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JUDGE OF ALL TRADES

FURTHER THOUGHTS ON SPECIALIZED COURTS

BY DIANE P. WOOD

THE proverbial visitor from Mars (or perhaps from the habitable exoplanet Kepler-62f) with an interest in judicial systems would have no trouble perceiving that Earthlings follow two distinct philosophies about the benefits of specialization for their judges and courts. At one extreme, our visitor would see that the federal courts in the United States largely eschew specialization, preferring instead to throw any kind of case at any judge. At the other extreme, the alien would find the civil law jurisdictions, where specialization exists at every level of the *magistrature*, from the tribunals of first instance up through the courts of last resort. And there are quite a few examples that lie somewhere between those two endpoints.[1]

In most other areas of human endeavor, few question the proposition that there are gains from specialization. Adam Smith, among other notables, pointed out that the division of labor makes a factor more efficient,[2] and that insight may be applied generally to the entire economy. The practice of law in the United States today provides a perfect illustration: Apart from lawyers who practice in small rural settings, who may still be true general practitioners who handle a divorce one day, an incorporation the next day, criminal defense the third, and a will the fourth, nearly all lawyers specialize, and sub-specialize. Competent practice practically demands this move. Who, for instance, could responsibly advise a client about the unwieldy Affordable Care Act without carefully studying its nearly thousand pages, following every regulation issued by both the federal government and the state governments, and keeping up with the many lawsuits around the country? I have just described more than a full-time job. To ask that lawyer also to follow the U.S. Court of Appeals for the Federal Circuit's patent jurisprudence, the changes in the criminal law of wire fraud, rules governing the obligation of a school district to educate disabled children, and the Foreign Corrupt Practices Act, just to name a few fields, would be to ask the impossible. Only specialization produces the knowledge of the field that is essential. And, we hope, many specialists working together can ensure that society as a whole is able to function under the rules that are needed for a sophisticated, complex, political organism and ultimately support the rule of law.

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Why, then, do we find such variation in the use of specialized courts? Or, more to the point, why do some countries — especially the United States — reject specialization to the extent that they do? The latter qualification is important, because specialization in the United States is not unknown even at the federal level. There it pervades the vast system of administrative law that has existed since the time of the New Deal. For example, the first-line judges who adjudicate labor cases are administrative law judges who work exclusively for the National Labor Relations Board; the Department of Justice's Executive Office ▸

of Immigration Review uses immigration judges for the nearly quarter of a million cases that come before the immigration courts each year[3]; the Social Security Administration relies on its own administrative law judges to assess the more than half a million hearing and appeal dispositions of claims for disability or supplemental benefits each year.[4] And at the state level, although there is the usual variation among the 50 states and other jurisdictions, specialization is not uncommon: Especially at the first-instance level, most states have dedicated family law, probate, and small claims courts; many have separate civil and criminal law courts; and some have commercial law or business courts.

The federal courts established under Article III of the Constitution, however, with just a few exceptions, have not jumped onto the specialization bandwagon. The exceptions are the Court of International Trade, an Article III court[5] with (as the name suggests) jurisdiction over tariff, customs, and other international trade issues,[6] and the Court of Appeals for the Federal Circuit.[7] The Court of International Trade stands out because Congress chose for most other such trial courts to create them using its Article I powers. Thus, for instance, the Court of Federal Claims,[8] the Court of Appeals for Veterans' Claims,[9] and the Court of Appeals for the Armed Forces[10] are all Article I tribunals, and so do not have judges with the Article III protections of life tenure and salary level. The Court of Appeals for the Federal Circuit is an Article III court, but unlike the other federal circuit courts, it does not have plenary jurisdiction over all matters within the jurisdiction of the district courts (or, in some instances, particular administrative tribunals). At the same time, it is hard to say that the Federal Circuit is specialized in the same way as a probate court or a labor court is. Instead, Congress has entrusted the Federal Circuit with a hodge-podge of areas that bear little resemblance to one another. It has exclusive jurisdiction over patent appeals, over decisions of the Court of Federal Claims, over determinations of the Court of International Trade, and over decisions rendered by the Trademark Trial and Appeal Board, to name a few.[11] It also has exclusive jurisdiction over appeals from cases brought by federal employees before the Merit Systems Protection Board, over final decisions of an agency board of contract appeals, and appeals under section 5 of the Emergency Petroleum Allocation Act of 1973 and section 506(c) of the Natural Gas Policy Act of 1978. In sum, the Federal Circuit has multiple unrelated "specialties." Its restricted jurisdiction enables it to take advantage of at least some gains from specialization.

> "I MADE the modest suggestion that Congress ought to abolish the Federal Circuit's exclusive jurisdiction over patent cases and to substitute concurrent jurisdiction with the regional circuits. My reason for making this suggestion was simple: Although once-upon-a-time the law of patents seemed to stand on its own (just as copyright, trademark, and trade secrets did), in modern times the lines among these different species of intellectual property have blurred considerably. . . . Neither the patent bar nor patent scholars took kindly to my suggestion, but I was pleased to see that it received a great deal of attention.

In 1997 I was privileged to deliver the Eighth Annual Judge Irving L. Goldberg Lecture at Southern Methodist University School of Law in Dallas. That speech, entitled "Generalist Judges in a Specialized World," took the position that it is not only possible, but also highly desirable, for federal judges to remain generalists.[12] I recognized (and still believe) that neither system is all good or all bad. Specialization has the advantages of enhancing efficiency in decision making, assuring knowledgeable adjudicators, and (perhaps) increasing uniformity of result across the country. But those pros come at a cost that I was not then, and still am not, willing to pay.

Generalist judges, as I said, "cannot become technocrats; they cannot hide behind specialized vocabulary and 'insider' concerns."[13] If judges operate inside a silo, both court users and the public at large are less likely to understand the results the court reaches. Opacity, in my view, is bad; courts have a duty to do better than "explain" an outcome with the statement "trust us, we know what is best for you." Generalist judges are less likely to fall into this trap, because they stand outside the culture of any particular field. Put differently, generalist judges will be largely immune from the phenomenon of regulatory capture. They also will be better able to understand and police the boundaries between different areas of the law, as I noted with respect to antitrust law in the Goldberg Lecture:

> If one never emerges from the world of antitrust, to take one field that I know well, one can lose sight of the broader goals that lie behind this area of law; one can forget the ways in which it relates to other fields of law like business torts, breaches of contract, and consumer protection, and more broadly the way this law fits into the loose "industrial policy" of the United States. Economic mumbo-jumbo is already prevalent in the field, but lawyers talk of the trade-off between the deadweight loss "triangle" and the income transfer "rectangle" at their

peril in front of a judge who does not live and breathe the field.[14]

CROSS-FERTILIZATION OF IDEAS ALSO OCCURS MORE THAN ONE MIGHT THINK. For example, one day a generalist judge may be looking at an employment discrimination case and thinking of the relationship among a company, a supervisor, and a subordinate employee; the next day she may be considering who was responsible for a particular method of policing in a city; and the next week she is tackling the question of the scope of the ERISA plan a company decided to adopt. These cases have common threads, and the law benefits when a judge recognizes them and can either harmonize doctrine or craft different rules with open eyes.

Another point worth emphasizing is that it is often "only" the substance of a case that differs from area to area. Procedural rules tend to be constant. On the civil side, all federal cases proceed under the Constitution, Title 28 of the United States Code, and the Federal Rules of Civil Procedure. The right to a jury trial in a civil case is assured by the Seventh Amendment, as long as the case is one for which a jury would have existed of right in 1791, when that amendment was adopted. Doctrines of subject-matter and personal jurisdiction are largely transsubstantive, and the Federal Rules have remained transsubstantive since their adoption in 1938. The *Erie* doctrine[15] applies when the Rules of Decision Act[16] calls for the application of state law, no matter the legal theory that the parties are pursuing in the case. The Federal Rules of Evidence apply in all cases, civil as well as criminal,[17] and so there is no variation to worry about there either. Judges, in short, are experts in the judicial process. That expertise, more often than not, is what matters in litigation, not a person's knowledge of patent law, or Dodd-Frank,[18] or immigration law.

My general view on this subject has not changed since I gave that lecture. I have continued, however, to think about when specialization might be justified, and when not. In September 2013, in a talk at the Chicago-Kent Law School's Supreme Court Intellectual Property Review, I made the modest suggestion that Congress ought to abolish the Federal Circuit's exclusive jurisdiction over patent cases and to substitute concurrent jurisdiction with the regional circuits.[19] My reason for making this suggestion was simple: Although once-upon-a-time the law of patents seemed to stand on its own (just as copyright, trademark, and trade secrets did), in modern times the lines among these different species of intellectual property have blurred considerably. Economic analysis has shown them to be closely related, and the policy issues requiring a balance between protection of the creator's property interest (and assuring its ability to recoup its investments), on the one hand, and the public's interest in wide dissemination of new technologies, on the other, are common to the different types of intellectual property. But judicial responsibility for these subspecies of IP has not reflected that change. Instead, just when intellectual property doctrine was really taking off, in 1982, Congress carved off patents and gave that authority exclusively to the Federal Circuit,[20] while at the same time it left all other forms of IP to the regional circuits (not to mention issues relating to the *licensing* of patents, which are understood to involve contract doctrine, not patent doctrine[21]).

This change, while well meaning, has meant that pure issues of law in the patent field (as opposed to the facts and application of law to particular patents) have not benefited from the different perspectives among the circuits that accompany almost all other legal matters. The Supreme Court, which features conflicts in the circuits (and with state supreme courts) prominently in its rules as a signal that a question is important enough to warrant a grant of certiorari,[22] is thus deprived of that input. Just as importantly, when one circuit announces a rule that fails to persuade its sister circuits, the outlier circuit is sometimes able and willing to re-examine that rule and to restore harmony on its own, without the need for Supreme Court attention. Having only one circuit addressing an area — and a very important one, in the case of patent law — prevents this process from taking place.

Neither the patent bar nor patent scholars took kindly to my suggestion, but I was pleased to see that it received a great deal of attention. An often-minimized part of the proposal was precisely the fact that it did *not* call for anything so dramatic as abolishing the Federal Circuit altogether, or of stripping that court of its patent jurisdiction. To be clear, I favor neither of those alternatives. My suggestion instead is based on my belief, as a former antitrust lawyer, that competition is good. Most Americans would agree with this, in the abstract: Our market system has served us well, and we rely on competition to bring us the best mixture of goods and services at the lowest prices. There is no reason to think that competition among courts, or among agencies, does not bring about the same benefits.

And the kind of competition for which I am calling exists right now, in a field closely related to patents: trademarks. A person who would like to have a trademark canceled begins by filing a petition with the Trademark Trial and Appeal Board ("TTAB"), which is a part of the U.S. Patent and Trademark Office. After the TTAB issues its ruling, the aggrieved party has a *choice* of two ways of going forward. It may bring an action contesting the TTAB's action in the federal district court,[23] or it may take a direct appeal to the Federal Circuit.[24] If it takes the former route, the district court is entitled to take new evidence, and any appeal from its decision goes to the regional court of appeals that covers that district.[25] The latter route proceeds on the basis of the administrative record, and of course goes to the Federal Circuit.

The system I would like to see for patent appeals would similarly offer parties a choice: They would be entitled to take an appeal either to the Federal Circuit, just as they may do now, or they could opt to go to their regional circuit. (As I discuss in more detail below, patent *trials* are handled by the regular district courts. If the same patent were involved in two or more districts, uniformity

of result could be assured by assigning the Judicial Panel on Multidistrict Litigation the responsibility of selecting a single appellate body for that patent.) There is no reason to think that this would cause any more problems than the current system governing trademarks. True, the aggrieved party would be likely to choose the forum it thought would be most sympathetic (that is, to forum-shop), but there is no reason to fear that. Parties may think they know what a particular court of appeals is likely to do with a case, but, as Yogi Berra said, it's tough to make predictions, especially about the future. I have sat on many cases in which it seemed that a party had tried hard to get in the Seventh Circuit, only to find that our supposed inclination to rule in a particular way did not materialize. The courts of appeals pay close attention to one another's rulings. In the Seventh Circuit, we never create a conflict with another circuit before circulating the proposed conflicting opinion to every active judge on the court and ensuring that the proposed position reflects the full court's considered decision.[26] Different views, however, are just what we need in the patent context. Over time, bringing more minds and voices into the debate is likely to reduce the need for Supreme Court surveillance of patent decisions and bring them back into line with other complex commercial matters.

THE FEDERAL CIRCUIT'S APPELLATE JURISDICTION OVER PATENT CASES IS, OF COURSE, JUST ONE EXAMPLE OF SPECIALIZATION IN A JUDICIARY. And the Federal Circuit is not a patent court in the same way that, for instance, the Competition Appeal Tribunal in the United Kingdom is a specialized appellate body. The latter Tribunal specializes in reviewing economic regulatory decisions from the national competition authority and certain sectoral regulators in the United Kingdom.[27] It is interesting to try to predict what would be affected if the United States decided to adopt highly specialized first-instance and appellate courts in areas that some have urged are suitable for such treatment: social security matters; immigration petitions for review; habeas corpus petitions from state prisoners; cases under the various federal statutes that prohibit employment discrimination; petitions for review or enforcement from the National Labor Relations Board; intellectual property cases; antitrust cases; securities cases; and so on.

Perhaps there would be an increase in expertise among the judges assigned to this array of specialized tribunals, because they would become familiar with both the law and recurring fact patterns. For areas in which expert testimony is critical, as it is for many of those examples, the judges would become quasi-expert themselves. They might also be able to handle their dockets with more dispatch, since there would be fewer occasions in which the material presented by the case is new to the judge. These are not trivial advantages.

On the negative side, however, I begin with the point that Judge Richard Posner made in an essay he wrote in 1983:

> One does not have to be a Marxist, steeped in notions of anomie and alienation, to realize that monotonous jobs are unfulfilling for many people, especially educated and intelligent people, and that the growth of specialization has given to many white-collar jobs a degree of monotony formerly found only on assembly lines. I have said that all a federal court of appeals judge does, essentially, is decide appeals; that means reading briefs and records, hearing oral arguments, conferring with other judges after the argument, preparing opinions, reviewing opinions prepared by the other judges on the panel, voting on petitions for rehearing — and little else. The activities I have just mentioned, repeated over and over and over again, have about them an undeniable element of the monotonous. . . . While there are able people who would like nothing better than to spend twenty or thirty years just judging appeals in tax or patent or social security or antitrust cases, I do not think it would be easy to maintain a high quality federal appeals bench on such a diet.[28]

I agree with him: Over time, tedium would set in, even in the most complex area. It is no surprise that in some countries that rely heavily on specialized courts, the profession of judging itself (while respected) is only one more type of government employment.

Judges in the Anglo-American world have enjoyed high status, and a judicial appointment has traditionally been the crowning achievement of a career. In the United Kingdom, barristers move up to become Queen's Counsel, and appointments to the bench are drawn almost exclusively from the successful QCs. This is not something that can happen at the outset of one's professional work. For the federal courts in the United States, the same is true. Granting that Presidents have the power to appoint whomever they wish to vacant positions, it is almost unheard-of to see a district court appointee below the age of 35 (and thus probably 10 years out of law school), and uncommon to see an appointee below the age of 40. The same is true for the courts of appeals and the Supreme Court, where a 40- to 45-year-old appointee would be considered quite young. Particularly given the salary sacrifice that many new appointees face, the prestige that attends a federal judicial appointment is critical to maintaining the quality of the bench.

Specialization can have other negative consequences as well. Many areas that come before the courts are hotly contested by experts in the field. In antitrust, some believe that exclusionary acts should be prohibited and punished severely, while others think that it is impossible as a practical matter to distinguish between an unlawful exclusionary act and tough, beneficial competition. In labor law, some think that unions are a necessary counterbalance to an employer's bargaining power over its labor force, while others think that unions have long outlived their usefulness and should be curbed. Some think that employment at will is the heart's-blood of an economy, while others think that workers should be fired only for cause. A specialist judge is bound either to have or to develop views consistent with one school of thought or another in the field entrusted

to her court. Generalist judges, however, will not be so immersed in these intramural disputes and thus will be more likely to stay above the fray and leave the policy choices to the proper branches of government — the legislature and the executive.

A relatively recent development at the trial court level, however, suggests that the debate over specialized courts could benefit from some refining.[29] The idea is this: The higher a court stands in the judicial hierarchy, the weaker the case for specialization becomes. Conversely, there are more potential gains from specialization at the first-instance level, whether that is before an administrative agency or it is before a trial court. A pilot project has been underway for some time in 14 United States district courts, including the Northern District of Illinois, to test this concept for patent cases. In Chicago's district court, the Patent Pilot Project began on Monday, Sept. 19, 2011, with ten participating district court judges.[30] This offers the best of both worlds to the volunteer participating judges: They will become relatively expert in patent law, while at the same time they will continue to enjoy the varied docket to which they are accustomed.

NOT EVERY TYPE OF CASE WILL BENEFIT FROM A SOMEWHAT SPECIALIZED TRIAL BENCH, BUT IT IS POSSIBLE TO IDENTIFY A NUMBER OF VARIABLES THAT WOULD POINT IN THAT DIRECTION. The first is the complexity of underlying subject matter. Is there a complex statutory scheme, such as the Tax Code, the environmental laws, the telecommunications statutes, or the health care field? If so, trial specialization may help. If not, it has little to offer. Will expert testimony be critical to the resolution of the case, as it is in most antitrust cases (where the underlying statutes are practically Delphic and the law is essentially judge-made), or in toxic tort cases, or in disability adjudications? If so, then it would be helpful for the judge to have some familiarity with the field of expertise, if only to be able to serve as the "gatekeeper" required by Federal Rule of Evidence 702.[31] Is the case complex because of the sheer volume of material that the finder of fact must consider, as one sees in all-too-many business matters these days, where lawyers speak with horror about 80 to 100 million documents that must be reviewed for production? No particular *judicial* specialization will help in those cases. What is needed instead are strong management skills and the ability to require the parties to cooperate on such matters as computer search terms. If the case is going to turn on procedural issues that are relatively independent of the subject matter (e.g., personal jurisdiction), then once again it is hard to see how specialization would help the decision-making process. Finally, if the parties agree on the relevant facts and recognize that the outcome will turn on the judge's understanding of the governing law, the case for specialization is weak.

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Cases that require long-term judicial involvement may also be good candidates for a specialized bench. This may explain why the state courts almost universally use specialized tribunals for family law and probate matters, each of which can require supervision for many years. Having a single judge responsible for the case, knowledgeable about both the facts and the legal issues, and acquainted with the parties, makes a great deal of sense. At one time, the federal courts were involved in significant institutional-reform litigation concerning schools, prison systems, mental hospitals, and similar places. Those days are largely over, however, as both Congress[32] and the Supreme Court[33] have taken the position that federalism concerns, separation-of-powers concerns, and institutional capability limitations combine to discourage these broad-based uses of litigation. It is hard to imagine any call for a specialized school-desegregation or prison-reform tribunal today.

Before too much enthusiasm builds for specialized first-instance tribunals in the United States, however, we need to recall the fact that the tribunal is not the presumptive finder of fact, except in cases that traditionally fell under the jurisdiction of the equity courts. The Seventh Amendment commands that the finder of fact in a federal court, should the case go to trial, will be a jury. Even though very few cases (maybe 1.5 percent on the civil side) reach this point, the possibility of a jury affects all of pretrial procedure, from motions to dismiss, to discovery, to summary judgment motions and beyond. Should a case go to trial, the expert judge would be limited to the same kind of trial controls that any other judge would exercise: jury voir dire, opening statement, motions in limine, evidentiary rulings during the trial, motions for judgment as a matter of law, instructions to the jury. Only the jury could choose whom to believe, what to disregard, how much in the way of monetary damages was implicated, and who ultimately should win.

The existence of the jury system thus limits the theoretical gains from specialization. Even if that is seen as a cost, I do not advocate any move away from the Seventh Amendment. The gains from the jury system are considerable. Members of the community sit in judgment; the legitimacy of the verdict is enhanced

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by the fact that a jury from the locality has reached a decision; and the jury's verdict receives substantial protection on appeal from the Seventh Amendment's Re-examination Clause. And juries, contrary to a certain amount of hand wringing about the institution, tend to get it right, according to the trial judges who observe their work.[34] If the question with which we began is reformulated as asking whether, when juries are the ultimate finders of fact, generalist or specialist judges are preferable, it seems likely that the answer — taking the jury system as a given — is that generalist judges are the best.

THIS THOUGHT BRINGS US FULL CIRCLE. We began with the observation that the U.S. federal courts have traditionally, and for the most part still, use generalist judges. This is not because there are no gains from specialization. To the contrary, against the backdrop of the right legal system, gains such as efficiency, higher accuracy in assessing facts, and consistency in results can be expected from specialized courts. But those gains must be weighed against the costs of specialization, such as capture and the loss of a broader perspective. The gains from specialization may be greater at the level of the first-instance tribunal, as one can see especially in areas of administrative law in which a case does not arrive in federal court until after a specialist adjudicator has examined it. But even there, specialization is no cure-all: If the case receives a full hearing by a first-instance, or trial, judge, there is only so much that the judge may do on her own. Unlike in Europe, where professional judges in the courts of first instance frequently sit with expert lay judges, in the United States the trial judge is likely to be guiding a jury toward its deliberations. (If the parties so choose, the trial judge will sit as the finder of fact, but there is no guarantee *ex ante* that this will occur.)

In the end, the costs of specialization for the federal-court system in the United States are outweighed by the benefits of maintaining an omni-competent, generalist, judiciary. Those judges will not become so immersed in any particular area that they fail to see the forest for the trees. Those judges will not become spokespersons for any particular viewpoint that may be popular at a given moment in that area of law. Instead, they will see connections from one area to the next that would escape the specialist who was immersed in only one field. They will apply procedural rules neutrally, no matter what the subject matter. They will be experts in case management, because they will have seen problems common to all complex cases, problems common to all recurring cases, and they will know what to do about them. For the federal courts, and especially for the federal courts of appeals, the current system (with the exception of the exclusivity of the Federal Circuit's jurisdiction) is preferable to any alternative that has been suggested. Perhaps our situation resembles democracy itself, as Winston Churchill described it: the worst form of government except for all those other forms that have been tried from time to time.[35] Our generalist courts have stood the test of two and a quarter centuries. There is no reason to change the system now.

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[1] *See, e.g.*, Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Courts: Specialists versus Generalists,* 36 Fordham Int'l L. J. 788 (2013), for examples that focus on antitrust law.

[2] Adam Smith, An Inquiry Into the Nature and Causes of the Wealth of Nations (Edwin Cannan eds., 1976).

[3] *See* Executive Office for Immigration Review, FY 2014 Statistics Yearbook, at A2, http://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/03/16/fy14syb.pdf.

[4] *See* Official Social Security Website, http://ssa.gov/appeals/.

[5] *See* 28 U.S.C. § 251(a) (2012).

[6] *See* 28 U.S.C. §§ 1337(c), 1581 (2012).

[7] *See* 28 U.S.C. §§ 41, 1295 (2012).

[8] 28 U.S.C. § 171(a) (2012).

[9] 38 U.S.C. § 7251 (2012).

[10] *See* Art. 141 of the Uniform Code of Military Justice, 10 U.S.C. § 941 (2012).

[11] 28 U.S.C. § 1295 (2012).

[12] Diane P. Wood, *Generalist Judges in a Specialized World*, 50 SMU L. Rev. 1755 (1997).

[13] *Id.* at 1767.

[14] *Id.*

[15] *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

[16] 28 U.S.C. § 1652 (2012).

[17] Fed. R. Evid. 101(a).

[18] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (July 21, 2010).

[19] Diane P. Wood, *Is It Time To Abolish the Federal Circuit's Exclusive Jurisdiction in Patent Cases?*, 13 Chi-Kent J. Intell. Prop. 1 (2013).

[20] *See* Pub. L. No. 97-164, effective Oct. 1, 1982.

[21] *See T. B. Harms Co. v. Eliscu*, 339 F.2d 823 (2d Cir. 1964) (Friendly, J.) (copyright example).

[22] *See* Sup. Ct. R. 10(a), (b).

[23] *See* 15 U.S.C. § 1071(b) (2012).

[24] *See* 15 U.S.C. § 107(a) (2012).

[25] *See generally* Bd. of Regents of Univ. of Wisc. Sys. v. Phoenix Intern. Software, Inc., 653 F.3d 448 (7th Cir. 2011).

[26] *See* Seventh Circuit Local Rule 40(e).

[27] *See* Competition Appeal Tribunal, About the Tribunal, http://www.catribunal.org.uk/242/About-the-Tribunal.html.

[28] Richard A. Posner, *Will the Federal Courts of Appeals Survive until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. Cal. L. Rev. 761, 779–80 (1983).

[29] I am not the first to make this suggestion, I hasten to add. As early as 1983 Judge Posner wrote that the case for specialization was stronger at the trial court level. *See supra* note 28, at 780–81. Others have also made this point. *See, e.g.*, Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 Brook. L. Rev. 67 (1995) (arguing in favor of specialization in trial courts with generalist appellate review); Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 Brook. L. Rev. 1 (1995) (commenting on the Delaware chancery court's expertise in corporate matters); Anne Tucker Nees, *Making a Case for Business Courts: A Survey of and Proposed Framework to Evaluate Business Courts*, 24 Ga. St. U. L. Rev. 477 (2007) (evaluating the success of specialized business courts).

[30] *See* Court Information Release, Patent Pilot Project in the Northern District of Illinois (Sept. 19, 2011), http://www.ilnd.uscourts.gov/home/_assets/_news/Patent%20Pilot%20Program%20%2809-19-11%29.pdf.

[31] *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999).

[32] *See, e.g.*, Prison Litigation Reform Act, 18 U.S.C. § 3626 (2012) (addressing injunctions in cases challenging prison conditions and requiring any such injunction to be narrowly tailored and the least intrusive means of accomplishing the necessary goal).

[33] *See, e.g., Milliken v. Bradley*, 433 U.S. 267, 281–82 (1977).

[34] *See, e.g.*, Harry Kalven, Jr. & Hans Zeisel, The American Jury 12 (1966); Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 Law & Hum. Behav. 29, 34, 48 (1994); Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's The American Jury*, 2 J. Empirical Legal Stud. 71 (2005).

[35] Churchill, House of Commons (Nov. 11, 1947), in Winston Churchill, Churchill by Himself: The Definitive Collection of Quotations 574 (Richard Langworth eds., 2008).

CASE NOTE

Circuits split on cell data privacy

Cell phones contain a wealth of information that is increasingly at play in litigation. Here is one example: Cell phones track a user's location when a call is placed or a text message is sent. To send a call or text, the phone connects to the nearest cell site with the strongest radio signal. The cell phone provider automatically retains information about the communication, including the location of the cell site to which the phone connected and the timing of the connection.

This electronic data is called cell site location information ("CSLI"). CSLI can be used to approximate the whereabouts of the cell phone when the call or text was sent or received — and that information can be useful to law enforcement officials.

Graham argued that obtaining CSLI without a warrant was an unreasonable search that violated the Fourth Amendment. The Fourth Circuit agreed.

In *United States v. Graham*, 2015 U.S. App. Lexis 13653 (4th Cir. 2015), the Fourth Circuit found that warrantless inspection of CSLI violates the Fourth Amendment. The defendant, Aaron Graham, was prosecuted for a series of six armed robberies in Baltimore, Md.

When Graham was arrested, the government found two cell phones in his car. The government sought and obtained court orders under the Stored Communications Act ("SCA") for 221 days of CSLI from the cell phone provider for the two phones. Graham unsuccessfully sought a motion to suppress the CSLI at his jury trial. Graham argued that obtaining CSLI without a warrant was an unreasonable search that violated the Fourth Amendment. The jury convicted him of all counts. Graham appealed the denial of his motion to suppress.

The Fourth Circuit held that the government violated Graham's Fourth Amendment rights by seeking and inspecting the 221 days of CSLI without a warrant. The court determined that extended CSLI enables the government to track the activities and personal habits of a cell phone user and that cell phone users have an objectively reasonable expectation of privacy for this information. The court, however, upheld Graham's conviction and sentencing because the government acted in good faith on court orders issued under the SCA.

Judge Stephanie D. Thacker concurred separately to express her concerns about the erosion of privacy in the current era of technological developments. Judge Diana Gribbon Motz concurred in the majority's affirmation of Graham's conviction and sentences but dissented in part, maintaining that the government did not violate Graham's Fourth Amendment rights in its warrantless inspection of the CSLI. She reasoned that a cell phone user voluntarily transmits his or her location data to the cell phone provider by connecting to the provider's cell sites. Under the third-party doctrine, Judge Motz concluded, a person does not enjoy a legitimate expectation of privacy for information voluntarily given to a third party.

Judge Motz's dissent mirrors decisions made by the Fifth and Eleventh Circuits in similar criminal cases. These circuit courts determined that cell phone users voluntarily transmit CSLI to third parties by using their cell phones and no warrant is needed to inspect data. That the Fourth Circuit's majority opinion now stands apart from its sister circuits suggests that the question may soon reach the Supreme Court.

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