

ANTITRUST COURTS:  
SPECIALISTS VERSUS GENERALISTS

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*INTRODUCTION*

In the last several decades, scores of new competition laws have been adopted and National Competition Authorities (“NCAs”) established around the world.<sup>1</sup> In every instance of which we are aware, a decision of the NCA is subject to judicial review. The path to review varies, as does the destination. The reviewing court may be a court of general jurisdiction or it may

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1. For the competition laws of some 170 countries, see *Competition & Consumer Protection Authorities Worldwide*, U.S. FED. TRADE COMM’N, <http://www.ftc.gov/oia/authorities.shtm> (last modified Feb. 7, 2013).

be a tribunal that specializes in the review of NCA decisions. In countries that provide a private right of action for an antitrust violation, again a generalist or a specialist court may hear the matter in the first instance and/or on appeal.

Specialization can take any of several forms, so it is best seen as a matter of degree, depending upon both the percentage of a court's cases (or workload) arising under the antitrust laws and the degree to which the judges of a court have skills or training specific to antitrust.

At one end of the spectrum are the generalist courts of the United States, such as the twelve Circuit Courts of Appeals that review the decisions of the Federal Trade Commission and, in private cases, the judgments of the federal trial courts. Antitrust cases account for less than one percent of the total caseload in each of the appellate courts.<sup>2</sup> A somewhat more specialized model can be found in some countries, such as Portugal, where (from 2008 until the creation in 2012 of a single antitrust court) the review of NCA decisions has been vested in the commercial section of the geographically competent general court.<sup>3</sup> Another variation of the somewhat specialized model appears in France, where all challenges to the decision of the NCA are referred to a particular chamber of the Paris Court of Appeals that hears other types of cases as well. A still more specialized model puts review of the NCA's decision in a "business" or "commercial" court, such as the Market Court in Finland or Chamber 13 of the Council of State in Turkey. A bit further along the spectrum are courts that specialize in reviewing economic regulatory decisions, such as the Competition Appeals Tribunal in the United Kingdom, which reviews decisions of the NCA and of the various sectoral regulators. Finally, there are

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2. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS: 2011 ANNUAL REPORT OF THE DIRECTOR, tbl. B-7 (2011) [hereinafter AOUS]. The ninety-four federal district courts decide in the first instance cases brought by the Antitrust Division of the Department of Justice or by a private antitrust plaintiff. *Id.* tbl. C-2A. In each of the past five years, antitrust cases accounted for less than half of one percent of their overall case load, though the percentage was no doubt somewhat higher in at least a few districts. *Id.*

3. See *The Handbook of Competition Enforcement Agencies 2012: Portugal*, GLOBAL COMPETITION REVIEW, <http://www.globalcompetitionreview.com/handbooks/45/sections/153/chapters/1767/portugal> (last visited Apr. 16, 2013).

courts, such as the Competition Appellate Tribunal of India, that review decisions of the NCA alone.<sup>4</sup>

In addition to these variations in the degree of specialization reflected in the formal structure of review, informal or “opinion” specialization by a particular panel or judge is yet another possibility. When he was President of the European Court of First Instance, where antitrust cases are a significant part of the docket, Judge Bo Vesterdorf took special responsibility for antitrust matters, as Judge Nicholas Forwood now may be doing. Such informal specialization also occurs in certain subject areas, including antitrust, in the appellate courts of the United States.<sup>5</sup>

No matter what the arrangement for initial review of the NCA decision or review of a trial court in a private action, there is always an upper level reviewing court of general jurisdiction, whether mandatory or discretionary. Few antitrust cases, however, reach that level in any jurisdiction except the European Union.<sup>6</sup>

In addition to the antitrust share of a court’s total docket, another important dimension of specialization among competition tribunals relates to the specialized human capital they bring to bear upon review NCA decisions. For example, the specialized tribunals in Canada<sup>7</sup> and the United Kingdom<sup>8</sup> may,

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4. Yet another variation vests initial review of National Competition Authorities (“NCAs”) decisions in an appellate division of the NCA itself, which seems to be the arrangement in Australia and in Vietnam.

5. See Edward K. Cheng, *The Myth of the Generalist Judge*, 61 *STAN. L. REV.* 519, 526 (2008) (arguing that opinion specialization is “an unmistakable part of everyday judicial practice” in US federal circuit courts).

6. The Supreme Court of the United States has decided twelve antitrust cases in the last ten years. From 2007 to 2011, the Court of Justice of the European Union decided 100 antitrust cases. *COURT OF JUSTICE OF THE EUROPEAN UNION, ANNUAL REPORT 2011*, tbl. 9 at 104 (2011). Antitrust cases account for 1.5% of the Supreme Court’s opinions and about 4% of the opinions of the Court of Justice. *Id.* tbl. 9 at 104–05 (2011).

7. See Competition Act, R.S.C. 1985, c. C-34. (Can.); Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.) ¶ 3(2) (Can.) (“The [Canadian Competition] Tribunal shall consist of . . . not more than six members to be appointed from among the judges of the Federal Court by the Governor in Council . . . [and] not more than eight other members [all] to be appointed by the Governor in Council on the recommendation of the Minister [of Justice].”); Competition Tribunal Act, R.S.C. 1985, c. 19 (2d Supp.) ¶ 3(3) (Can.) (“The Governor in Council may establish an advisory council to advise the Minister with respect to appointments of lay members, which council is to be

variously, include among the three judges on panel one or two lay members expert in industrial organization economics or public affairs, or with relevant business experience.<sup>9</sup> In this way, the mix of skills among the judges may be tailored to the needs of each particular case.

The proliferation of tribunals reviewing NCA decisions invites inquiry as to whether one degree or another of specialization provides more satisfactory results, however measured. We set out to investigate what has made for a more or less successful institutional design, using economic sophistication as our criterion of success. Bearing in mind that a court might resolve a close question of antitrust economics in more than one way, we proposed to use as a proxy for economic sophistication the degree, if any, to which the tribunal made reference to and relied upon relevant economic literature. In particular, we hoped to investigate how generalist and specialist courts analyzed certain issues that could be expected to arise in many jurisdictions, such as the standard for predatory pricing and the analyses used to determine whether a price or margin squeeze, a vertical restraint, or price discrimination is unlawful.

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composed of not more than ten members who are knowledgeable in economics, industry, commerce or public affairs . . .”).

8. See Enterprise Act, 2002, c. 40, §12 (U.K.) (establishing the Competition Appeal Tribunal); see also *About the Tribunal*, COMPETITION APPEAL TRIBUNAL, <http://www.catribunal.org.uk/242/About-the-Tribunal.html> (last visited Feb. 15, 2013) (“Cases are heard before a Tribunal consisting of three members: either the President or a member of the panel of chairmen and two ordinary members. The members of the panel of chairmen are judges of the Chancery Division of the High Court and other senior lawyers. The ordinary members have expertise in law, business, accountancy, economics and other related fields.”); *Fee-Paid Chairman of the Competition Appeal Tribunal*, U.K. JUDICIAL APPOINTMENTS COMM’N, <http://jac.judiciary.gov.uk/selection-process/selection-exercises/in-progress/1651.htm> (last visited Feb. 15, 2013) (noting, in advertising to fill positions of Chairman of the Competition Appeal Tribunal “Chairmen will be expected to lead two lay members with expertise in economics, business, accountancy, academia, law and public affairs, to provide clear direction on law and procedure”).

9. See also Restrictive Trade Practices Law, 5748–1988, 42 LSI 135 (1987–88), art. 23(b) (Isr.) (“The Minister [of Trade and Industry] shall designate five members [of the Exemptions and Mergers Advisory Committee] who shall be civil servants possessing expertise and knowledge in economics, accountancy, business administration or law . . . and eight members who shall be representatives of the public, among whom—(1) Four members shall be highly reputed researchers and teachers in the Committee’s fields of expertise; (2) Four shall be members of the general public possessing academic degrees in the Committee’s fields of expertise, and having knowledge and experience of at least seven years in the above mentioned fields.”).

This research design quickly proved impractical. As it turns out, very few courts have opined at all on these issues; more have dealt with claims of predation, but they are mostly courts within the European Union, which are bound to follow the rulings of the European Court of Justice, so there were in fact too few data points and still fewer variations among them for one to identify empirical relationships between court design and economic sophistication or any other measure of performance. In part, the paucity of data reflects the short time since many NCAs were established or since a specialist tribunal was created to review the decisions of a pre-existing NCA. Also, courts in civil law jurisdictions only rarely cite non-legal sources, such as economic literature, which further complicates the task of evaluating the justification for their decisions. To the common law competition lawyer, the decisions of civil law courts may seem somewhat wooden because they are couched in purely legal terms which obscure the degree to which the court was exposed to and understood economic arguments for interpreting the law one way or another.

With our preferred research path blocked, we were remitted to evaluating the case for specialist versus generalist tribunals by reference to criteria that have been widely accepted in the legal and political science literature evaluating actual or proposed specialized courts,<sup>10</sup> and applying those criteria to the particular context of antitrust cases. While there is no shortage of passing references in favor of (or against) specialized antitrust tribunals without analysis of the costs and benefits of specialization, the only more extended effort specific to antitrust seems to be a one-page passage in Judge Richard Posner's book on the federal courts,<sup>11</sup> using antitrust as an example in a chapter critical of judicial specialization generally, and a paragraph devoted to antitrust as an example of the perils of specialization in an article by Judge Diane Wood.<sup>12</sup>

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10. For a greater discussion, see LAWRENCE BAUM, *SPECIALIZING THE COURTS* (2011) and the extensive bibliography at pp. 231–71.

11. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 251 (1996) [hereinafter POSNER, *CHALLENGE AND REFORM*]; RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 151–52 (1985) [hereinafter POSNER, *CRISIS AND REFORM*].

12. Diane P. Wood, *Generalist Judges in a Specialized World*, 50 S.M.U. L. REV. 1755, 1767 (1997).

The conventionally claimed benefits of specialized courts go to their potential efficiency, subject matter expertise, and, if they are given a monopoly over the subject matter, uniformity of decisions. All these benefits are somewhat speculative and therefore debatable. In this context, (1) efficiency typically refers to increasing the court's outputs for any given level of inputs, holding constant the quality of the outputs. (2) Subject matter expertise refers to the quality of judicial outputs, which is subjective and difficult to measure; expert judges might increase or decrease the quality of judicial outputs.<sup>13</sup> (3) Uniformity means simply consistency in the law. Because these three putative virtues of specialization need not correlate with ideological shifts in substantive policy, they are sometimes referred to in the literature as the "neutral virtues."<sup>14</sup> We consider each with particular attention to how it might apply to antitrust cases.

### I. EFFICIENCY

Keeping in mind the distinction between efficiency and expertise is difficult but important. When we refer to a tribunal's efficiency, we are holding constant the level of its expertise. In this context, efficiency is an objective function measuring the rate at which judicial outputs are produced from inputs.

The argument that a specialist tribunal is more efficient for handling any particular type of case, although speculative, has an undeniable appeal. In the more than two centuries since Adam Smith pointed out that the division of labor makes a factory more efficient and the one century since Henry Ford

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13. See BAUM, *supra* note 10, at 33 ("[E]xpertise is not parallel with efficiency. Enhanced efficiency is an outcome, but expertise is a trait that might affect outcomes."). For an argument that appeal and reversal rates provide a valuable, if imperfect, signal of the quality of first instance decisions in antitrust cases, see Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges?: The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J.L. & ECON. 1 (2011) (finding judicial training in economics reduces the rate of appeals taken and judgments reversed in a subset of relatively simple antitrust cases). Also, see Stephen J. Choi, Mitu Gulati & Eric A. Posner, *How Well Do Measures of Ability Predict Judicial Performance?: A Case Study Using Securities Class Actions* (N.Y.U. L. & Econ. Research, Paper No. 10-18, 2011), available at [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3001&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3001&context=faculty_scholarship) (discussing various measures of the quality of judicial output, including appeal and reversal rates).

14. BAUM, *supra* note 10, at 32-34.

brought the point home, it has become common to assume that, *ceteris paribus*, the cost of production declines with specialization. Although many specialized courts have been created over that period, there is still no empirical foundation for the proposition that specialist judges are more efficient than generalists in the production of judgments.<sup>15</sup> Even as simplistic a metric as the time it takes for a specialist versus a generalist court to dispose of comparable claims remains undocumented.

With respect to a specialist court for the trial or appeal of antitrust cases, we do think it reasonable to believe that a judge with experience in the subject matter will be quicker to recognize a claim that should be dismissed early on or an argument on appeal that can quickly be put to the sword. An experienced antitrust specialist should be more able than a generalist to do such early triage because the judge's experience with prior cases that should not have gone to trial or should have been summarily affirmed on appeal will inform his or her view of the pleadings and evidentiary proffers in later cases.<sup>16</sup> This point is of some relevance to any particular field of the law, but probably has more heft as applied to antitrust than to most fields because economic evidence is central to the merits of almost all antitrust cases. The ability early on to spot a gap in either a party's economic reasoning or its factual allegations is surely improved by frequent exposure to recurring economic issues. The learning curve may be fairly steep, even for antitrust cases, but the generalist judge who sees one antitrust case every year or two would surely be slower to progress down that curve than would the judge who sees such cases weekly.

Efficiency specifically in reviewing the decisions of an NCA is also likely increased by accumulating experience. A judge who reviews the decisions of an administrative agency that regulates a

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15. See *id.* at 218 (“[E]fficiency is the virtue most closely associated with specialization . . . but there is little evidence on this issue.”).

16. See William W. Schwarzer, *Techniques for Identifying and Narrowing Issues in Antitrust Cases*, 51 *ANTITRUST L.J.* 223, 225 (1982) (“[I]t’s critical at the outset to try to get the issues identified clearly . . . in plain English: . . . what specific conduct is plaintiff complaining about; what is the agreement which is the source of the litigation; who are supposed to have been the parties to it; what was its effect; what are the products that are affected [etc.] . . . . In particular, I think it’s important to address very early in the context of issue clarification what relief is sought in the case, what is the theory of damages, whether the plaintiff has a viable theory of damages, and whether there is meaningful relief available at the end of the litigation.”)

complex field of economic activity, whether sectoral or, as with antitrust, economy-wide, becomes familiar with the regulatory scheme overall and sees more quickly how a case fits into the relevant statutory framework or body of precedent. Consequently, the judge comes to see quickly whether a new case presents a serious issue or can be disposed of summarily upon the basis of cases he or she has studied many times before and need not read again before entering judgment.<sup>17</sup>

The potential gains in efficiency from a specialist tribunal must necessarily be evaluated by comparison with the efficiency of the alternative, a generalist court. In the United States, the federal courts of appeal have issued on average around forty antitrust opinions per year over the last decade. Over that same period the Supreme Court has issued on average barely more than one antitrust opinion per year. Keeping up with the case developments therefore is not impossible for the generalist judge with a special interest in the subject; presumably doing so would be quite practical for a judge in a specialist tribunal. At bottom, therefore, we think a specialist tribunal would be more efficient in processing antitrust cases, perhaps particularly in the first instance, where case management can be most expedited by a judge knowledgeable about the subject.

## II. UNIFORMITY

If a single judge in a court of first instance or a single court of appeals has a monopoly on a type of case, then there is no possibility that the outcome of a particular case depends upon “the luck of the draw,” referring here to the judges to whom the case is assigned. The monopoly also facilitates business planning and precludes forum shopping.<sup>18</sup> At the trial level, however, no one judge could possibly hear all the antitrust cases filed in a jurisdiction that allows private antitrust suits or requires its NCA

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17. Although the Court of Appeals for the District of Columbia Circuit does not see many antitrust cases, one author’s personal experience is that involvement with the subject matter through teaching and writing keeps a judge familiar with the cases cited in the occasional antitrust brief. With a degree of judicial specialization he might actually get to the point where prudence does not require him to re-read all the cases counsel cite when an antitrust case does come along.

18. See, e.g., Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 331 (1991) (“A pattern of conflicting court orders, uncertainty about the law, and forum shopping has traditionally led to the establishment of specialized courts.”).

to bring enforcement cases to a court of first instance, as the US Department of Justice must do.<sup>19</sup> A multiplicity of trial judges is therefore inevitable.

Non-uniformity of the decisions made in the first instance may be eliminated retrospectively by a court of appeals with a monopoly over review of first instance or higher judgments.<sup>20</sup> If more than one panel of that court is required in order to handle the volume of cases, however, it may be necessary on occasion to coordinate their decisions in order to avoid disuniformity at the appellate level. A common solution is to provide for rehearing of a panel's decisions before the full court, as is done in most of the US Circuit Courts of Appeals or before a panel intermediate in size between the full court and a regular panel, as is done in the US Ninth Circuit Court of Appeals (with eleven of the twenty-nine judges sitting), where the full court would be too large efficiently to coordinate the decisional process and the deployment of so many judges would, in any event, be a waste of resources. Absent a court with a monopoly over appeals, and a concomitant degree of specialization, the resolution of conflicts between courts and the restoration of unity in the law must fall to a higher and typically a generalist court—often the national supreme court.<sup>21</sup> Alternatively, concentrating all cases of a particular type in a single appellate forum eliminates the potential for disuniformity and conserves the resources of the higher court for review of the most important issues rather than the resolution of conflicts among the lower courts.

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19. There were 475 antitrust cases filed in federal district courts over the twelve month period ending September 30, 2011. *See* AOUS, *supra* note 2, tbl. C-2. More than 1,000 cases were filed as recently as five years ago. *See id.* tbl. C-2A.

20. The European Court of Justice ("ECJ") can maintain the uniformity of EU antitrust law by reviewing the decisions of the highest national courts with antitrust jurisdiction. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 267, 2010 O.J. C 83/47, at 164 [hereinafter TFEU], or by reference from the General Court "where there is a serious risk of the unity or consistency of Union law being affected." *Id.* art. 256 (2), at 159.

21. In the ECJ a case may be assigned to a panel of three or of five judges, or to a Grand Chamber (comprising fifteen of the twenty-seven judges), depending upon the "difficulty or importance of the case." Rules of Procedure of the Court of Justice, art. 60(1), 2012 O.J. L 265/1, at 20. If the courts of two member states issued apparently conflicting judgments, the ECJ might refer the case to a Grand Chamber at the request either of a Member State or of the Commission. *Id.*; Protocol on the Statute of the Court of Justice of the European Union, art. 16, 2004 O.J. C 310/210, at 213.

Achieving uniformity without resort to the highest court is not entirely costless. As Judge Posner has pointed out, an appellate court with a monopoly over a subject matter deprives the supreme court of “the benefit of competing judicial answers to choose among when deciding questions within the domain of the specialized court.”<sup>22</sup> That is true, of course: a monopoly means the absence of competition—at least in a jurisdiction where the courts do not publish dissenting opinions, which also provide competing judicial answers. But is the absence of competition among courts significant?

In the last decade, two of the twelve antitrust cases decided by the US Supreme Court (seventeen percent) arose from the need to resolve a conflict between courts of appeals.<sup>23</sup> In the other ten cases (eighty-three percent), the Court lacked competing judicial answers from which to choose but still had the benefit of adversarial presentations in the briefs of the parties and of amici curiae presenting alternative arguments and rationales for a decision. Therefore, while neither disputing the marginal benefit to be had from “competing judicial answers” because they are proffered by disinterested judges, nor jumping to the conclusion that a specialist court with a monopoly over appeals below the highest court is what every jurisdiction needs, we think the advantages of uniformity outweigh the drawback hypothesized by Judge Posner. There are, however, other weightier drawbacks to be considered before concluding a specialist tribunal is a superior forum, as he and others have emphasized.

### III. EXPERTISE

In determining whether a specialist tribunal is likely to bring greater expertise to its decision-making, one should distinguish between technical facility and the substantive change in the law that may ensue from having specialists with established views deciding cases. By technical facility we mean the substantively neutral improvement in the quality of

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22. POSNER, *CRISIS AND REFORM*, *supra* note 11, at 155–56.

23. In seven of the twelve cases, the party seeking discretionary review argued not only the importance of the issue but also that there was a conflict among the courts of appeal; in only two opinions, however, did the Court cite the conflict as its reason for hearing the case.

decisions, as reflected in their clarity and logical rigor, as distinct from their ultimate result. An expert in antitrust likely will bring to bear a more accurate and a more sophisticated use of the specialized legal terminology and economic concepts unique to antitrust cases than would a generalist.

There appears to be broad support within the US antitrust bar for the view that generalist courts suffer from their lack of antitrust expertise. The Antitrust Section of the American Bar Association created a Task Force on Economic Evidence comprising prominent antitrust economists, lawyers, and academics, and a federal trial judge, to study the role of economic evidence in federal court.<sup>24</sup> The Task Force reached consensus on the proposition that “it is critical that judges and juries understand economic issues and economic testimony in order to reach sound decisions” and that “these problems can seriously affect the adversarial process by skewing judicial outcomes, by leading decision makers to ignore conflicting economic testimony or come to ‘wrong’ conclusions, and can increase litigation costs.”<sup>25</sup> The Task Force’s survey of forty-two antitrust economists revealed that only twenty-four percent believe judges “usually” understand the economic issues in a case.<sup>26</sup> Similar views are shared in other jurisdictions, as the International Competition Network found in a survey of competition authorities in seven countries, noting that “all countries but one reaffirm that *lack of specialized knowledge on competition issues by the judiciary* is an important issue affecting competition policy implementation.”<sup>27</sup> The debate over an

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24. Memorandum from Jonathan B. Baker & M. Howard Morse, Co-chairs, Econ. Evidence Task Force, Final Report of Econ. Evidence Task Force to Officers and Council 2 (Aug. 1, 2006).

25. *Id.*

26. *Id.*

27. INT’L COMPETITION NETWORK, COMPETITION AND THE JUDICIARY: 2ND PHASE—CASE STUDIES 17 (2007) (“At least for developing countries, such statement showed to be the most important worry . . .”). The six NCAs of this view were Brazil, Canada, Chile, El Salvador, Mexico, and Turkey. The Brazilian competition authority has also advocated the creation of a specialized court for antitrust or more broadly economic law in Brazil, mostly due to the recurring efforts and delay entailed in educating judges about antitrust law each time a case is filed. See OECD AND INTER-AM. DEV. BANK, COMPETITION LAW AND POLICY IN LATIN AMERICA: PEER REVIEWS OF ARGENTINA, BRAZIL, CHILE, MEXICO AND PERU 163 (2005); see also Michael S. Gal, *When the Going Gets Tight: Institutional Solutions when Antitrust Enforcement Resources Are Scarce*,

expansive interpretation of the Federal Trade Commission's authority under Section 5 of the FTC Act to prohibit "unfair methods of competition" also hinges upon whether the Commission's expertise renders it better situated than are generalist courts to evaluate the economic evidence that plays so large a role in modern antitrust cases.<sup>28</sup> At the same time, a specialist will have—either prior to or after becoming a judge—a particular outlook on substantive antitrust issues that may affect how he or she resolves an issue that another specialist with equal technical facility might have resolved differently. To the extent that any field of law is contested by different schools of thought, the selection of an established specialist to become a judge on a specialist tribunal will be more controversial than is the appointment of a judge to a court of general jurisdiction because special interest groups will have more at stake.

In recent decades, improvements in empirical economics and the increased diffusion of technical economic skills among both theorists and practitioners have narrowed the gap between schools of antitrust thinking.<sup>29</sup> For example, there is now

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41 LOY. U. CHI. L.J. 417, 428 (2011) (discussing specialized tribunals as a way to "bypass incompetent courts").

28. J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Remarks before the New York State Bar Association Annual Antitrust Conference: The Great Doctrinal Debate: Under What Circumstances is Section 5 Superior to Section 2?, 2 (Jan. 27, 2011) (transcript available at <http://www.ftc.gov/speeches/rosch/110127barspeech.pdf>) (advocating enlargement of the scope of conduct within the condemnation of "unfair methods of competition" in Section 5 of the FTC Act); *id.* at 14 ("The problem [with generalist judges] is that they're not required to be experts in antitrust law."); *see also* Daniel A. Crane, *Reflections on Section 5 of the FTC Act and the FTC's Case Against Intel*, 18 (Jan. 19, 2010) (transcript available at [http://download.intel.com/pressroom/legal/ftc/Crane\\_Section\\_5\\_Paper.pdf](http://download.intel.com/pressroom/legal/ftc/Crane_Section_5_Paper.pdf)) (arguing courts are "more likely to trust an agency's prediction based on its superior familiarity with the type of conduct at issue"); Tad Lipsky, Remarks at the Workshop on Section 5 of the FTC Act as a Competition Statute, 189 (Oct. 17, 2008) (transcript available at <http://www.ftc.gov/bc/workshops/section5/transcript.pdf>) ("The entire reason that agency interpretations receive any deference is that specialized agencies are presumed to have greater subject matter expertise than generalist judges.").

29. Judge Posner observed the convergence between the Chicago and Harvard Schools more than three decades ago. *See generally* Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979); *see also* William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1 (2007) (noting shared contribution of the Chicago and Harvard Schools to modern monopolization law). Modern debates over antitrust policy are more likely to appeal to empirical tests of competing theories. *See* William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43, 58–59 (2000) ("The availability of

widespread agreement about the pernicious effects of cartels upon consumer welfare,<sup>30</sup> the diminished relevance of market definition and market structure in inferring competitive effects,<sup>31</sup> and the proposition that resale price maintenance is more often than not efficient.<sup>32</sup> Still, there remain areas in which fundamentally different views can affect the outcome of a case: How likely are exclusionary practices to harm competition? Is price predation a significant threat in view of the likelihood of entry? Does the promise of acquiring static market power lead to more rapid innovation? Because there are such important issues over which reasonable judges may disagree, a specialist court, for all its expertise, may be or at least appear to be more subject to political influences (as explained below) than is a generalist court.

#### A. *Selection Bias*

In the case of a specialist antitrust tribunal, the groups with the most at stake will be the NCA itself and the organized

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new data sources like electronic point-of-purchase data, the refinement of flexible game-theoretic models, and the new emphasis on innovation assures that robust arguments over the proper content of competition policy will flourish into the 21st century.”).

30. ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS, vii (2007), available at [http://govinfo.library.unt.edu/amc/report\\_recommendation/amc\\_final\\_report.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf) (“There is a strong consensus worldwide favoring vigorous enforcement against cartels. Cartels offer no benefit to society and invariably harm consumers.”).

31. See U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES 7 (2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf> (“The measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger’s likely competitive effects.”); Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 701, 717 (2010) (“As economic learning and practice evolved, the emphasis on market shares found in Section 2.21 of the 1992 Guidelines became less helpful to achieve transparent and accurate merger enforcement . . .”).

32. See James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT’L J. INDUS. ORG. 639 (2005) (reviewing twenty-four empirical papers on vertical restraints including resale price maintenance (“RPM”) and concluding “virtually no studies can claim to have identified instances where vertical practices were likely to have harmed competition”); see also Daniel P. O’Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, in THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 76 (Konkurrensverket, Swedish Competition Authority, 2008) (“With few exceptions, the literature does not support the view that these practices are used for anticompetitive reasons. This literature supports a fairly strong prior belief that these practices are unlikely to be anti-competitive in most cases.”).

antitrust bar that practices before the NCA or the specialist court that reviews decisions of the NCA. The interested parties might also include consumer organizations and various confederations of business, both general and those specific to industries facing frequent antitrust claims. None of these interest groups ordinarily speaks out for or against the appointment of a judge to a generalist court.

Although it is reasonable to expect special interests to try to influence the selection of specialist judges, evidence of their efforts is hard to come by because their influence ordinarily must be exerted through private channels to the government officials who will make or block the appointment. An interested party—particularly the NCA and the antitrust bar—would not publicly oppose a possible appointee lest its effort fail and it must then appear in court before the new judge; indeed, an interested party might not even voice its support in public lest its favorable comments tend to undermine the expectation that the potential judge will be unbiased in deciding cases of concern to it.

The need for access to political officials inevitably gives an advantage to the NCA as an arm of the government. Even if the NCA is independent as, for example, the South African Competition Tribunal appears to be,<sup>33</sup> the government of the day will be concerned that its policies, as expressed either to or by the NCA, are not thwarted upon review in court. There is at least some evidence that specialist tribunals, often established to hear a type of case in which the government is usually a party, are more favorable to the government's interests than are generalist courts.<sup>34</sup> This bias may be less pronounced in a

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33. *See, e.g.*, Wal-Mart Stores Inc. & Massmart Holdings Ltd., Case No. 73/LM/Dec10 (S. Afr. Competition Trib. June 29, 2011) (statement of reasons rejecting testimony of expert witnesses for three government ministries that had intervened in the appeal from the decision of the Commission).

34. *See* BAUM, *supra* note 10, at 39 (“Where judicial specialization increases the incentives and opportunities to influence what courts do, governments are in an especially good position to benefit as a result.”). *See, e.g.*, Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1152–53 (1990) (arguing specialized courts charged with reviewing decisions of administrative agencies are likely to be biased in favor of the agency). *But see* James Edward Maule, *Instant Replay, Weak Teams, and Disputed Calls: An Empirical Study of Alleged Tax Court Judge Bias*, 66 TENN. L. REV. 351 (1999) (finding the Tax Court is not systematically biased against taxpayers).

jurisdiction where there are many private antitrust suits—as in the United States, where the NCAs bring fewer than twenty-five percent of all antitrust cases<sup>35</sup>—but in the great majority of jurisdictions there are few or no private antitrust actions. To the extent that courts reviewing administrative decisions already indulge the government agency with a lenient standard of review and place the burden of persuasion upon the regulated party, any additional bias in favor of the NCA would deprive the public of a meaningful check upon the agency.<sup>36</sup> Unless this potential for pro-government bias can be avoided, as we suggest in Part IV that it can be, a specialized antitrust court does not seem to be an attractive proposition.

### B. *Loss of Perspective*

Once appointed a specialist judge would be subject to continuing influence from both the NCA, as a repeat player in the judge's court, and from the antitrust bar. The NCA, by constant appearance before the court, will be in a position to gain the confidence of the judges; a repeat litigant has the greater incentive to avoid misleading the court in order to avoid reputational penalties and the judges will come to know they can rely upon the agency's integrity; it would not be surprising if that affected the court's judgment that the NCA acted "reasonably" in finding the facts, interpreting the law, and exercising its remedial discretion. Only the private lawyers who appear in court most frequently would have anything close to the same opportunity to gain the confidence of the court. The specialist bar as a group will have some opportunities to make a favorable impression by including the judge as a speaker at their

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35. Bonny E. Sweeney, *Defining Antitrust Violations in the United States*, in *PRIVATE ENFORCEMENT OF ANTITRUST LAW IN THE UNITED STATES: A HANDBOOK* 14, 15 n.3 (Albert A. Foer & Randy M. Stutz eds. 2012).

36. *Cf.* CHARLES R. SHIPAN, *DESIGNING JUDICIAL REVIEW: INTEREST GROUPS CONGRESS, AND COMMUNICATIONS POLICY* 94–95 (1997) (describing broadcaster interest groups' preference for locating judicial review of the Federal Communications Commission exclusively in the DC Circuit despite their perception the court often favored the agency, in order to reduce legal uncertainty and to raise the costs of appeal to less wealthy rivals).

events and programs, but it is not clear whether the influence of “[a]gencies and their opponents” will predominate.<sup>37</sup>

There is another likely source of bias, more subtle than that arising from the appointment or cultivation of judges, that may with the passage of time affect even the most neutral appointee: judges, perhaps more than most people, would like to think the work they do is important beyond the salary it brings them. A judge newly appointed to a specialist antitrust court might conceivably think it important to confine the scope of antitrust law at every turn, but it is more reasonable to expect all but the most curmudgeonly judge will believe, or will come to believe, antitrust is a worthwhile project, to be preserved and perfected, even if the NCA must occasionally be reminded of its limitations. The more typical judge specializing in antitrust will likely take an expansive view of the subject, one that will bring to the court a continuous flow of interesting, “cutting edge” issues—and an edge cuts only when it is moving forward.

There is also a plausible concern that specialists are inherently less desirable than generalist judges precisely because of their expertise. Whereas the specialist brings to the court a depth of knowledge about the subject that enables the judge immediately to place a new issue in its evolutionary context and hence to grasp its significance beyond the case at hand—especially in the more path-dependent common law—generalists by definition have a breadth of experience upon which to draw. Judge Wood makes the point specific to antitrust:

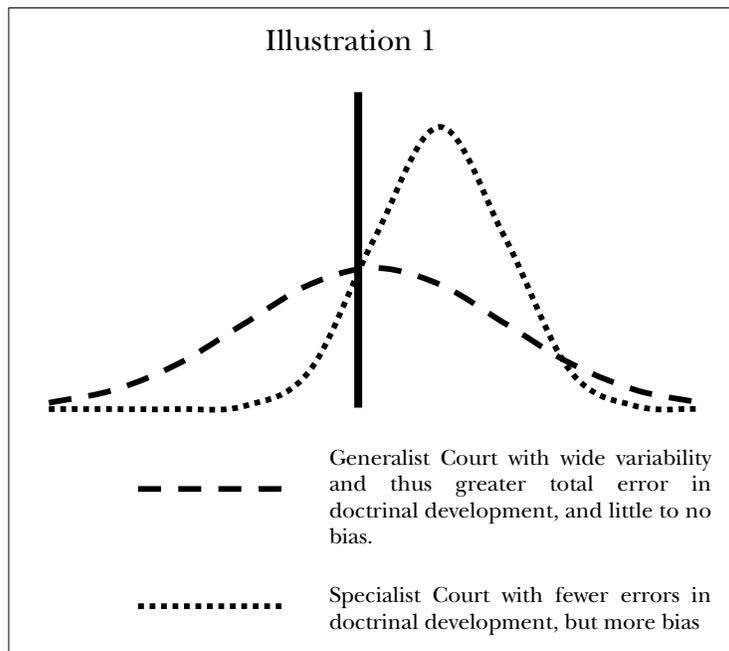
If one never emerges from the world of antitrust, to take one field that I know well, one can lose sight of the broader goals that lie behind this area of law; one can forget the ways in which it relates to other fields of law like business torts, breaches of contract, and consumer protection, and more broadly the way this law fits into the loose “industrial policy” of the United States . . . . Specialists need to emerge from their cocoons from time to time and find out how their smaller world fits in with the larger one.<sup>38</sup>

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37. Lawrence Baum, *Judicial Specialization, Litigant Influence, and Substantive Policy: The Court of Customs and Patent Appeals*, 11 L. & SOC’Y REV. 823, 833 (1977); cf. Revesz, *supra* note 34, at 1152 (“[W]here the Department [of Justice] faces a strong private bar . . . [its influence upon the selection of judges] will be considerably mitigated.”).

38. See Wood, *supra* note 12, at 1767.

Indeed, exposure to other areas of the law may give the generalist insights unavailable to a specialist but nonetheless helpful in penetrating an argument or seeing an issue in a broader context, perhaps one that implicates limitations upon government institutions. If, for example, sectoral regulators display certain systematic biases, such as excessive risk aversion or a tendency toward mission creep, so too may competition authorities, but that would be less likely apparent to the judge who sees only the handiwork of the NCA (or of any other single agency). Thus, replacing a generalist court with a specialized court may entail trading a lower rate of error for a higher degree of bias, as illustrated below:



Historically, special courts have been proposed for the purpose of removing from the courts of general jurisdiction the burden associated with some type of case that is heard in large numbers but is typically rather simple; claims for social security benefits are a recent example.<sup>39</sup> The purpose of this type of proposal is to free up the resources of the generalist courts so

39. See, e.g., Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 *ADMIN. L. REV.* 731 (2003).

they can devote more time to each of their remaining cases, which present more complicated factual or legal issues.<sup>40</sup> Judge Posner objects that the caseload of any specialized court is going to be more volatile than that of a court with broad jurisdiction, making it more difficult to match the supply of and demand for judicial services.<sup>41</sup> There is indeed a fair amount of volatility from year to year in the number of antitrust filings in US courts<sup>42</sup> and, most likely, in the output of most NCAs. The point is that when the docket of a specialized court is growing, it will not have an adequate number of judges, and getting new judges is difficult, time consuming, and imprudent in light of the probability that the caseload will soon turn down again. When the court's caseload is declining, the specialist court would have excess capacity.<sup>43</sup>

As an additional objection, we note that creating a specialist court is likely to raise some difficult boundary questions as to where a particular case should have been brought. Such a boundary problem may arise whenever there is a specialist court the subject matter of which may arise also in a court of general jurisdiction, for instance, as a defense to an action that could not have been brought in the specialist court. This occurs routinely in jurisdictions where there is a special constitutional court; a case brought in the court of general jurisdiction and met with a constitutional defense must be halted and either the

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40. See, e.g., *An Address by Justice Antonin Scalia, United States Supreme Court*, 34 FED. B. NEWS & J. 252 (1987).

41. See POSNER, CHALLENGE AND REFORM *supra* note 1, at 259–60 (“It is a mathematical law that the federal appellate caseload as a whole changes less from year to year than the components of that caseload. So if each component were assigned to a separate court it would be harder to match supply to demand.”).

42. In the five year period ending March 31, 2011, the number of civil antitrust suits filed in US federal district courts has ranged from a low of 555 in the year ending March 31, 2011, to a high of 1,165 in the year ending March 31, 2007. See AOUS, *supra* note 2, tbl. C-2 (2011); *Federal Judicial Caseload Statistics—March 31, 2007*, ADMIN. OFFICE OF THE U.S. COURTS, tbl. C-2 (2007), available at <http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2007/tables/C02Mar07.pdf>.

43. In the United States, the temporary reassignment of federal judges to match supply with demand is addressed by 28 U.S.C. §§ 291(a), 292(a) (1982), which authorize the Chief Justice and the chief judges of the courts of appeals to assign circuit and district judges respectively to sit with a different federal court “in the public interest” and “whenever the business of that court so requires.” In each of the last several years, judges of the specialist Federal Circuit have served occasionally with generalist courts; those judges are to that degree less specialized than would appear from the statutorily prescribed jurisdiction of their court.

entire case or more usually the constitutional issue must be referred to the constitutional court for resolution and potentially then returned to the original forum for further proceedings.<sup>44</sup> Where there is a special court for the review of antitrust cases and another special court for the resolution of intellectual property disputes, as there now is in Portugal, the boundary problem might arise when the defendant in the antitrust matter interposes its patent as a defense to antitrust liability;<sup>45</sup> similarly, a contract or other action brought in a court of general jurisdiction may be met with an antitrust defense.<sup>46</sup> To the extent that antitrust and patent issues arise in the same litigation, the boundary problem could be mitigated by legislation assigning both those subjects to a single semi-

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44. See, e.g., William Burnham & Alexei Trochev, *Russia's War Between the Courts: The Struggle over the Jurisdictional Boundary Between the Constitutional Court and the Regular Courts*, 55 AM. J. COMP. L. 381 (2007); Lech Garlicki, *Constitutional Courts Versus Supreme Courts*, 5 INT'L J. CON. L. 44, 64 (2007) (Germany, Italy and Poland); Leslie Turano, *Spain: Quis Custodiet Ipsos Custodes?: The Struggle for Jurisdiction Between the Tribunal Constitucional and the Tribunal Supremo*, 4 INT'L J. CON. L. 151 (2006) (Spain); John H. Merryman & Vincenzo Vigoriti, *When Courts Collide: Constitution and Cassation in Italy*, 15 AM. J. COMP. L. 665 (1967) (Italy); TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN EAST ASIA* (2003) (Korea and Taiwan); RADOSLAV PROCHAZKA, *MISSION ACCOMPLISHED: ON FOUNDING CONSTITUTIONAL ADJUDICATION IN CENTRAL EUROPE* 159–67 (2002) (Czech Republic); Renate Weber, *The Romanian Constitutional Court: In Search of its Own Identity*, in CONSTITUTIONAL JUSTICE, EAST AND WEST 283–308 (Wojciech Sadurski ed. 2002) (Romania); Jiri Priban, *Judicial Power vs. Democratic Representation: The Culture of Constitutionalism and Human Rights in the Czech Legal System*, in CONSTITUTIONAL JUSTICE, EAST AND WEST 373, 373–94 (Wojciech Sadurski ed. 2002) (Czech Republic); Andrej Skolkay, *Slovakia: Interview with Jan Drgonec, Justice of Constitutional Court of the Slovak Republic*, 6 E. EUR. CONST. REV. 89 (1997) (Slovakia); Herve Bribosia, *Report on Belgium*, in THE EUROPEAN COURTS & NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE 3–39 (Anne-Marie Slaughter et al. eds. 1998) (Belgium).

45. The Supreme Court of the United States has twice clarified the boundary of the Federal Circuit's exclusive jurisdiction over patent appeals. See *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988) (holding appeals involving patent defenses to non-patent claims do not ipso facto fall within the Federal Circuit's exclusive jurisdiction); *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002) (same for counterclaims). These cases suggest that legislation creating a specialist jurisdiction can give rise to boundary problems that require multiple decisions by the court of last resort before each party may know in which court it must bring or appeal a particular claim.

46. See *Kelly v. Kosuga*, 358 U.S. 516, 520–21 (1959) (describing the “narrow scope” of antitrust illegality as a defense to breach of contract claim based upon principle of “preventing people from getting other people's property for nothing when they purport to be buying it.” (quoting *Cont'l Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 271 (1909) (Holmes, J., dissenting))).

specialized court, which would then be able to work out the relationship between patent and antitrust law as applied in particular cases.<sup>47</sup> There would still be contract actions met by an antitrust defense, so the problem of an antitrust issue arising in a court of general jurisdiction would persist at least to that extent.

#### IV. SYNTHESIS

To review, the principle drawbacks associated with a specialized competition court are two. First, the selection of judges for the specialist tribunal may be unduly influenced by one or another interest group, such as the NCA or the defense bar, each seeking to turn the specialized court into a friendly forum for its recurring arguments. The efforts of those contending interest groups may offset one another and leave the court free of their influence, but there is undeniably the potential for regulatory capture through influence over the selection of judges and, to a lesser extent, over their conduct once appointed.

Second, specialization in antitrust risks losing the broad perspective attributed to the generalist judge, who approaches his occasional antitrust case informed by knowledge of other areas of the law, which knowledge can be useful, whether by analogy or by contrast, to improve the resolution of an antitrust issue. This claimed drawback is difficult to document but seems plausible, indeed likely; the remaining question is whether sparks jump from one field of law to another, as the generalist judge moves across subject matters, frequently enough to warrant sacrificing the greater depth a specialist brings to the adjudication of antitrust cases.

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47. Cf. James B. Gambrell, *The Evolving Interplay of Patent Rights and Antitrust Restraints in the Federal Circuit*, 9 TEX. INTELL. PROP. L.J. 137, 156 (2001) (arguing the Federal Circuit “elevates patent rights at the expense of unfair competition and core antitrust principles that it was not given the jurisdiction to control”); Peter M. Boyle, Penelope M. Lister & J. Clayton Everett, Jr., *Antitrust Law at the Federal Circuit: Red Light or Green Light at the IP-Antitrust Intersection?*, 69 ANTITRUST L.J. 739, 741 (2001) (noting the Federal Circuit’s “antitrust opinions . . . often contain imprecise or misguided dicta, including language suggesting that patent owners enjoy such broad immunity from antitrust scrutiny that they will seldom face antitrust liability . . . [which among other] deficiencies ha[s] the potential to mislead lower courts and to circumscribe unreasonably an intellectual property owner’s exposure to antitrust liability”).

We believe the drawbacks associated with having a specialist court for the resolution of antitrust cases can be mooted, perhaps entirely, by proper institutional design: The specialist court should be staffed by judges drawn from generalist courts, temporarily and only to the extent needed. This simple solution has been used before in other countries, such as the United Kingdom (Competition Appeals Tribunal) and Canada (Competition Tribunal), and in the United States when circumstances called for the creation of a special court and the President or the Congress or both were concerned that the court not be captured by any special interest nor come to identify unduly with one or another repeat litigant. Examples include the short-lived Commerce Court,<sup>48</sup> the Temporary Emergency Court of Appeals,<sup>49</sup> the Federal Circuit,<sup>50</sup> which is semi-specialized in intellectual property (patent and trademark) law, and the Foreign Intelligence Surveillance Court and the associated special Court of Appeals.<sup>51</sup>

In the US examples, the selection of the particular judges to serve on the specialist court was left to the Chief Justice, sometimes providing the appointment would be for a fixed term and prohibiting reappointment.<sup>52</sup> In this way, generalist judges who had accumulated experience with the range of matters that come to a federal court would spend the plurality if not the majority of their time upon a single type of case, after which they would return full time to their previous role. The result should be to benefit the specialist court with the insights

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48. Mann-Elkins Act, 36 Stat. 539 (June 18, 1910) (establishing the Commerce Court); *see* Urgent Deficiency Act, 38 Stat. 208 (Oct. 22, 1913) (abolishing the court).

49. Act of December 22, 1971, Pub. L. No. 92-210 (1971).

50. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified as amended in various sections of 28 U.S.C.); *see also* Douglas H. Ginsburg, *Remarks*, 10 *GEORGETOWN J.L. & PUB. POL'Y* 1, 3 (2012) (“[T]he D.C. Circuit has become a relatively specialized court in the area of administrative law.”).

50. Foreign Intelligence Surveillance Act of 1978, Pub. L. 95-511 (1978). *See generally* Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 *N.Y.U. L. REV.* 1 (1989); *see also* Ginsburg, *supra* note 49, at 3 (“[T]he D.C. Circuit has become a relatively specialized court in the area of administrative law.”).

51. Foreign Intelligence Surveillance Act (“FISA”) of 1978, Pub. L. No. 95-511 (1978).

52. The statute creating the Temporary Emergency Court of Appeals provides for indefinite, rather than fixed, terms. Judges appointed to the FISA court and the associated Court of Appeals have fixed seven year terms, and no judge may be reappointed.

brought by a generalist judge who, while acquiring expertise in the subject matter of the specialist court, would not come under the influence of any party to the particular legal subculture of that specialty.

By deputing the Chief Justice to choose generalist judges to serve on the specialist court for a limited time, the problem of parties trying to exert pressure upon the selection of a specialist judge would essentially disappear. Judges would continue to be selected for their qualifications as generalists, and the slight chance that a particular prospective judge might in the future be brought into service on the specialist court would be insufficient reason to expend resources to further or oppose his selection and confirmation to a court of general jurisdiction. During the time of the judge's incumbency on the specialist court, there would no doubt be efforts by the NCA and the organized bar to ingratiate themselves with the judge, but the limited term of special service and the certainty of returning full time to a court of general jurisdiction would both mitigate the judge's susceptibility to influence in the short run and diminish the return, and therefore the supply, of parties' efforts to influence the judge during his sojourn on the specialist court.

This institutional arrangement would also overcome the objection based upon the greater degree of volatility in the caseload of a specialized court. The Chief Justice could appoint more judges as the special court's docket grew, and could refrain from filling vacancies as that court's docket moved into a phase of contraction. Indeed, in a slack period judges would simply sit more in the "home" courts.<sup>53</sup>

The expertise of specialist judges chosen in this way from a pool of generalist judges would not, particularly at the outset of their service, be as well developed as that of a lawyer who comes to the bench after some years of having practiced antitrust law, whether as a lawyer for the NCA or for private parties on the other side of the NCA's cases. Even supposing, however, that it

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53. The minor objection (not discussed above) that the specialist court might not attract judges as able as those who sit on the generalist courts, *see* POSNER, CHALLENGE AND REFORM, *supra* note 11, at 99–100; Revesz, *supra* note 34, at 1154, n.173–74 (1990), would of course be moot as well. The prospect of possibly being asked, or even required, to sit on the specialist court for a period of years would hardly act as a disincentive for a lawyer who would otherwise welcome being selected as a generalist judge.

takes two or three years to achieve the level of expertise that a seasoned practitioner would bring to bear in year one, the result would still elevate considerably the average degree of expertise on a panel of three appellate judges. A trial judge hearing solely antitrust cases would likely adapt even more quickly and would of course be subject to correction by a still more expert court of review. Unlike specialists chosen solely to serve on a specialist court for a term by the time he leaves the court, will be wholly concentrated in a single field, in which he must engage for the remainder of his career if he is to maximize his post-judicial earnings. The inevitability of going (or returning) to a specialized practice after serving on the bench may well affect the specialist judge's perspective and consequently his views on substantive legal issues while still on the court. Such a judge will not want to alienate the private bar to which he might look for later employment; nor would he want to make rulings that impair the opportunities open to lawyers practicing in that field. Limiting the types of actions that may be brought, or the damages that may be recovered, or otherwise constraining the rewards for lawyers in his special field of practice would be a career-ending move. Not so for the judge of a specialist court who will be going on not to the specialized practice of law but rather to the generalist court from which he came.

#### *CONCLUSION*

The careful reader will have noticed that we make no recommendation for or against the use of specialist courts for antitrust cases where they do not already exist. Our point is the more modest one that the objections commonly raised against specialist tribunals, at least as applied to antitrust cases, are not daunting, much less insurmountable. Whether all antitrust cases—or perhaps only cases seeking review of a decision of an NCA—should be singled out for resolution by a specialist court depends, therefore, entirely upon the claim that the economic evidence in such cases would be better understood and analyzed by judges who deal repeatedly with cases of the same ilk.<sup>54</sup>

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54. There is little evidence available to evaluate the hypothesis that judges with repeat exposure to antitrust cases perform better than their counterparts who lack repeat exposure. Baye & Wright, *supra* note 13, find that judicial exposure to economic training improves performance in simple cases but draw their data from decisions by

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generalist federal judges. The Federal Trade Commission provides an opportunity—though limited by a small sample of decisions—to test the expertise hypothesis to the extent that it operates as a specialized appellate court sitting in review of decisions of its administrative law judges. Federal Trade Commission decisions appear to provide little support for the expertise hypothesis. See Joshua D. Wright & Angela M. Diveley, *Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence From the Federal Trade Commission*, 1 J. ANTITRUST ENFORCEMENT 82 (2013) (finding, *ceteris paribus*, Commission decisions are appealed to and reversed by the Courts of Appeal at a statistically significantly greater rate than decisions by federal district court judges).