courts, such as the Competition Appellate Tribunal of India, that review decisions of the NCA alone.[4]

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.[5]

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.[6]

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[7] and the United Kingdom[8] may,

---

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.[9] 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

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,[10] 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,[11] 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.[12]

---

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

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.[13] (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."[14] 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

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 (discussing various measures of the quality of judicial output, including appeal and reversal rates).

14. BAUM, *supra* note 10, at 32–34.

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.[17]

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

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

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.[24] 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."[25] 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.[26] 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."[27] The debate over an

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.[28] 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.[29] For example, there is now

---

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) (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

widespread agreement about the pernicious effects of cartels upon consumer welfare,[30] the diminished relevance of market definition and market structure in inferring competitive effects,[31] and the proposition that resale price maintenance is more often than not efficient.[32] 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

---

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 ("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/guide lines/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*

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,[33] 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.[34] This bias may be less pronounced in a

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[35]—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.[36] 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

events and programs, but it is not clear whether the influence of "[a]gencies and their opponents" will predominate.[37]

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.

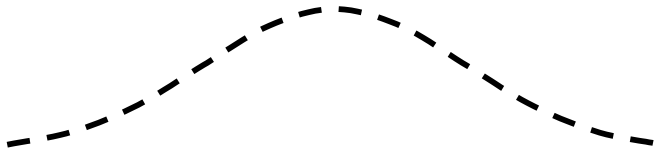
There is also a plausible concern that specialists are inherently less desirable than generalist judges precisely because of their expertise. Whereas the specialist brings to the court a depth of knowledge about the subject that enables the judge immediately to place a new issue in its evolutionary context 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.[38]

---

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* 5 (4) -1.4 (,) -7.1 (7.02 0 0 7 14) (17) 18 7 (( )) -9 0 6 v 7 ( )] TJ /F2 1 Tf3 -.0419 0 TD -.009 Tc [(su) -19.4 (p) r1



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.[44] 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;[45] similarly, a contract or other action brought in a court of general jurisdiction may be met with an antitrust defense.[46] 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-

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 (Woiciech 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 clarifep5.52 0 0 8.52 461.76 28L-11.2.02 411 Tc [(15992 Tc [(

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,[48] the Temporary Emergency Court of Appeals,[49] the Federal Circuit,[50] which is semi-specialized in intellectual property (patent and trademark) law, and the Foreign Intelligence Surveillance Court and the associated special Court of Appeals.[51]

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.[52] 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

---

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 re-appointed.

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 service on the specialist court.

organized bar to ingratiate themselves with the judge, and 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 service on the specialist court. 57 Texas 0 TD .0008N -.00ose gen TD -.00i1neral n

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

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.