from the High Court to the Court of Appeal (Civil Division), where the Master of the Rolls and the Lords Justices of Appeal sit. That court normally sits with three members to a panel. Finally, the House of Lords (through the "Law Lords") has discretionary jurisdiction over appeals from the Court of Appeal. On the criminal side, the Crown Court (which sits in about ninety places) is the principal tribunal; appeals go to the Court of Appeal (Criminal Division), and as before, there is an opportunity to seek review by the House of Lords. There are also specialized courts, such as the industrial tribunals that administer employment-related legislation, and the restrictive practices court, which consider certain anti-competitive agreements.

One notable effect of the specialization that other countries have adopted for their judiciaries is the lack of a sense of crisis from growing caseloads and ever more sophisticated controversies. Undoubtedly, the former fact may partly be due to the lower rate of litigation in those countries—a phenomenon that stems from many sources, including the supply of lawyers, the cost of bringing a suit, the risk of losing a case if fees and costs must be paid, the amount of damages recoverable, the existence of a much more comprehensive social safety net, and so on. Sophistication of subject matter is plainly of less concern if the judges themselves specialize in the field, whether it be commercial law, environmental regulation, labor relations, criminal law, or constitutional law. With their career judiciaries and specialized courts, the Continental coun-

tries have a judicial system that operates at a lower profile across the board than their American counterparts. Whether this means that they are more "successful," however, depends entirely on what we mean by success. As I will suggest in a few moments, I believe our system has preserved certain essential values precisely because it has resisted the kind of professionalization and specialization that others have adopted.

### III. CHANGE IN THE UNITED STATES: THE STATE COURTS

Nevertheless, change is afoot here as well as abroad. The present picture in the United Kingdom bears a strong resemblance to the court systems that have developed in most of the states of the United States. Unlike the federal courts, which must always assure themselves that a case falls within the Article III constitutional grant of jurisdiction and (normally) some statutory heading of jurisdiction, the state courts are our courts of general jurisdiction. This does not mean, obviously, that every state court can hear every case, and in almost every state some functional specialization has occurred for areas like family law, wills and probate, and small claims. In some states, including Texas, separate criminal and civil courts exist, although Texas is unusual in having a separate Court of Criminal Appeals and in reserving its Supreme Court for exclusively civil matters.

Recently, some states have been experimenting more boldly with specialized tribunals, and the early reports appear to be positive. The newcomers all owe a debt to the 200-year-old Delaware Chancery Court, which has been, *de facto*, the nation's best known business court for many years. The Chancery Court has no jurisdiction over criminal and tort matters, and thus it is able to act quickly in important corporate governance matters. The business of incorporation is, of course, big business for Delaware, and its courts have responded by developing the expertise their constituents want.

New York inaugurated a new division of its State Supreme Court dedicated to commercial litigation on November 6, 1995. Between that date and July 31, 1996, a whopping 5024 new cases were filed in the Commercial Division in New York County alone.<sup>39</sup> The new division was created out of a recognition that New York, as a world financial and commercial center, needed to meet the litigation needs of the business community. (This suggests an interesting competition among court systems, reminiscent of the earliest days of English law when the King's courts slowly took over business from the feudal and hundreds courts. Yet dispute resolution is, at its base, a service, and it should not be surprising that states will take steps to provide needed services to their important political constituents.) Reports suggest that the business community is happy with its new court. The court uses strong judicial case management techniques, it

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39. See Robert L. Haig, *Can New York's New Commercial Division Resolve Business Disputes as Well as Anyone?*, Oct. 14, 1996, available in WLN 10835, 1996 WL 584460.

has an automated case management system, and it has an alternative dispute resolution component that has resolved nearly half of the cases referred to it. The judges assigned to this court have also, naturally, become more expert in the subjects with which they deal.

The Commercial Division does not use a jurisdictional threshold for its cases, nor does it operate under any precise definition of the term "commercial" itself. Instead, the parties themselves designate the case as one for the Commercial Division, and one of the judges then reviews the case to see if it is suitable. This has not been a problem thus far, but it may prove troublesome if the court begins to get so many cases that it ends up turning away a significant number. The vagueness of the criteria will also bear watching, since there is a risk that the court will end up taking only the cases that are large in financial terms, leaving the smaller business disputes to the general civil division.

Other states, including North Carolina, Wisconsin, and Illinois, have adopted some variant of the commercial court. This is in keeping with the recommendation of the American Corporate Counsel Association Board of Directors' recommendation, adopted June 13, 1996. In that statement, the ACCA urged:

states to consider wherever appropriate the advantages of specialized procedures for resolution of business disputes. ACCA believes that the most effective way to realize such advantages is for states to create business courts or specialized court divisions or parts dedicated to business litigation.

The United States has a large and sophisticated business community with unique legal needs. Businesses have increasingly turned to other forums to resolve their disputes, to avoid the difficulties often encountered in overburdened state courts. However, the ACCA Board of Directors' statement supports public state court systems that can resolve commercial disputes efficiently. Business courts should result in more cost-effective and timely case processing and an improvement in the quality of dispositions. They will therefore foster a more favorable environment for creating and maintaining businesses, and will as a result enhance the economic well-being of the nation.

Business courts will ease pressure on overcrowded state court systems. Removing complex commercial cases from other parts of the courts will allow those parts to function more efficiently and will reduce the possibility that a few complicated commercial cases will displace the time and attention that the many other cases pending in those parts should receive. The legal issues in commercial litigation are often complex. Efficient resolution of these disputes requires the expertise of judges experienced in these areas and skilled at handling these cases.

The ACCA statement makes the idea of business courts sounds like a win-win game, better for business and better for all other litigants. Not surprisingly, the idea has not been received quite so warmly in all quarters. In California and Pennsylvania, plaintiffs' attorneys have lob-

bied against the creation of this kind of court. They argue that it is unfair to give special treatment for corporate litigants, that business courts are likely to favor hometown companies, and that the judges will become captured by the interest groups they oversee.

#### IV. THE FEDERAL COURTS: TO SPECIALIZE OR NOT TO SPECIALIZE?

Many of the same criticisms, and many of the same benefits, have been raised in the debate about the wisdom of increasing specialization in the federal courts. Before turning finally to that debate, it is worth looking at the existing ways in which the federal court system, broadly construed, has already moved down this line.

##### A. EXISTING SPECIALIZATION

Even now, specialization is not entirely unknown in the Article III courts of the United States, and thus there are some Article III judges whose dockets are more regular and predictable than the rest of us. The most prominent example is the Court of Appeals for the Federal Circuit, which has a hodge-podge jurisdiction over areas that Congress thought needed a single national voice: patents, customs, certain other international trade matters, government employment matters, and claims against the United States. (It is interesting to note that the Federal Circuit, as the successor court to the Court of Customs Appeals, the Court of Patent Appeals, and then the Court of Customs and Patent Appeals, has had an ever-expanding scope of jurisdiction. There may be a lesson in this as other specialized tribunals are considered.) In addition, at the lower court level, we have the Article III Court of International Trade and the Foreign Intelligence Surveillance Court. There was also briefly the Commerce Court, which for three years heard certain appeals from Interstate Commerce Commission orders, and there was the Temporary Emergency Court of Appeals, which monitored the price control system put in place during the oil crisis.

The picture I want to paint would not be complete without remembering the Article I courts as well. The best known of these are the Tax Court and the Court of Federal Claims. Military courts still play a vital function in the system, and territorial courts, while less important in today's stable world than they once were, also continue to exist. In sheer numbers, though, the dominant Article I tribunals are the adjudicative bodies established in the administrative agencies, presided over by the administrative law judges (ALJs). Social security cases, labor cases, immigration cases, railroad disability cases, and countless others begin before ALJs and often enter the Article III system only at the court of appeals level. When they reach us, our review is deferential: the usual standard for looking at facts is the "substantial evidence" test, and agency interpretations of governing law receive deference from the courts under the *Chevron* doctrine. These Article I judges are the face of federal jus-

tice for countless litigants whose problem lies with the federal government in some fashion. When we look at the system as a whole, we may not be as far out of step with the rest of the world as the Article III part of the judiciary would make one think.

#### B. EXTANT PROPOSALS

Should we take Article I tribunals into account when we consider whether Article III judges should continue to operate as generalists? In my opinion, the answer is clearly yes. Even though some discussions of this subject have looked only to Article III courts, we get a broader and more accurate picture of the possibilities if we also take into account the various Article I bodies. The Federal Courts Study Committee did not overlook the Article I courts when, in 1990, it recommended various ways of addressing the increasing demands on the federal judiciary. The trick is to know which administrative areas would benefit from the attention of specialized administrative review by neutral, professional administrative law judges, and at what point the perspective of the Article III judge becomes critical.

In addition to its recommendations relating to the Article I tribunals, such as the one to create a social security appeals board, the Federal Courts Study Committee suggested one new Article III court. It would have established an Article III appellate division of the Tax Court with exclusive jurisdiction over appeals in federal income, estate, and gift tax cases, and it would have restricted initial tax litigation to the trial division of the Article I Tax Court. Interestingly, it recommended *against* consolidation of the review of federal administrative agency orders in a specialized court of administrative appeals, principally for the reason that "a court with a monopoly over review of agency cases would necessarily be too large to be effectively administered." (The observation about size is undoubtedly true, given the number of agency cases that reach the district courts and the courts of appeals combined; whether the predicted difficulties of administration would result is more debatable, if we recall the example of the French courts.)

#### C. PROS & CONS

One can legitimately ask, in light of the changes in the economy, the experience in other countries, and the success of existing experiments in specialization in both the state and federal courts, whether we have been too modest in our moves in that direction. After all, specialization has its advantages. It can enhance efficiency; it would ensure that the adjudicators were knowledgeable in the subject matters presented to them (how many lawyers have not shuddered to try their first antitrust or CERCLA case to a neophyte federal judge); and it might increase uniformity of result across the country (as the example of the Federal Circuit's patent jurisdiction suggests). If these results came about, they would represent real gains for the system.

Nevertheless, powerful arguments against fundamentally changing the role of the Article III judge also exist. In my view, the strongest one relates to the accountability of the courts to the rest of society. Generalist judges cannot become technocrats; they cannot hide behind specialized vocabulary and "insider" concerns. The need to explain even the most complex area to the generalist judge (and often to a jury as well) forces the bar to demystify legal doctrine and to make the law comprehensible. This creates obvious benefits for clients as well as courts, since in today's skeptical world clients are not likely to warm to the "trust me, I know what is best for you" explanation either.

Related to this observation is the fact that the generalist judge is less likely to become the victim of regulatory capture than her specialized counterpart, despite the best of intentions on the latter's side. If one never emerges from the world of antitrust, to take one field that I know well, one can lose sight of the broader goals that lie behind this area of law; one can forget the ways in which it relates to other fields of law like business torts, breaches of contract, and consumer protection, and more broadly the way this law fits into the loose "industrial policy" of the United States. Economic mumbo-jumbo is already prevalent in the field, but lawyers talk of the trade-off between the deadweight loss "triangle" and the income transfer "rectangle" at their peril in front of a judge who does not live and breathe the field. Specialists need to emerge from their cocoons from time to time and find out how their smaller world fits in with the larger one. Today, nothing prevents those who would prefer an "expert" decisionmaker from choosing the arbitration route.<sup>40</sup> Once the aid of the courts is invoked, however, the broader perspective should legitimately be part of the picture.

Another advantage of the general docket comes from the cross-fertilization of ideas it makes possible. I have already experienced this personally, when I have looked at cases from one field and realized how an earlier decision in which I participated from a different field may suggest a creative answer to the problem. We still use the common law methodology of reasoning by analogy to a striking degree. Plainly, this can have its weaknesses, but when not taken to an obsessive degree it can also have its strengths. A problem of agency that occurs in the employment discrimination area is not so different from a problem of agency that occurs in the pension administration area, or even from a problem of agency that arises in the course of professional representation. Only generalist judges are able to take those insights and carry them across fields of the law.

Finally, the generalist perspective reveals that many seemingly different areas of the law give rise to legal issues that do not vary by the area. Due process may be the paradigmatic example. The way we think about due process should be a constant, whether we are talking about criminal

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40. See *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (permitting arbitration of international antitrust claims).

procedure, deprivations of governmental benefits, or court procedure. Applications will vary, depending on the circumstances, as the Supreme Court held in *Mathews v. Eldridge*,<sup>41</sup> but the principle does not. We are able to resist unwarranted claims for special treatment when we have the full picture of litigated cases in front of us, and we are able to recognize the special case for what it is. This may be because judges themselves are specialists in "judging," which certainly is a distinct subset of the legal profession as a whole. The enterprise of marshaling the salient facts, teasing out the key legal arguments, and coming to a conclusion is distinct in some ways from the task of the trial lawyer, or the office lawyer. Increasingly, the lawyers themselves are likely to be specialized, as I have already noted—especially those who litigate in federal court. This places a heavy responsibility on their shoulders for helping the courts to understand the matter in controversy, but it also means that they cannot be the source of a broader perspective.

#### IV. CONCLUSION

In my view, the contributions of the generalist judiciary are still far too great to abandon. The greatest pressure to move toward specialization appears to be coming from the business community, which would like faster justice for itself, but who does not want that? Right now, we have a healthy mix of generalist fora and specialized fora, when one takes into account both the variety of courts and administrative tribunals and the increasing importance of alternative dispute resolution. Federal judges are the last generalists left—maybe in the world! This makes for a fascinating, challenging job for the judge, but it also creates important benefits for the litigants and for society as a whole. More than ever, we need these generalist judges in our specialized world.

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41. 424 U.S. 319 (1976).