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ARE FEDERAL JUDGES COMPETENT?
Dilettantes in an Age of Economic Expertise

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Thank you very much for that very kind introduction. My wife will now come forward and deliver the rebuttal.

I also want to express my thanks to Professor Sean Griffith, the Director of the Fordham Corporate Law Center, for inviting me to give this lecture, and to Ann Rakoff, the Executive Director of the Fordham Corporate Law Center, for not vetoing the choice.

Most of all, I want to express my gratitude to the Becker Ross law firm for endowing this lecture in honor of their retired partner Albert A. DeStefano. I should mention that the Becker Ross law firm has no cases pending before me and, given the nature of their practice, is unlikely to have any cases before me in the future. I congratulate them on their good fortune.

As for Al DeStefano, he is, as you can tell from Gus Katsouris’s remarks, a surviving example of that endangered species: the lawyer-statesman. During his years of practice, Mr. DeStefano was at once a much-sought-after counselor in the field
of corporate acquisitions, a scholarly adjunct professor at this law school, and a trustee of such laudable charitable institutions as the Helen Keller Services for the Blind and the Cleary School for the Deaf. I am truly honored to give a lecture that bears his name.

Finally, I want to acknowledge the presence here this evening of Albert DeStefano’s sons, Paul and James, and his grand-daughter, Katherine, who is a first year law student at – where else? – Fordham Law School.

The title of my little talk here tonight is “Are Federal Judges Competent?” This naturally raises the question of whether I am competent to answer that question. I put this question to myself, and, after careful consideration of both sides of the argument, concluded that I was competent to determine whether I am competent. As H. L. Mencken once said, “A judge is a law student who grades his own exams.”

But the sub-title of my talk – “Dilettantes in an Age of Economic Expertise” – is more revealing of what this talk is about, which is whether generalist judges and courts of general jurisdiction still make sense in an era of ever greater specialization. It was Professor Griffith who suggested this topic to me, totally disregarding my suggestion that I talk about the New York Yankees. The result is that this will be a serious
talk about a serious subject; and thus any bloggers who are here may feel free to leave now.

Over the past some decades, there has been an accelerating trend toward creating specialized courts, that is, courts that specialize in specific subject matters. Although these courts vary widely, they are premised on the common assumption that limiting the subject matter of a court to a particular kind of controversy will bring an enhanced expertise to the resolution of such controversies. In New York State, for example, you have the surrogate courts (dealing with probate matters), the landlord-and-tenant courts, the family courts, the drug courts, and so forth. Although the trend is less pronounced at the federal level, even there you have the bankruptcy courts, the tax court, the court of international trade, and, of particular interest, two appellate courts that have a semi-specialized jurisdiction: the D.C. Circuit, which has exclusive jurisdiction over many, though not all, administrative appeals, and the Federal Circuit, which has exclusive jurisdiction over patent appeals. In a more diffuse sense, you also have the growth, at both the state and federal levels, of regulatory agencies like the S.E.C., the F.T.C., and the N.L.R.B., that, in addition to their rule-making functions, are called upon to adjudicate certain controversies in their specialized areas.
Very recently, there has also been a trend in many states to create specialized courts to deal with corporate and business disputes. Part of the impetus for this development comes from the success of the Delaware Chancery Court, which, somewhat ironically, did not begin as a specialized court but has in some sense come to be viewed as one because it deals with so many corporate law issues in a state where most large U.S. corporations are incorporated. (Incidentally, Delaware’s hegemony in this regard is now being challenged by such diverse places as Nevada and the Cayman Islands; but over 60 percent of Fortune 500 companies are still incorporated in Delaware.)

In any event, it is widely perceived that part of Delaware’s attractiveness to business is not just its pro-business corporate laws themselves but also the expertise of its courts in interpreting those laws, and the result has been that no fewer than 19 other states have created specialized business courts. In New York State, for example, this take the form of the Commercial Part of the New York State Supreme Court, where complex commercial cases are sent for expedited treatment.

While it may be too soon to judge these new business courts, so far they seem to have been well received. But partly this is because the judges who have been assigned to them are often the most experienced and best regarded judges from the courts of
general jurisdiction; so it is difficult to tell whether the success is the result of specialization or of simply staffing these courts with the best generalist judges. Still, it has been suggested that even these very good generalist judges, when called upon to limit their focus to sophisticated business cases, develop an enhanced expertise that makes them better able to understand the financial, economic, and commercial complexities of these cases, and thus better able to render more informed and fairer decisions. If so, the argument goes, wouldn’t it make sense to develop a specialized business court at the federal level as well, staffed, perhaps, by judges who by education or experience have particular expertise in complex business, financial, commercial, and economic issues?

The question is a fair one. At present, the jurisdiction of the federal district courts is so broad that no judge readily develops more than a passing expertise in more than a few areas. On any given day, a typical federal judge might have to give some attention to, say, a narcotics case, a securities fraud action, a maritime dispute, a labor controversy, an employment discrimination claim, and a trademark case. By background or experience, the judge may have some special familiarity with a few of these areas; but there may be others that he or she will know little or nothing about. In particular, even if the judge
knows the law in each of these areas, the judge may have little specialized knowledge of the factual context in which the law must be applied. So, for example, a judge who generally knows patent law will frequently be confronted with patent cases that involve obscure technologies that the judge must learn from scratch. Or, again, a judge who generally knows the antitrust laws will often be confronted with antitrust cases involving specialized practices in specialized markets about which he knows nothing.

And just who are these federal district judges who are being called upon to judge these complicated disputes (assuming the disputes aren’t to be decided by an even less expert jury)? Well, for the most part, we are English or History majors, who spent 20 years or more after law school practicing in some narrow specialty and who got on the court because we were reasonably intelligent and reasonably respected in our profession, and because we knew someone who knew a U.S. Senator. It also might have helped that we had never said or written anything controversial — which was itself a function of our lack of expertise.

Of course, we all came to the court with one area of expertise, in that we had all been experienced litigators. Notice I use the word “litigator,” rather than the words “trial
lawyer," because in an age of fewer and fewer trials, some lawyers are now being appointed to the federal district court with little trial experience. But to be a successful litigator, even outside the trial context, one must be a “quick study” – because you can’t best your opponent unless you know more than he does about the underlying facts of a case, no matter how complicated. So, as every successful litigator will tell you, you do, for a short time, become incredibly expert in some arcane area – though you may forget it all the day after the case is over.

In theory, one might argue, the former litigator become federal judge might be able to use this ability to quickly master vast quantities of arcane materials to become an instant expert in any matter brought before him. But this assumes you have nothing else to do, that, like the litigator you once were, you can devote the great bulk of your energies to a single case, at least for a concentrated period of time. But that is not the fate of a federal district judge. If, in actuality, you have a docket of 300 active cases, at least 100 of which are moderately complex and all of which have some call on your attention, how will you ever find the time to become an expert, even in the ad hoc way of litigators. Hence, the argument goes, one must have specialized courts, where judges, who may often be appointed to
such a court because of their specialized training, will in any
event be confronted with a sufficiently narrow range of subject
matters that they can develop the expertise necessary to really
understand such cases.

Parenthetically, I can honestly say that I would be bored to
tears if my docket were limited to one kind of case; but my
personal love of variety is hardly a convincing reason to reject
the creation of specialized courts. Besides, if I didn’t want to
be a specialized judge, I could always apply for a job as a
utility player on the Mets, a job for which I believe I am at
least as well qualified as several of the current incumbents.

But there are, I would like now to suggest, at least five
fundamental reasons why the creation of a federal business court,
or, indeed, the creation of any more specialized federal courts
than we already have, would be a major mistake.

First, judicial specialization tends to obscure what judges
are really supposed to do, which is to apply reason, legal
principles, and basic moral values to the resolution of
controversies. It is by this, and not by any narrow expertise,
that judges are ultimately judged to be good or bad judges. It
is also why judges are required to state the reasons for their
decisions, so that they can be reviewed on appeal, as well as
assessed by the legal community and the general public. But in
specialized courts, judges, rather than having to clearly state the reasons for their conclusions, can wrap their decisions in the cloak of expertise, to which appellate courts inevitably give deference. Specialized courts, I submit, quickly develop an impenetrable jargon that makes it difficult, if not impossible, to understand how they reached their decisions. And precisely because of this obscurity, the appellate court, rather than admitting its mystification, defers to the lower court’s supposed expertise. As a former member of my court, the famous judge and lawyer Simon Rifkind, stated to Congress in opposing the creation of specialized federal courts:

[W]hen you are dealing with a matter that concerns the general welfare of the United States, it is not wise to create a small group of men who become, like the Egyptian priests, the sole custodians of a body of knowledge and who sooner or later begin to talk a language that nobody else understands but which is common only to them and the practitioners who appear before them and who drift away from those general principles of equity [and] morality, which pervade the entire judicial system.

Second, because specialized courts deal with disputes specific to a particular constituency, they tend to be influenced, or even captured, by the interests and biases common to that constituency. Thus, as I will discuss further in a few minutes, the Federal Circuit, in dealing chiefly with disputes between patent owners and patent challengers, only hears
arguments that reflect the shared assumptions and prejudices of patent owners and patent challengers, and eventually comes to share some of those assumptions and prejudices.

Furthermore, where a court deals chiefly or exclusively with controversies involving a limited group of special interests, those special interests are much more likely to play an active role in the selection of the judges to that court. Thus, in the case of New York’s landlord-and-tenant court, landlord and tenant lobbyists are widely believed to play a dominant role, fueled by campaign contributions, in the selection of judges who are known from the outset to be pro-landlord or pro-tenant.

And even where the selection process is more neutral, a specialized court is much more likely than a generalist court to be affected by the judges’ personal ideologies, since, unlike a generalist court, the judges on a specialist court are dealing again and again with the same small set of issues. The fact that those issues may appear complicated, or require a certain amount of expertise to fully grasp, can not disguise the fact that they usually involve competing values that no amount of expertise can resolve. As Circuit Judge Richard Posner, who certainly possesses a wealth of economics expertise, has written in opposition to a specialized antitrust court:

Antitrust is a forbidding field to the noninitiate.
Its practitioners are experts, but are they objective? Antitrust theorists are divided into three warring camps. One camp thinks the most important values that the antitrust laws are designed and should be interpreted to promote are social or political values having to do with decentralizing economic power and equalizing the distribution of wealth. ... [T]he two other camps ... are united in believing that the only proper goals of antitrust law are economic ... [but are divided between] a “Harvard School,” [which is] prone to find monopolistic practices, and a “Chicago School,” which believes the same practices to be for the most part procompetitive....

These cleavages, reflecting deeper and at the moment unbridgeable divisions in ethical, political, and economic thought, would not be eliminated by committing the decision of antitrust appeals to a specialized court. They would be exacerbated. A [particular] “camp” is more likely to gain the upper hand in a specialized court than in the entire federal court system or even in one circuit. This is not only because appointment to the specialized court would inevitably be made from the camps, but also because experts are more sensitive to the swings in professional opinion than an outsider, a generalist, would be. The appearance of uniform policy that would result from the domination of the specialized court by one of the contending factions in antitrust policy would be an illusion. It would reflect power rather than consensus.

Third, judges in specialized courts have a temptation to look over their shoulders at the impact of their decisions on their future employment outside the specialized court, thus compromising their independence. This, for example, is a problem for federal bankruptcy judges, who regularly seek employment at the end of their 14-year terms with law firms that are known to represent only debtors or only creditors. As a result, it is widely believed, though perhaps unfairly, that the decisions made
by an outgoing bankruptcy judge near the end of her term will seemingly be affected by the interests of the kind of clients represented by the law firms she would most like to join once her term is over.

You might think this would be less of a problem for a life-tenured federal district or appellate judge appointed to a specialized court. But because of the unfortunate state of judicial salaries, more and more federal judges are departing after only a relatively few years on the bench. Even now, this presents a threat to their independence; but if they were judges on specialized courts, where the divisions are so much more clearly drawn, the threat to independence resulting from the desire for lucrative future employment might well become severe.

Fourth, -- and to my mind the most insidious problem with specialized courts -- even the best of judges in specialized courts tend to develop a tunnel vision, oblivious to developments in other parts of the law that should impact their decisions. As we all learned long ago, “the law is a seamless web.” To the extent that the law strives to promote consistency and predictability, it requires that the same basic principles and procedures be applied regardless of what substantive area of law you are dealing with. Relatedly, judges are repeatedly called upon to balance competing objectives; it makes no sense for the
balance reached in the rest of the law to be disregarded, or even
overruled, in some specialized arena, for no better reason than
that the specialized judges are intent on promoting their own
narrow interests.

A good example of this problem, I reluctantly suggest, is
the Federal Circuit. As noted, the Federal Circuit, while it has
partial jurisdiction over a number of subjects, has exclusive
jurisdiction over patent disputes and in this respect is a
specialized court. Given the importance of patents in a modern
economy, the experience of the Federal Circuit may therefore be
suggestive of the benefits and detriments of any proposed federal
business court.

The Federal Circuit was created in 1982, primarily in
response to complaints from the patent bar that patent law was
being interpreted by the various circuit courts in radically
varying ways, leading to inconsistency in the laws governing one
of the more important areas of our economy. The circuit split,
crudely stated, was between those circuit courts that favored
giving strong protection to existing patents and strong
couragement to new patents in order to incentivize innovation
and those circuit courts that favored narrow interpretation and
protection of patents, both out of antitrust concerns and because
of a belief that too broad patent protection actually de-
incentivized innovation.

The real culprits here were the Supreme Court and the Congress, either of which could have resolved these long-time splits through judicial decision or legislation. But, instead, they chose to duck the issue: the Supreme Court by refusing to grant certiorari, and the Congress by pretending that this circuit split, which really reflected a clash of values, could be better decided by a specialized court that would bring uniformity to patent law. To that end, Congress, while leaving it to generalist district courts to still decide patent disputes in the first instance, created, in 1982, a single appellate court, the Federal Circuit, to decide all patent issues on appeal.

This solved the immediate problem in that it guaranteed that the circuit split would be resolved, at least at the circuit level, by the creation of this specialized court. But no one should have been under any illusion that it meant that the split would be resolved by the application of some special expertise. The split was one of policy, and, in operational terms, it was largely a split between the objectives promoted by patent laws and those promoted by antitrust laws. By creating a court that had exclusive power over the patent laws and had nothing to do with antitrust laws -- a court that heard disputes between members of the patent bar and rarely if ever heard from the
antitrust bar -- a court that was largely staffed by judges who, though almost uniformly excellent, were frequently drawn from a patent law background -- Congress guaranteed, wittingly or unwittingly, that the split would be resolved in a pro-patent fashion. And, indeed, over the next 15 years or so, the Federal Circuit created a protection for existing patents and a receptiveness to new patents that went well beyond anything previously seen.

Almost from the outset, the district courts saw this as one-sided and unbalanced. But the Federal Circuit began overruling the district courts to a virtually unprecedented degree. District courts suffered a 40% reversal rate in the Federal Circuit, compared to a less than 5% reversal rate in all other circuits. Was this because, as proponents of specialized courts might argue, the district courts lacked the specialized expertise that the Federal Circuit brought to bear? Or was it because the Federal Circuit, oblivious to the kind of balancing of values that is the everyday concern of generalist courts, was off on a frolic of its own?

The answer was supplied by the United States Supreme Court. Beginning in 1996 and continuing almost to the present, the Supreme Court began reversing the Federal Circuit at a rate unmatched by any other circuit court, even the much maligned
Ninth Circuit. Moreover, eight of these reversals were unanimous and none was by a bare 5-4 vote. Many were couched in harsh language, and nearly all suggested, at least by clear implication, that the Supreme Court believed that the Federal Circuit was using the cover of “expertise” to interpret the law differently from how it had been uniformly interpreted in other contexts. So much for the supposed benefits of specialization.

A comparison with another so-called specialized court, the Delaware Court of Chancery, is also instructive. Although Delaware law as a whole reflects a pro-corporate tilt, many observers, including this one, find the decisions of the Delaware Court of Chancery, and the Delaware courts generally, very well written and remarkably free of jargon or cant. But although proponents of specialized business courts frequently point to this high quality as evidence of what a specialized business court can achieve, in fact I think it is substantially wrong to view the Delaware Chancery Court as a specialized court, at least in the sense of a court of limited subject matter jurisdiction. In actuality, the jurisdiction of the Delaware Chancery Court is very broad, comprising the extensive equity jurisdiction that marked the reach of the English High Court of Chancery back in the days when the courts of England were divided between the courts of law and the courts of equity. If, then, the Delaware
Court of Chancery speaks with the clarity and vision of a generalist court, it is because it really is, fundamentally, a generalist court. Because, however, its jurisdiction includes so much of Delaware corporate law, and because so many large corporations are incorporated in Delaware, its decisions have a huge impact on the development of corporate law everywhere. In much the same way, because Wall Street is located in the Southern District of New York, more cases involving high finance are brought in my district than in any other federal district and so our decisions frequently have impact in this area; but this doesn’t mean that we are a specialized court, or that our decisions require the exercise of some supposed expertise unobtainable by district judges in other districts, or that we don’t pay a lot of attention to what other districts, and circuits, say about these issues. Like all generalist courts, and unlike truly specialized courts, we are the beneficiaries of cross-fertilization. And you don’t need Darwin or Mendel to tell you that cross-fertilization is a good thing.

Fifth, and finally, I would go so far as to suggest that a judge’s lack of specialized expertise is frequently a benefit, rather than a detriment, in reaching the right decision. Because what does a good judge do if he doesn’t understand some complexity in some abstruse area? He requires the lawyers to
explain it to him, in language he can understand. And the result, almost always, is that he comes to appreciate that the dispute before him cannot be resolved by the exercise of any supposed expertise but only by the careful weighing of competing interests and values well familiar to every judge. After many years on the bench, this is what Oliver Wendell Holmes had to say on this subject:

Having to listen to arguments, now about railroad business, now about a patent, now about an admiralty case, now about mining law and so on, a thousand times I have thought that I was hopelessly stupid [but] as many times have found that when I got hold of the language there was no such thing as a difficult case.

I am not sure I could say it any better than that; and, even if I could, when you have Oliver Wendell Holmes on your side, it’s time to sit down. So, let me simply conclude by giving my answer to my original question: Are federal judges competent? Competent to appreciate every nuance of every jargon-filled specialty? - Perhaps not. But competent to judge, well and with understanding, the essential disputes brought before us in every area of our jurisdiction? - You bet!

Thank you very much.