Courtroom Use:
Access to Justice, Effective Judicial Administration and Courtroom Security

Hearing before the Subcommittee on Courts and Competition Policy
of the United States Committee on the Judiciary

U.S. House of Representatives
September 29, 2010
Rayburn House Office Building,

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Submitted, September 24, 2010

I appreciate the opportunity to provide information to the Subcommittee on Courts and Competition on questions of access to justice, judicial administration, and courthouse security. In addition to teaching about the federal courts, occasionally litigating within them,[1] and participating in many symposia about them, I have just completed a book that examines the history and development of courts in the United States and elsewhere.[2] Based on this work, I elaborate five points below.

First, while adjudication is an ancient practice, the essential attributes of what we today call "courts" are relatively new. Once, judges were told to be subservient to and loyal servants of the ruling powers. Today, they are required to be independent, with structural protections.

Further, while rulers regularly provided public displays of adjudication, the purpose of such rituals was to impress on local populations state power to maintain peace and security. Today, those "rites" have become "rights" of access to courts. Around the world, the mandate is for "open" and "public" courts. Moreover, "fair" procedures once meant only that procedures were those prescribed by law, rather than today's understanding that a "fair hearing" requires substantive protections such as impartial and independent judges obliged to accord each side equal respect. Finally, only during the last several decades has the idea come to be embraced that all persons—regardless of color, gender, age, ethnicity and the like—are eligible to be heard in court as litigants or witnesses and to serve as jurors, judges, lawyers, and staff.

Second, the purpose of underscoring the relative novelty of these attributes is to serve as a reminder of the remarkable commitment that all branches of the United States government have had to adjudication. The growth in the number of judges and courthouses and in the jurisdictional and remedial roles for courts is a tribute to the shared, constitutionally-based norms of respect and appreciation for judges and courts in the United States.

One way to clarify this point is through a few numbers. In 1850, the federal government owned about fifty buildings. None were labeled courthouses. Rather, before federal post offices and courthouses became familiar outposts of the national government, the first wave of buildings creating a "federal presence" across the country were custom houses and marine hospitals.[3] These buildings joined those dedicated in Washington, D.C. to the legislative and executive branches as the embodiments of the federal government.[4]

The fact that more than 550 federal courthouses now exist is a tribute to all three branches of the federal government, committed to the rule of law and federal norm enforcement. These buildings are a material testimonial to the importance of adjudication in democratic orders.

Public and open courts—to which all have access to bring claims before independent judges—represent a great and a recent achievement. As the phrase inscribed over the United States Supreme Court's front door puts it, the architecture and practices

aim to make good on commitments to "equal justice under law." Open courts are not only a product *of* democracy, they also make a significant contribution *to* democracies—providing lessons about citizen access and about government obligations of fair treatment, made plain when judges are required to explain publicly their exercise of power.

Third, during most of the twentieth century, federal filings grew. At the beginning of that century, just under 30,000 cases were pending. By century's end, more than 300,000 cases were pending, along with more than one million bankruptcy petitions. Yet, resources for litigants and for courts did not match the need, and both state and federal courts faced challenges. Some of the response came by way of more judgships and funding, but other responses were to cut back on access to courts. Some adjudication was devolved to administrative agencies, some outsourced to private providers, and some decisionmaking in courts become more private as judges refocused on settlement. Moreover, several decisions by the United States Supreme Court have imposed challenges to filing lawsuits and limitations on judicial remedies.

Fourth, the shifting contours of adjudication have had an impact on court filings. In 1995, the Long Range Plan of the Federal Courts had anticipated that by 2010, filings would exceed 600,000. But over the last ten years, filings in the federal courts have been basically flat—around the 325,000 to 350,000 of the 1990s. (Appendix A is a chart providing that information.)

Fifth, the response to this potentially puzzling under-usage of federal facilities is not to cut back on either access to courts or on equipping courts with the necessary resources but, rather, to help bring litigants back into courts. Congress is considering legislation to do so, such as to limit the imposition of mandatory arbitration in consumer and employee contracts.

In addition, I suggest that the Subcommittee support the judiciary in creating district-by-district committees, akin to those deployed under the Civil Justice Reform Act (CJRA) of 1990,[5] to address questions of courtroom usage in each district. Such "courtroom usage committees" should be asked to review the circumstances of each district so as to provide proposals based on the varying needs of districts about a) how to increase courtroom usage, b) whether to share courtrooms, and if so, with what sets of adjudicators, and c) whether courtrooms could be used by relevant local federal agency adjudicators or whether state court users would be appropriate.[6] Another model of reform that should serve as a guide comes from the history of bankruptcy courts. Before the 1980s, the bankruptcy system did not have the stature that it has gained by virtue of congressional authorization for bankruptcy judges, who moved before the public in courtrooms around the country. A similar intervention for immigration hearings could help to improve dramatically the problems that have beset those proceedings, benefitting the administration of justice and alleviating some of the burdens that these cases now impose on the appellate courts.

I. Building Adjudication, the Federal Judicial System, and Courthouses

While the number of filings of cases and of federal courthouses are important markers of recent commitments to justice, the many solid (and often stone) buildings may make it easy to forget that the pillars of adjudication, today taken for granted, are relatively new inventions. The rapid historical sketch provided below demonstrates that Congress has been central to the development of the federal judiciary—turning to courts for norm enforcement and providing the necessary resources by supporting judgeships and courthouse construction.

A. From "Rites" to "Rights"

Judges were once supposed to be loyal servants of the state, not independent actors, and when they displeased rulers, they lost their jobs. The English Act of Settlement of 1701 marks the beginning of legal protection of judges, followed by the Massachusetts Constitution in 1780 and Article III of the United States Constitution in 1787.

Similarly, the public aspects of adjudication were once ritualistic enactments of state power—offering spectacles like executions. The history of the United States lets one trace the shift from such "rites" to "rights." The 1676 Fundamental Laws of West New Jersey, an English colony, provided "[t]hat in all publick courts of justice for tryals of causes . . . any person or persons . . . may freely come into, and attend . . . that justice may not be done in a corner nor in any covert manner . . . ."[7]

A century later, state constitutions emphatically insisted that such customs of open processes were legal guarantees. The 1777 Vermont Constitution and the 1792 Constitutions of Delaware and Kentucky offer examples, proclaiming that "all courts shall be open." As of 2008, the words "all courts shall be open" can be found in the constitutions of nineteen states.

The federal Constitution includes the phrase "open court" in its (little-read) section on treason. In addition, the Constitution guarantees criminal defendants the right to a speedy and public trial, and authorizes civil juries. These provisions, coupled with First Amendment and Due Process principles and common law traditions, have protected public access to both civil and criminal trials and to pre-trial hearings and court records. Indeed, just last year, the United States Supreme Court held that a state court judge's exclusion of a single spectator at a voir dire for a criminal trial violated these principles.[8]

But it was not until the twentieth century that the Supreme Court insisted that "fair hearings" were obligations that required equal and dignified treatment of all persons, who gained rights to be *in* courts—as litigants, witnesses, jurors, lawyers, and most recently as judges. Formal principles of equal treatment entitled a host of claimants—regardless of race, class, ethnicity, and gender—to fair hearings. More than

that, democratic precepts of constrained and accountable governments entitled individuals to bring challenges against the state to courts.

B. Courthouses as Monuments to Adjudication's Promises

These four pillars of modern adjudication—independent judges, public courts, fairness in opportunity, and equal access for all—are what the many federal courthouses symbolize. The courthouses and the administrative infrastructure of the federal courts are artifacts of decades of cooperative work among all branches of government. At the urging of Chief Justice William Howard Taft, Congress created in 1922 the Conference of Senior Circuit Judges, the predecessor of what is now the Judicial Conference of the United States. Further, Congress financed the building of the Supreme Court, opened in 1935 and recently renovated. And, toward the end of the twentieth century, the Judicial Conference, chaired by Chief Justice Rehnquist, succeeded in obtaining congressional authority for the "largest public-building construction campaign since the New Deal: a 10-year, $10 billion effort to build more than 50 new Federal courthouses and significantly to alter or add to more than 60 others."[9]

The decision to commit public funds to courthouses represents deep political and social premises of American democracy—that private enforcement of the laws through public adjudication is a value; that individuals have a right to be heard in open proceedings; that judges should give reasons for their judgments; and that we, the public (who are neither litigants nor judges) should be able to watch our government in action.

C. From Ad Hoc Construction Projects to the Development of Federal Courthouses (1800s-1930s)

1. **Before the Civil War**: Paralleling the development of legal commitments to courts is the development of the federal infrastructure. As noted, buildings belonging to the federal government were once rarities.[10] Congressional legislation funding the various projects of the first half of the nineteenth century made minimal mention of courthouses. Some federal legislation authorizing construction of custom houses did make reference to paying for furnishings for judges[11]—thus revealing the assumption that a courtroom was to be tucked inside. In addition, Congress occasionally provided expressly for the construction of courts and jails in its territories.[12]

By the 1850s, the federal government owned eighteen marine hospitals and twenty-three custom houses, and fifteen more buildings were underway.[13] As noted, none bore the label "courthouse." The meager references to facilities for judges were appropriate when considered against the backdrop of the size of the federal courts of that era. In 1850, some thirty-seven federal trial judges were dispatched to the forty-five district courts in the states,[14] including two to California, which had gained statehood that year.[15]

Beginning around 1850, one finds government planners calling specifically for courthouse construction.[16] In 1852, the Treasury Department created a unit called the

Office of Supervising Architect, which affected the shape of structures for the nation even after, almost a century later, its work was folded into a different administrative structure in 1939.[17]

2. **New Jurisdictional Statutes, Chartering the Justice Department, and Authorizing More Judges and Courthouses (1860s-1939)**: Building ambitions had to be put on hold for a period, as the violence and financial stress of the Civil War required a hiatus in national construction. But in the War's aftermath, two creations of the first Congress of 1789—the lower federal courts and the Treasury Department—came into closer contact as Congress repeatedly turned to the federal courts as instruments for enforcement of federal norms.[18] In 1867 Congress gave federal courts authority to hear habeas corpus petitions from individuals held in state custody.[19] In 1871 Congress gave federal courts the power to hear cases alleging deprivations of civil rights;[20] and in 1875 Congress gave the federal courts "general federal question jurisdiction," enabling them to hear various kinds of claim alleging rights under federal law as long as a certain amount of money was in controversy.[21]

The implementation of federal rights required more organization of lawyers for the federal government. In 1870, Congress created the Department of Justice.[22] The 1870 legislation also centralized most of the court-related work in the Justice Department by transferring "supervisory powers . . . over the accounts of the district attorneys, marshals, clerks, and other officers of the courts of the United States" from the Secretary of the Interior to the Justice Department.[23] To gain efficacy in requesting funds from Congress on behalf of the judiciary, the Justice Department began to compile statistical information about the federal courts. Beginning in 1871, the Attorney General provided annual reports to Congress on cases pending as well as those terminated.[24]

The number of judges increased along with the docket. While several federal districts continued to have only one judge, between 1857 and 1886, Congress gave thirteen states a second judgeship,[25] resulting in some sixty-four judgeships by 1886. That expansion was part of the growth in the paid civilian employment of the federal government. In 1861, some 37,000 individuals were employed; by 1891, almost 160,000 were on the federal payroll.[26]

New construction was a complementary technique to materialize this new federal authority. "Between 1866 and 1897 . . . the federal government built nearly three hundred new buildings throughout the Union."[27] In those new buildings, spaces inside (and sometimes whole buildings) went to courts. In the early part of the twentieth century, Congress "opened the floodgates . . . by inventing . . . the 'omnibus' public building bill, which replaced for the most part the previous practice of enacting individual bills for each building."[28] In the 1902 act alone, Congress authorized more than 150 new buildings.

Federal building was a boon to members of Congress, able to return to their districts with new commercial resources. Through "wholesale authorization," members of

the House gained "the possibility of providing their district with a federal building, regardless of need."[29] (Not until 1926 did Congress authorize surveys for "needs" prior to appropriations.[30])

By 1892, the federal government had an inventory of almost three hundred buildings, with another ninety-five projects underway.[31] The rate of building in the pre–World War I era was impressive. In 1899, about 400 building projects were in process; by 1912, the number of projects had grown to 1,126, producing a "new building every fourth day in the year."[32] By the 1920s, enough architects were employed by the federal government to create their own "Association of Federal Architects" that aspired to improve the esprit de corps of civil service personnel involved in construction.[33]

As is familiar, in 1939, the Office of the Supervising Architect was folded into the Public Buildings Administration.[34] In 1949, that entity became part of the General Services Administration (GSA),[35] which continues to be the government unit charged with overseeing federal buildings, from land purchase to construction and maintenance.

D. New Principles of Federal Construction and New Commitments to Representing the National Government through its Courts (the 1960s to 2010)

1. The Architecture of Federal Buildings and Senator Moynihan's Guiding Principles: The last decades of federal courthouse construction need to be understood in the context of sixty years of concerns that federal construction in general had not been undertaken with sufficient attention to embodying social and political values. Over the decades, a series of initiatives sought to support federal buildings that were more inviting, more sociable, more accessible, more environmentally sustainable, and historically respectful spaces that would contribute to the neighborhoods in which they sat. In the last decade, sadly, security has come to the fore.

Most accounts identify the election of President John F. Kennedy in 1960 as the beginning of a new appreciation for the contributions that art and architecture could make to the civic life of the country. Prompted in part by concern about the "precarious financial underpinnings" of major cultural institutions and in part by the national government's own need for more space, in 1961 President Kennedy chartered the Ad Hoc Committee on Government Office Space.[36]

The result was "Guiding Principles for Federal Architecture"—"a new quality-conscious federal attitude toward architecture . . . that led directly to a mandate for fine art in public buildings,"[37] subsequently supported by the National Endowment for the Arts (NEA). The Ad Hoc Committee, chaired by Arthur Goldberg, then Secretary of Labor, is identified with its lead staffer, Daniel Patrick Moynihan, who later served in the Senate on behalf of New York. Moynihan is given credit for the vision represented by the report[38] as well as for drafting a one-page set of "Guiding Principles" that is regularly invoked in contemporary discussions of federal buildings.[39]

The Ad Hoc Committee concluded that government buildings were often undistinguished and sometimes mediocre. The Principles called for public architecture to "provide visual testimony to the dignity, enterprise, vigor, and stability of the American Government."[40] Further, the "Government should be willing to pay some additional cost to avoid excessive uniformity in design of Federal buildings."[41] To accomplish these goals, the Guiding Principles argued that the government should not be seen as a source of "standards" for quality building. Instead (and consistent with the premises of the 1893 Tarsney Act[42]), the private sector was the place to look: "Design must flow from the architectural profession to the Government and not vice versa."[43]

In 1974, a NEA Task Force report recommended that buildings have more inviting atmospheres so that federal workplaces could be both functional for and attractive to government employees, while also serving to improve the "human vitality" of many downtowns.[44] In response, in 1976 Congress enacted the Public Buildings Cooperative Use Act.[45] The "cooperative" in the act's title reflected the new authority given to the GSA to lease federal building space to tenants for "social and commercial uses"—to wit, shops and restaurants aiming to respond to the "perceived barrenness"[46] of federal offices. That 1976 legislation also picked up concerns from the 1966 National Historic Preservation Act, instructing that attention be paid to "acquiring and reusing historic and architecturally interesting buildings."[47] Therefore, before proposing new construction, the GSA was required to consider whether historic buildings could satisfy federal needs for space.

In addition to sociability and historicity, attention turned in the 1970s to the environment and to the challenges of persons with disabilities. In 1969 Congress had enacted the National Environmental Policy Act,[48] which required federal construction to address the impact of new building on natural resources and habitats. Within a few years, the GSA came to describe its buildings as incorporating "energy conservation technology,"[49] and developed performance goals and energy conservation standards, with a focus on "green" and "sustainable" buildings.[50]

The 1962 Guiding Principles had called for buildings to "be accessible to the handicapped."[51] In 1968 Congress took up the aspirational terms of the Principles and required (in the obliquely named Architectural Barriers Act of 1968) that any building constructed for or used by the United States had to meet standards to "insure that physically handicapped persons will have ready access to, and use of, such buildings."[52] Congress instructed the GSA and other federal agencies to prescribe guidelines for accessibility design that resulted in uniform federal accessibility standards.[53]

In 1990 federal law went further in the Americans with Disabilities Act (ADA), which mandated accessibility in state and private facilities.[54] But problems of compliance were pervasive. In 2004 the United States Supreme Court upheld a provision of the ADA that permitted individuals to seek monetary damages from states for failing to comply with the federal law requiring accommodations to enable disabled persons to use courts.[55] As the bare majority described the underlying facts of the case at bar (a term sadly apt),

the plaintiff, George Lane, who was wheelchair-bound because he was a paraplegic, had "crawled up two flights of stairs to get to the courtroom" in Tennessee where he was to answer to criminal charges.[56] Determining that states were not immune from damage actions, the Court explained that "affirmative obligations" flowed because access to courts was such a foundational constitutional value.

In addition to sociability for workers and users, environmental friendliness, preservation, and accessibility, the other factor that reformatted federal buildings during the last decades of the twentieth century was security. By the 1990s, the vulnerability of federal sites became painfully evident. In 1995, the bombing in Oklahoma City by Timothy McVeigh of a federal building, also housing a day care center, killed more than 160 people.[57] The GSA and the federal judiciary have since focused a good deal on barriers and fortification. The part of the federal judiciary's budget devoted to security grew from forty-two million dollars in 1989 to $185 million in 1999, representing a 335 percent increase, adjusted for inflation.[58]

Indeed, security became the "Objective No. 1" in a late 1990s GSA guide for architects and engineers competing to obtain commissions.[59] That guide emphasized the importance of physical barriers, surfaces that could withstand "ballistic or blast attacks," and it also insisted on the need to impose control over vehicle access, enclose parking for federal personnel, screen both persons and parcels, and install surveillance devices to monitor movements about buildings. In addition, designers were to provide "dedicated, separate, and restricted corridors" as well as elevators for the exclusive use of judges to provide "safe movement within the building."[60] The September 11, 2001, attack on the World Trade Center in New York and the Pentagon intensified these concerns.

2. **U.S. Court Design Guides:** As is familiar, in the late 1970s, the GSA, working with the Administrative Office of the U.S. Courts, had developed guidelines for court construction,[61] put forth first in 1979 and then in 1984. The GSA Guides had discussed two areas within a courtroom, the "activity zone" for formal proceedings and the "public zone" where observers could sit.[62] For courtroom sizes, the *1984 GSA Design Guide* relied on Judicial Conference decisions under Chief Justice Warren Burger who supported alternative dispute resolution and had proposed small ("Tom Thumb") courtrooms. While the 1946 Judicial Conference guidelines had called for 2,200 square foot courtrooms,[63] in the 1980s when Chief Justice Burger presided, the Judicial Conference downsized somewhat, by settling on four sizes of courtrooms ranging from 1,120 square feet to 2,400 square feet.[64] The 1984 *GSA Design Guide* incorporated those standards and also detailed the height for ceilings—twelve feet, except for the large courtroom, where heights of sixteen feet were recommended.[65]

As for the number of courtrooms, the 1979 *GSA Design Guide* had specified that, in accordance with Judicial Conference resolutions, "no judge of a multiple-judge court will have the exclusive use of any particular courtroom."[66] Although tacitly still the policy, that comment was not included in the 1984 version formally approved by the Judicial Conference.

By the late 1980s, the AO reported "excessive delays and costs related to the acquisition and management of space and facilities."[67] Enlisting the National Academy of Public Administration, the AO explored whether responsibility for "defining requirements, designing, leasing, constructing, managing, and performing other functions related to space and facilities" could be transferred from the GSA to the AO.[68] Thereafter, the judiciary sought to distance itself from the GSA by gaining authority to expand its own building stock and to take charge of courthouse design.[69]

In 1991, the Judicial Conference published its own *U.S. Courts Design Guide*, which has been revised several times since. That 1991 guide called for courthouses to "symbolize the Judiciary as a co-equal branch of Government. Courthouse design should reflect the seriousness of the judicial mandate and the dignity of the judicial system. The scale of a courthouse should be monumental, and the materials used on its exterior durable. The spirit of the architecture should be impressive and inspiring. . . . [70] The 1997 version modified those points, under its "General Design Guidelines," stating that "a courthouse facility must express solemnity, stability, integrity, rigor, and fairness. The facility must also provide a civic presence and contribute to the architecture of the local community."[71]

As is also familiar, the federal court design guides revisited the idea that judges could share courtrooms. Instead of the premises of the Burger years that courtrooms were to be "available on a case assignment basis to any judge" and that no judge on multi-judge courts had "the exclusive use of any particular courtroom,"[72] the Judicial Conference took the position that a courtroom had to be dedicated to each judge.[73] As recorded in the 2007 *U.S. Courts Design Guide*: "Recognizing how essential the availability of a courtroom is to the fulfillment of the judge's responsibility to serve the public by disposing of criminal trials, sentencing, and civil cases in a fair and expeditious manner, and presiding over the wide range of activities that take place in courtrooms requiring the presence of a judicial officer, the Judicial Conference adopts the following policy for determining the number of courtrooms needed at a facility: With regard to all authorized active judges, one courtroom must be provided."[74]

Until 2008 the Judicial Conference left the question of dedicated courtrooms for "senior," "visiting," and magistrate judges to decentralized decisionmaking.[75] Then, faced with conflicts over rent and congressional oversight, the Conference moved to the position that in new court construction, senior trial judges were to share courtrooms, as might magistrate judges and possibly others.[76]

II. The Puzzle of Under-Utilization of Federal Courtrooms

This hearing, however, is prompted in part by concerns about how courtrooms are being used. In a series of studies over a decade, the General Accountability Office (GAO) and the Congressional Budget Office (CBO) have reported on under-utilization of federal courtrooms.[77] Yet, according to the Administrative Office of the United States Courts (AO), between 1974 and 1998, Congress enacted some 474 provisions that

expanded "the workload and the jurisdiction of the federal courts."[78] Moreover, filings grew steadily during most of the course of the twentieth century—from around 30,000 in 1901 to some 325,000 by that century's end.[79]

Yet, today, of one hundred civil cases filed in federal courts, fewer than two start a trial. This phenomenon has gained widespread attention, captured in the appellation: "the Vanishing Trial."[80] Other relevant data come from the *1995 Long Range Plan of the Federal Courts*, issued by the Judicial Conference of the United States.[81] At that time, the judiciary raised concerns that too many cases were being brought to court.

The *1995 Long Range Plan* estimated that some 610,000 civil and criminal cases would be filed in 2010. But in 2008, when the Administrative Office of the United States Courts did a report on the implementation of the *Long Range Plan*, the AO noted that filings had not grown as anticipated.[82] Indeed, over the last decade, the numbers of filings of civil and criminal cases have been relatively flat – averaging about 325,000 per year.[83] See Appendix A.

But one should not assume that this figure represents the sum total of federal adjudication. Bankruptcy filings have long hovered around one million a year. Filings dipped somewhat after the bankruptcy reforms of this decade. Filings have, however, risen again to 1.4 million as of 2009.[84] Moreover, tens of thousands of claimants appear before administrative judges working within federal agencies. The largest volume is in the Social Security Administration. In addition, immigration dockets are high; as of 2008, 238 immigration judges averaged some 1,200 cases each year.[85] Concerns about process and outcomes come from many quarters, including federal appellate jurists reviewing judgments and reporting inadequate lawyering and unfair treatment.[86]

Furthermore, this country's need for courts extends far beyond the federal system. All of federal adjudication—in courts and agencies—is dwarfed by activities in the state courts, where more than 45 million cases are filed annually. Yet state courts face significant hurdles to keeping their doors open. In 2007, the New Hampshire courts cut costs by halting criminal and civil jury trials for a month. In 2008, Maine closed its clerk's offices for trial courts on some afternoons because it could not afford to keep them open. In 2009, the Chief Justice of Massachusetts' system warned that one should not assume state courts were "too big to fail," as she argued the need to face the crisis in resources.[87]

Thus, the questions raised are:

a) why, given the array of congressional authorizations for individuals allegedly harmed to bring lawsuits, federal courtroom usage is not as great as what was anticipated;

b) how Congress can act to reinvigorate the use of federal courtrooms, and

c) whether, when not needed for federal court proceedings, trial or appellate courtrooms could be used by federal administrative agencies to conduct proceedings such as immigration hearings or by state courts.

The purpose of all these inquiries is to enable more public access to adjudication. Below I sketch late twentieth century policies that have limited the use of federal courtrooms. I then turn to a discussion of why the lack of public processes in open courts poses a problem that Congress should address.

III. The Practices That Route Litigants Elsewhere

As part of the discussion is about federal courthouse buildings, the term "barrier" may invoke literal structures. My comments here seek to draw attention to other kinds of impediments that help explain the under-utilization of courtrooms.

A. Resources

Simply put, large numbers of would-be litigants lack the resources to pursue their rights. This inability to access justice has prompted recent reports from leading jurists and bar associations on the need for a "civil *Gideon*" to provide rights to counsel for poor claimants dealing with fundamental needs, such as shelter and family relations.[88] In addition, concerns have mounted about the need to provide greater support for the Legal Services Corporation.

B. Doctrine, Rules, and Policies Erecting Barriers to Courts

Some litigants do have resources to come to court. However, over the last four decades, legal policies have been developed to route individuals elsewhere. A series of decisions by the Supreme Court dealing with pleadings, standing, implied causes of action, and immunities have made it more difficult to pursue claims.[89] In addition, three mechanisms—rules and statutes pressing litigants towards private settlements, devolution of adjudication to agencies, and outsourcing to private providers by enforcement of form contracts requiring arbitration—shift the practices of adjudication away from public courtrooms.

1. **Alternative Dispute Resolution:** The promotion of "alternative dispute resolution" (ADR) can be found in revisions to the *Federal Rules of Civil Procedure*, first promulgated in 1938. Those rules created a "pre-trial" procedure for judges and lawyers to meet and confer in advance of trial so as to simplify trials. The archival records of the rule-drafters do not indicate that judges were supposed to use the occasion to encourage lawyers to settle cases or to seek methods of dispute resolution other than adjudication.

But in 1983 and again in 1993, the rulemakers reframed the judicial role such that what had once been "extra-judicial" procedures became "judicial" procedures. Judges were told to consult with parties and advise them on the desirability of settlement.

Congress has also enacted a series of statutes pressing both courts and administrative agencies to use ADR and to pursue negotiated conclusions.[90]

Federal judges are now multi-taskers—sometimes deployed as managers of lawyers and cases, sometimes acting as super-senior partners providing advice for both parties, sometimes serving as settlement masters or mediators, and at other points as referral sources sending disputants either to different personnel within courthouses or to institutions other than the courts. As a consequence, the trial judge on the bench is becoming (to borrow the words of one noted federal district court judge) an "endangered species."[91]

The rationales for this shift in doctrine and practice are many, as analytically different concerns (not detailed here) support efforts for ADR. Many of the reformers share a failing faith in adjudicatory procedure and a normative view that consent of the contracting parties, developed through negotiation or mediation, is preferable to the outcomes that judges might render. "Bargaining in the shadow of the law" is a phrase often invoked,[92] but private bargaining is increasingly becoming a requirement of the law of conflict resolution.[93]

2. **Devolution of Adjudication to Administrative Agencies**: Over the last fifty years, Congress has assigned many claimants to administrative agencies. A snapshot of the shift from court-based to administrative adjudication is provided by a comparison of the volume of evidentiary hearings during 2001 in federal agencies with those in federal courts. That year, some 100,000 evidentiary proceedings—in which district, magistrate, or bankruptcy judges received testimony of any kind (on motions as well as during trials)—took place inside the hundreds of federal courthouses around the United States.

In contrast, an estimated 700,000 evidentiary proceedings took place in four federal agencies with a high volume of adjudication.[94] Unlike federal courts, however, where constitutional precepts insist that the courtroom doors remain open, some federal administrative adjudicatory proceedings are presumptively closed to outsiders. Further, even if one is permitted to attend, finding such hearings is difficult because they take place in office buildings not readily welcoming to street traffic.

3. **Mandatory Arbitration of Federal and State Statutory Rights**: The United States Supreme Court has, over the last three decades, enforced mandatory arbitration contracts, even when entered into by consumers and employees who lack the ability to bargain for other terms. My own 2002 cell phone service agreement provides an example. By unwrapping the phone and activating the service, I waived my rights to go to court and was obligated to "arbitrate disputes arising out of or related" to prior agreements. Moreover, even when "applicable law" would permit me to join class actions or class arbitrations, the contract stated that both the provider and the consumer were precluded from pursuing any "class action or class arbitration."[95]

The law of the United States once refused to enforce such form contracts. One concern was that the party proffering the agreement had more bargaining power than

the offeree. Judges also explained that arbitration was too flexible, too lawless and too informal, in contrast to adjudication, which they praised for its regulatory role in monitoring adherence to national norms. For decades, the Supreme Court gave a limited reading to the Federal Arbitration Act, passed in 1925 to encourage commercial arbitrations. The Court concluded that the act did not, for example, bar stock purchasers from suing their brokers just because of a form waiver signed before a problem even existed.[96] Employees too could bring individual discrimination claims to court, even if their unions had entered into collective bargaining agreements.[97]

Beginning in the 1980s, however, the Supreme Court reversed some of its earlier rulings as it reread federal statutes to permit, rather than to prohibit, the enforcement of arbitration contracts when federal statutory rights were at stake—as long as the alternative provided an "adequate" mechanism by which to vindicate statutory rights.[98] Judges have not applied the test of "adequate" alternatives to require that mandatory arbitration programs provide the same procedures (such as discovery) that are available in courts. Further, the party contesting the enforcement of mandatory arbitration clauses bears the burden of showing that the costs charged to the disputants for arbitration are too great to make it qualify as an adequate alternative.

In 2001, the Supreme Court ruled (five to four) that an employee alleging discrimination under California law had to go before an arbitrator because he had signed a job application that waived his rights to court.[99] In 2009, the Court concluded (again, five to four) that employees under a collective-bargaining agreement lost their individual rights to go to court for age discrimination claims, even though they had not personally signed the agreement.[100] In addition, the Supreme Court has ruled that when parties disagree about how to interpret a contractual arbitration clause—diverging on the question of whether or not arbitration is required—the issue is to be decided, at least initially, by the private arbitrator and not by a judge.[101] In April of 2010, the Court closed another door. A panel of three arbitrators interpreted a form maritime contract that was silent on the question of class arbitrations. The arbitrators ruled that a class anti-trust arbitration (following a criminal investigation for price fixing in shipping) could proceed. But five Justices held that, because the underlying contract did not specifically authorize a class, that group-based process could not take place.[102]

4. **Congressional Responses Opening Access**: Some of the problems of bringing lawsuits to federal court have come to the attention of Congress, as its members have proposed and enacted various bills to protect opportunities for federal enforcement of rights. Congressional interventions in arbitration provide one illustration of what I am recommending: that empty courtrooms not be the predicate for a retreat from commitments to supporting open courts, but rather the basis for action.

The problem of mandatory arbitration for federal and state statutory rights provides one example. In 2002, Congress exempted car franchises from being bound by contracts to arbitrate claims against manufacturers.[103] A few years thereafter, Congress passed another act, protecting farmers dealing with large agricultural purchasing conglomerates.[104] Last fall, more than twenty-five members of this House proposed

doing the same for employees and consumers in a proposed "Arbitration Fairness Act."[105]

IV. The Democratic Role Played by Open Courts and Methods to Invigorate these Spaces

A. The Democracy in Adjudication

Above, I sketched how through case management, judicial efforts at settlement, mandatory ADR in or via the courts, devolution of disputes to administrative agencies and enforcement of waivers of rights to trial, the framework of "due process procedure," with its independent judges and open courts, is being replaced by what can fairly be called "contract procedure."[106] Despite the growing numbers of persons called "judges" and of conflicts called "cases," it is increasingly rare for government-based judges to be required to reason in public about their decisions to validate one side of a dispute. In mimetic symmetry, both judges in courts and their counterparts in the private sector now produce private outcomes that are publicly sanctioned.

These developments should be a source of concern, because public adjudicatory procedures make important contributions to functioning democracies. Indeed, this point was made in the early part of the nineteenth century by Jeremy Bentham, who called for "publicity" in courts and elsewhere.[107] He argued that open courts educate the public, enhance the accuracy of decisionmaking, and enable oversight of, as well as provide legitimacy for, the judiciary. In today's terms, Bentham could be understood both as a procedural reformer, focused on the interstices of legal rules, and as a political theorist, insistent on the role that courts play in contributing to what today is called "the public sphere"—arenas in which members of a polity develop views about the governing norms and practices.[108]

Courts are themselves a site of democratic practices. Public courts are one of many venues to understand, as well as to contest, societal norms. Courts both model the democratic precepts of equal treatment and subject the state itself to democratic constraints. The obligations of judges to protect disputants' rights, and the requirements imposed on litigants (the government included) to treat their opponents as equals, are themselves democratic practices of reciprocal respect. By imposing processes that dignify individuals as equals before the law, litigation makes good on one of democracy's promises—or may reveal democracy's failures to conform to its ideological precepts. Moreover, rights of audience divest the litigants and the government of exclusive control over conflicts and their resolution. Empowered, participatory audiences can therefore see and then debate what legal parameters ought to govern.

Consider the interaction between observers and courts. Public processes and published opinions of judges permit individuals who are neither employees of the courts nor disputants to learn, first-hand, about processes and outcomes. Indeed, courts—and

the discussions that their processes produce—are one avenue through which private persons come together to form a public so as to develop an identity as participants acting within a political and social order. Courts make a contribution by being what could be called "non-denominational" or non-partisan, in that they are some of the relatively few communal spaces not organized by political, religious or social affiliations. Open court proceedings enable people to watch, debate, develop, contest and materialize the exercise of both public and private power.

B. The Methods for Making Courtrooms Vital Public Spaces

The history provided above makes plain how important Congress has been to enabling public access to justice. While the past few decades have made plain that public processes are not always provided in courts, those functions can be reinvigorated in a variety of ways. Whether in courts or in their alternatives, one can build in a place for the public—to enable "sunshine," to borrow the term from legislation mandating open access to courts and other government institutions.[109] For example, federal judges could adopt a practice of holding many pretrial conferences in open court. Further, rules can oblige civil litigants to consent to settlement in open court, as do the legal constraints on entering guilty pleas for crimes. Moreover, limits could be placed on when discovery materials exchanged under the aegis of courts can be made confidential.

In terms of questions of courtroom sharing, I suggest that to determine how to return proceedings to courtrooms, when and if to share courtrooms, and with whom, Congress should support efforts of the judiciary to create committees in each district to evaluate usage and determine how to improve it. The model for this proposal comes from the Civil Justice Reform Committees that were chartered under a 1990 enactment calling on courts to address expense and delay. That approach is appropriate in this context, given the wide variation across districts in the roles played by magistrate and senior judges as well as very different docket pressures.

Each chief judge of a district could be asked to appoint a committee that included a diverse set of courtroom users. Relevant participants would include lawyers from different segments of the bar (for example, the United States Attorneys' Offices, Federal Public Defenders, civil litigators specializing in different kinds of cases) as well as court staff, representatives from relevant administrative agencies, from state courts, and members of the public. In terms of the scope of inquiry, these local "courtroom usage committees" should consider the number and kind of courtrooms available, including appellate as well as trial level courtrooms, the degree of sharing already under way, and any unique circumstances of particular courthouses. Further, if a district sits where a federal administrative agency conducts hearings (such as proceedings before immigration judges, social security judges, and the like), consideration should be directed to whether any of those proceedings could use courtroom space, if available.

Thank you for consideration of these comments.

Appendix A: Filing Trends

Review of Trends

The *Plan* devoted a chapter and appendix to trends that could threaten the judiciary's core values of providing equal justice, maintaining high standards of legal excellence, and sustaining legitimacy in the eyes of the public. Forecasts suggested the possibility of continued caseload increases at both the trial and appellate levels, and concomitant growth in the size of the judiciary.

Caseload and Judgeships: Forecasts versus Actuals

	Forecasts		Actual	
	2000	2010	2000	2007
District Cases Commenced	364,800	610,800	322,262	325,920
Criminal Cases	47,800	62,000	62,745	68,413
Civil Cases	317,000	548,800	259,517	257,507
Appeals	85,700	174,700	54,697	58,410
Authorized Appellate Judges	440	870	167	167
Authorized District Judges	890	1,430	665	692

Although the large growth trends forecast in 1995 have not borne out, new and unanticipated challenges have arisen such as the increase in immigration cases.

Individual committees continue to examine trends closely. The Committee on the Administration of the Bankruptcy System noted that while "the 1995 plan does not contain any explicit projection of trends in the bankruptcy system, there is at least an implicit assumption that the bankruptcy system would continue in its historical form into the foreseeable future. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 radically altered the basis for that assumption, making extensive changes to the substantive, procedural and administrative aspects of bankruptcy law and practice." As it concerns the future of the bankruptcy system, the Bankruptcy Committee notes that "as part of its long-range planning, the [committee] will have to evaluate what that steady state might look like, as well as how future economic developments...will affect the system."

	CIVIL AND CRIMINAL FILINGS	BANKRUPTCY FILINGS
1995	294,123	883,457
1996	322,390	1,111,964
1997	317,021	1,367,364
1998	314,478	1,436,964
1999	320,194	1,354,376
2000	322,262	1,262,102
2001	313,615	1,437,453
2002	341,841	1,547,669
2003	323,604	1,661,996
2004	352,360	1,618,987
2005	349,076	1,782,643
2006	312,738	1,112,542
2007	344,901	801,269
208	314,519	1,042,806
2009	333,082	1,402,816

* The above information is compiled from The Annual Reports of the Director: Judicial Business of the United States Courts, *available at* http://www.uscourts.gov/judbususc/judbus.html. The numbers contained in these reports tend to be lower than two other sources of case filing data on the Federal Judiciary webpage: Federal Court Management Statistics, *available at* http://www.uscourts.gov/fcmstat/index.html, and Judicial Facts and Figures, *available at* http://www.uscourts.gov/judicialfactsfigures/2008.html.

Endnotes

[1] For example, I was counsel of record in *Mohawk v. Carpenter*, 130 S.Ct. 599 (2009), which dealt with the question of whether a trial judge's ruling requiring disclosure of what was claimed to be protected by the attorney-client privilege was appealable, as of right, during the pendency of the case.

[2] Some of the materials presented in this Statement are drawn from my forthcoming book, coauthored with Dennis E. Curtis and entitled *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms*, to be published by Yale Press later this year. This statement was prepared with the assistance of Yale Law School students Allison Tait, Elliot Morrison, Adam Grogg, Joe Pace, Brian Holbrook, Brigid Davis, and of Katherine Haas, Rose Malloy, and Nicholas Makarov, Yale College, Class of 2012. A related statement was submitted for the record in the hearing *Eliminating Waste and Managing Space in Federal Courthouses: GAO Recommendations on Courthouse Construction, Courtroom Sharing and Enforcing Congressionally Authorized Limits on Size and Cost*, Hearing before the Subcommittee on Economic Development, Public Buildings and Emergency Management Committee on Transportation and Infrastructure Statement for the Record, U.S. House of Representatives, May 2010.

[3] The history of federal construction comes from several sources, including ANTOINETTE J. LEE, ARCHITECTS TO THE NATION: THE RISE AND DECLINE OF THE SUPERVISING ARCHITECT'S OFFICE 14–29 (2000). The phrase "a federal presence" is borrowed from Lois Craig's book THE FEDERAL PRESENCE: ARCHITECTURE, POLITICS, AND SYMBOLS IN UNITED STATES GOVERNMENT BUILDING (1978). As the Foreword by Nancy Hanks details, that history of "government attempts to house its services and activities" was prompted by concerns of the National Endowment for the Arts (NEA).

[4] LEE at 29–35. See also BATES LOWRY, BUILDING A NATIONAL IMAGE: ARCHITECTURAL DRAWINGS FOR THE AMERICAN DEMOCRACY, 1789–1912 (1985, published in conjunction with an exhibition of the same title).

[5] See *Civil Justice Reform Act of 1990*, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-82 (2006)). That legislation had a "sunset clause." See also *Task Force on Civl Justice Reform: Justice for All: Reducing Costs and Delay in Civil Litigation* (1989). Implementation was analyzed by RAND's Institute for Civil Justice. See also James S. Kakalik, Terence Dunworth, Laural A. Hill, Daniel F. McCaffrey, Marian Oshiro, Nicholas M. Pace, Mary E. Vaiana, *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (1996).

[6] The Judicial Conference has considered state court users, when noting that its policies on cameras in the courts would apply, rather than whatever policy was in place for states. See Statement of Judge Diarmuid O'Scannlain on Behalf of the Judicial Conference of the United States Regarding S. 829 as Applied to Federal Trial Courts, http://www.uscourts.gov/testimony/exhibit4CameraTest05.pdf (Nov. 9, 2005) (statement to the Senate Judiciary Committee); Bills Would Bring Rent Relief to Judiciary, Allow Cameras in Courts, Shape Judicial Security and Review, and Create Inspector General, 38 THIRD BRANCH 3 (May 2006), available at http://www.uscourts.gov/ttb/05-06/rentbill/index.html (discussing Judicial Conference policy to permit appellate courts, at their option, to televise oral arguments but to oppose "cameras in federal trial courtrooms").

[7] Charter of Fundamental Laws, of West New Jersey, Agreed Upon, ch. XXIII (1676), see http://avalon.law.yale.edu/17th_century/nj05.asp.

[8] See *Presley v. Georgia*, 130 S. Ct. 721 (2010).

[9] Randy Gragg, *Monuments to a Crime-Fearing Age*, NEW YORK TIMES MAGAZINE, May 28, 1995, at 36.

[10] Indeed, at the beginning of the nineteenth century, Congress proceeded in an ad hoc fashion through an independent authorization for each construction project. See, for example, Act of Feb. 13 1807, § 5, 2 Stat. 418, 419. Congress authorized the Secretary of the Treasury to find a "convenient site, belonging to the United States, in the city of New Orleans, a good and sufficient house, to serve as an office and place of deposit for the collector of the customs." The act appropriated $20,000 for building costs. In the 1830s, as both the federal budget and the professions related to buildings grew, the contours of a federal building program became more defined, and Robert Mills "served more or less officially" in a position sometimes called Architect of the Public Buildings. CRAIG at 56. The population of the United States doubled between 1830 and 1860. Federal expenditures more than quadrupled during those same thirty

years. See U.S. Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970, pt. II at 1104, http://www.census.gov/prod/www/abs/statab.html.

[11] For example, the Act of March 3, 1851, appropriating money for a Custom House in Savannah, Georgia, noted that funds were to be used for "furniture and fixtures for the accommodations of the officers of the revenue, and also for the post-office, and United States Courts." See also EDWIN SURRENCY, HISTORY OF THE FEDERAL COURTS 82 (Dobbs Ferry, NY: Oceana Publications, 2nd ed. 2002).

[12] Illustrative is the 1832 designation by Congress of acreage in Little Rock for the "erection of a courthouse and jail" for the Territory of Arkansas. See Act of June 15, 1832, 4 Stat. 531. Provisions were also made in 1839 for funds for a courthouse in Alexandria, Virginia. See Serial Set Vol. No. 364, Session Vol. No. 2, 26th Congress, 1st Sess., H. Doc. 32, 7 p. Dec. 30, 1839, Expenditure.

[13] DARRELL HEVENOR SMITH, THE OFFICE OF THE SUPERVISING ARCHITECT OF THE TREASURY: ITS HISTORY, ACTIVITIES, AND ORGANIZATION 3 (Baltimore, MD: Johns Hopkins Press, 1923); LOWRY at 52.

[14] One judge presided in each of the following states: Alabama, Arkansas, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Vermont, and Wisconsin. California, Florida, Louisiana, New York, Pennsylvania, and Virginia each had two judgeships. Our count does not include federal judges in the territorial courts, including those in the District of Columbia. See Chronological History of Authorized Judgeships in U.S. District Courts (Arranged by State) in HISTORY OF FEDERAL JUDGESHIPS: U.S. COURTS OF APPEALS AND U.S. DISTRICT COURTS, U.S. Courts, www.uscourts.gov/history/districtchronol.pdf (hereinafter Chronological History of Authorized Judgeships in U.S. District Courts). The database is provided by the Article III Judges Division, Office of Judges Programs, of the Administrative Office of the United States Courts.

[15] Act of Sept. 28, 1850, 9 Stat. 521. A reorganization reduced the number to one in 1866 but returned it to two in 1886. See Act of July 27, 1866, and Act of Aug. 5, 1886, 2 Stat. 308. As noted earlier, five other states (Florida, Louisiana, New York, Pennsylvania, and Virginia) also had two judgeships allotted.

[16] For example, in 1855 the Secretary of the Interior and the Postmaster General called for "sites for court houses and post offices" in Boston, New York, and Philadelphia. See Sites for Court House and Post Office, Message from the President of the United States, Serial Set Vol. No. 783, Session Vol. No. 5, 33rd Congress, 2d Sess., H. Doc. 43, 7 p., January 25, 1855.

[17] The work of that office is chronicled by Darrell Smith, Antoinette Lee, and others. Prior to its creation, federal officials who worked in the Treasury Department on federal building had various titles, including "Engineer in Charge of this Department" and "Supervising Architect." LEE at 29–43. No statutory authority supported the Secretary of the Treasury when he first created the unit, but legislation in the 1860s and thereafter made mention of that job. SMITH at 6–7. For example, the Act of March 14, 1864, ch. 30, 13 Stat. 22, 27, provided the Treasury with "one superintending architect, one assistant architect," several clerks and a messenger. The first architect appointee served from 1852 until 1862 as the "chief designer of all federal buildings" that fell within the Treasury Department's control. LEE at 47. Architect Young, credited with designing some seventy buildings, also made iron work the preferred material to provide fireproofing and permanency. Federal Judicial Center, Constructing Justice: The Architecture of Federal Courthouses 1-2 (A Description of Historical Photographs Exhibited at the Federal Judicial Center, undated essay); LEE at 59–60. The authority of the Supervising Architect grew after the Civil War. By 1875, Congress required that no funds be spent on public buildings without approval from the Secretary of the Treasury, "after drawings and specifications, together with estimates of costs thereof, shall have been made by the Supervising Architect" in that Department. See Act of March 3, 1875, ch. 130, 18 Stat. 371, 395. See also SMITH at 7–8.

[18] In 1849, the task of administering courts fell to the newly created Department of the Interior, charged with management of public lands and parks as well as the fiscal responsibility for the federal court system.

[19] See *Habeas Corpus Act of 1867*, ch. 28, 14 Stat. 385 (codified at 28 U.S.C. §§ 2241 et seq. (2006)).

[20] See *Civil Rights Act of 1871*, ch. 22, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (2006)).

[21] See Act of March 3, 1875, ch. 137, 18 Stat. 470 (codified at 28 U.S.C. § 1331 (2006)).

[22] Act of June 22, 1870. In contrast, the First Judiciary Act had created the Office of Attorney General, to be held by a person "learned in the law," to prosecute suits for the United States and to provide

advice on legal questions to the Executive Branch. See Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92–93; Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE LAW JOURNAL 561, 566–570; ANTONIO VASAIO, THE FIFTIETH ANNIVERSARY OF THE U.S. DEPARTMENT OF JUSTICE BUILDING, 1934–1984, at 2 (Washington, DC: U.S. Government Printing Office, 1984).

[23] An Act to establish the Department of Justice, ch. 150, 16 Stat. 162 (1870), § 15.

[24] See David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 SOUTHERN CALIFORNIA L. REV. 65, 98, table 4 (1981) (hereinafter Clark, *Adjudication to Administration*). Clark also detailed the change in the mix of cases; the proportions of criminal and civil cases varied over time as well as the ratio of civil filings by private parties to those brought by the government.

[25] Alabama got its second district judge in 1886. See Act of August 2, 1886, 24 Stat. 213. In 1871, Arkansas was given a second judge. See Act of March 3, 1871, 16 Stat. 471, 472. Other states that received second judgeships include California (1886); Georgia (1882), Iowa (1882); Louisiana (1881, returning it to two judgeships); Michigan (1863); Missouri (1857); North Carolina (1872); Tennessee (1878); Texas (1857); Virginia (1871, returning to a two judgeship provision); and Wisconsin (1870). The District of Columbia did as well in 1870. Illinois and Ohio received a second judgeship in 1855, and New York received a third in 1865. See Chronological History of Authorized Judgeships in U.S. District Courts.

[26] CRAIG at 163. The federal workforce grew from 4,847 employees in 1816 to 395,905 employees in 1911. Id.

[27] LOWRY at 58.

[28] LOWRY at 80. Some prior bills had authorized that buildings be constructed in several different locations. See, for example, Act of August 4, 1854, ch. 242, 10 Stat. 546, 571, providing for a "custom-house, post-office, and United States courts" in various cities. Another omnibus construction bill providing $45 million in funds was enacted in 1913. See Act of March 4, 1913, ch. 142, 37 Stat. 739. A third such bill, Act of May 25, 1926, Pub. L. No. 69-281, ch. 380, 44 Stat. 630, authorized construction of several kinds of federal buildings—"courthouses, post offices, immigration stations, customhouses, marine hospitals, quarantine stations, and other public buildings." While that list was similar to those found in bills from the late nineteenth century, the order had changed—the 1926 legislation put courthouses at the front.

[29] LOWRY at 80. As for the style of the buildings, many designs adopted the Beaux-Arts style popularized by the Chicago Exposition of 1893. Id. at 81–82; CRAIG at 203, 210–215. Concerns about pork-barrel funding led to cutbacks in 1911 in the workforce of the Office of Supervising Architect and to a hiatus between 1913 and 1926 in omnibus funding bills. CRAIG at 239–240.

[30] CRAIG at 163.

[31] CRAIG at 202.

[32] CRAIG at 213 (quoting the Secretary of the Treasury).

[33] CRAIG at 298. The group began publication of its magazine, *The Federal Architect*, in 1930. Id. The publication and the association "faded away" in 1947. Id.

[34] See Reorganization Plan No. I of 1939, 4 Fed. Reg. 2727 (Jul. 1, 1939), 53 Stat. 1423 (pursuant to the Reorganization Act of 1939, Pub. L. No. 79-19, 53 Stat. 561). In that same year, the Treasury's Section of Painting and Sculpture became the Section of Fine Arts, under the auspices of Public Buildings Administration; it became "inactive" in the 1940s. See Lloyd Goodrich, *Government and Art: History and Background*, 8 COLLEGE ART JOURNAL 171, 173 (1949). In 1949 Congress enacted the Public Buildings Act, authorizing the site selection and construction of federal buildings. See Public Buildings Act of 1949, Pub. L. No. 81-105, 63 Stat. 176 (codified as amended in scattered sections of 40 U.S.C.).

[35] Created under President Harry Truman at the end of World War II, the GSA was supposed to centralize the procurement and superintendence of government property. Functions of other agencies were transferred to the GSA, which was run by an "Administrator" appointed by the President. See Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, 63 Stat. 377 (codified in scattered sections of 40 U.S.C., 41 U.S.C., and 50 U.S.C.). The GSA described its 1949 mandate as "standardization, direct purchase, mass production, and fiscal savings." GENERAL SERVICES ADMINISTRATION, GROWTH, EFFICIENCY AND MODERNISM: GSA BUILDINGS OF THE 1950S, 60S, AND 70S at 29 (Washington, DC: GSA, 2006) [hereinafter GSA MODERNISM], available online at http://www.gsa.gov/gsa/. cm_attachments/GSA_DOCUMENT/Modern_R2-v01-t_0Z5RDZ-i34K-pR.pdf. A series of other acts added to GSA responsibilities, and the Public Buildings Act of 1959 gave the GSA more direct control over

federal construction. Public Buildings Act of 1959, Pub. L. No. 86-249, 73 Stat. 479 (codified at 40 U.S.C. §§ 490, 601–619, current version at 40 U.S.C.A. §§ 581–590, 3301–3315).

[36] LEE at 290–291.

[37] John Wetenhall, *Camelot's Legacy to Public Art: Aesthetic Ideology in the New Frontier*, 48 ART JOURNAL 303, 304 (1989).

[38] The history and importance of these principles are chronicled in three volumes published by the GSA, entitled VISION + VOICE, that include commentary and reflections from various participants (including architects, members of selection panels, and administrators) in the GSA programs. Published four decades after "Moynihan wrote the 'Guiding Principles for Federal Architecture,'" the set credits his work with changing "the course of public architecture in our nation." Id., Preface by F. Joseph Moravec, Commissioner, Public Buildings Service. Volumes II and III, both titled "Changing the Course of Federal Architecture," were published in 2004.

[39] The "Guiding Principles for Federal Architecture" are reproduced in I VISION + VOICE at 4–5 [hereinafter Guiding Principles, I VISION + VOICE].

[40] Guiding Principles, I VISION + VOICE at 4.

[41] Guiding Principles, I VISION + VOICE at 5.

[42] Act of Feb. 20, 1893, ch. 146, 27 Stat. 468 (Tarsney Act).

[43] Guiding Principles, I VISION + VOICE at 5. See also Wetenhall at 305; GROWTH, EFFICIENCY AND MODERNISM: GSA BUILDINGS OF THE 1950S, 60S, AND 70S at 44 (Washington, DC: U.S. General Services Administration, 2003) (hereinafter GSA MODERNISM).

[44] NEA, MULTIPLE-USE FACILITIES at 5.

[45] See Pub. L. No. 94-541, 90 Stat. 2505 (1976) (codified as amended at 40 U.S.C. §§ 3306 et seq. (2006)). The act imposed on the Administrator of the Public Buildings Service the obligation to "encourage the location of commercial, cultural, educational, and recreational facilities and activities in public buildings" (id. at section 102(a)(2)) as well as to "acquire and utilize space in suitable buildings of historical architectural, or cultural significance" (id. at 102(a)(1)).

[46] GSA MODERNISM at 58. The legislation was also responsive to the opinion of the GSA General Counsel that, absent new legislation, the agency lacked legal authority to rent space for other uses.

[47] CRAIG at 441.

[48] National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4331 et seq. (2000)).

[49] GSA MODERNISM at 11.

[50] GSA MODERNISM at 49–51.

[51] Guiding Principles, I VISION + VOICE at 5.

[52] *Architectural Barriers Act of 1968*, Pub. L. No. 90-480, 82 Stat. 718, 719 (codified at 42 U.S.C. §§ 4151 et seq. (2000)).

[53] *Architectural Barriers Act of 1968* at §§ 2-5.

[54] The Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 337, provides in Title II (codified at 42 U.S.C. §§ 12131–12165) that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

[55] *Tennessee v. Lane*, 541 U.S. 509 (2004). The legal question was whether the doctrine of sovereign immunity, embodied to some (contested) extent in the Eleventh Amendment to the United States Constitution, limited the power of Congress to authorize lawsuits against states for damages when the ADA was violated. In a five-to-four decision, with Justice Stevens writing for the majority, the Court upheld Congress's power to do so. Justice Souter, joined by Justice Ginsburg, concurred, explaining that courts had been in the business of perpetuating discrimination on the basis of handicap. *Id*. at 534. Chief Justice William Rehnquist, joined by Justices Kennedy and Thomas, in dissent, argued that Congress lacked the power to subject states to monetary damages for the violations. *Id.* at 538. Justices Scalia and Thomas each explained their further disagreements with the majority in separate dissents. *Id*. at 554 (Scalia, J., dissenting) and at 565 (Thomas, J., dissenting).

[56] *Tennessee v. Lane*, at 514.

[57] A HISTORY OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS: SIXTY YEARS OF SERVICE TO THE FEDERAL JUDICIARY 198 (Cathy A. McCarthy and Tara Treacy, eds., Washington, D.C.: Administrative Office of the United States Courts, 2000) [hereinafter HISTORY OF THE AO]. The bombing

of the Alfred P. Murrah Federal Building also damaged the U.S. courthouse that was located nearby, separated from it by a plaza. Id. at 199.

[58] HISTORY OF THE AO at 200.

[59] THE DESIGN EXCELLENCE PROGRAM GUIDE: BUILDING A LEGACY (Architect/Engineer Selection and Design Review) 70 (Washington, DC: U.S. General Services Administration, 2000) [hereinafter GSA DESIGN EXCELLENCE PROGRAM GUIDE]. In 2005, the Judicial Conference divided "the Committee on Security and Facilities into two committees: the Committee on Judicial Security, and the Committee on Space and Facilities[,] . . . enabling a separate committee to devote its full attention [to] judicial security." Lorraine H. Tong, Judicial Security: Responsibilities and Current Issues, Congressional Research Service, June 12, 2006 (RL33464) at 12.

[60] GSA DESIGN EXCELLENCE PROGRAM GUIDE at 70-71.

[61] See General Services Administration, Public Building Service, UNITED STATES COURTS DESIGN GUIDE (1 May 1979) [hereinafter 1979 GSA COURTS DESIGN GUIDE] and U.S. General Services Administration, Mar. 9, 1984 [hereinafter 1984 GSA COURTS DESIGN GUIDE].

[62] 1979 and 1984 GSA COURTS DESIGN GUIDES, ch. 4 at 2 (focusing on the layout of a district courtroom). While prisoners, judges, and the public had different entryways to the courtroom (id. at 3), a concept of maintaining discrete zones throughout the building was not put forth. Judges were encouraged, when possible, to have private elevators. Id., ch. 14 at 2.

[63] See also JCUS and DIRECTOR OF THE AO REPORT at 262 (Apr. 5–6, Sept. 13–14, 1973). That report had inventoried courtroom space and found that, as of 1973, the 705 courtrooms ranged in size from 600 to 4,330 square feet and that 75 percent measured 1,700 or more square feet. The following year, the number of courtrooms had grown to 714. JCUS and DIRECTOR OF THE AO REPORT at 138 (Mar. 7–8, Sept. 19–20, 1974).

[64] Those layouts for trial-level courts were twenty-eight by forty, thirty-four by forty-four, thirty-five by fifty-two, and forty by sixty feet. Those guidelines had been provided by the Judicial Conference. See JCUS Oct. 26 and 27, 1972, at 44–45. As the 1979 and 1984 Design Guides explain, the Judicial Conference had prescribed three sizes in the early 1970s, but "consultation" with both Chief Justice Warren Burger and Attorney General Griffin B. Bell "[led] to a reexamination of spatial requirements and the subsequent increase in size of the intermediate size courtroom." 1979 and 1984 GSA COURTS DESIGN GUIDES, ch. 4 at 1. Appellate courtrooms were to be from 1,500 to 2,400 square feet. Id, ch. 17 at 1 ("Circuit Courts of Appeals").

[65] See, for example, 1984 GSA COURTS DESIGN GUIDE, ch. 4 at 3 (limited-use courtrooms); ch. 4 at 7–8 (intermediate courtrooms); ch. 4 at 9–10 (standard courtrooms); ch. 4 at 11–12 (large courtrooms).

[66] 1979 GSA COURTS DESIGN GUIDE, at ch. 4 at 1.

[67] See Judicial Conference of the United States and DIRECTOR OF THE AO REPORT Mar. 12–13, June 30, and Sept. 18–19, 1986, at 53.

[68] See 1987 DIRECTOR OF THE AO REPORT at 70; HISTORY OF THE AO at 195. According to the 1988 DIRECTOR OF THE AO Report, the study "documented the need for the Judiciary to take a more aggressive role in managing its own space." Or, as the AO put it in 2000, the academy "recommended that the judiciary play a greater role in planning for and designing court facilities." HISTORY OF THE AO at 195. Thereafter the director of the AO and the administrator of the GSA entered into a "Memorandum of Understanding, establishing a planning process involving both GSA and the Judiciary, and defining relationships for funding space and facility projects." See 1988 DIRECTOR OF THE AO REPORT at 75. To provide such funding, the Judicial Conference launched a study of space standards and needs. Id. By the 1990s the AO had created a "space management information system." 1992 DIRECTOR OF THE AO REPORT at 24.

[69] HISTORY OF THE AO at 195.

[70] 1991 U.S. COURTS DESIGN GUIDE at 71.

[71] 1997 U.S. COURTS DESIGN GUIDE at 3-9.

[72] See JCUS Oct. 28–29, 1971, at 64.

[73] This rule was formulated by 1997 as Judicial Conference policy: "With regard to district judges, one courtroom should be provided for each active judge. In addition, with regard to senior judges who do not draw caseloads requiring substantial use of courtrooms and to visiting judges, judicial councils should utilize the following factors as well as other appropriate factors in evaluating the number of courtrooms at a facility necessary to permit them to discharge their responsibilities." JCUS Mar. 11, 1997, at 17.

[74] SPACE AND FACILITIES COMMITTEE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, U.S. COURTS DESIGN GUIDE, 2007 ed. [hereinafter 2007 U.S. COURTS DESIGN GUIDE] at 2-8.

[75] JCUS Mar. 11, 1997, at 17. See also 2007 U.S. COURTS DESIGN GUIDE at 2-8.

[76] See *Judicial Conference Adopts Courtroom Sharing Policy as Latest Cost-Saver*, 40 THIRD BRANCH 1 (Sept. 2008).

[77] See, e.g., *Courthouse Construction: Improved 5-Year Plan Could Promote More Informed Decisionmaking, U.S. Government General Accounting Office*, GAO/GGD-97-27 (Dec. 1996), available at http://www.gao.gov/archive/1997/gg97027.pdf; Courtroom Construction: Better Courtroom Use Data Could Enhance Facility Planning and Decisionmaking 1997). These materials have all come before this Subcommittee in a series of hearings. See, e.g., *Future of the Federal Courthouse Construction Program: Results of a Government Accountability Office Study on the Judiciary's Rental Obligations; Hearing before the Subcomm. on Economic Development, Public Buildings, and Emergency Management of the H. Comm. on Transportation and Infrastructure*, 109th Cong. 2 (2006).

[78] See Administrative Office of the U.S. Courts, Revision of List of Statutes Enlarging Federal Court Workload (Sept. 18, 1998 memorandum). Tracking of such statutes began in the 1970s and was updated periodically.

[79] Data on U.S. Court of Appeals, Number of Judgeships and Appellate Filings, Selected Years, and U.S. District Courts, Number of Judgeships and Cases Filed, Selected Years, 1998 (Administrative Office of the United States Courts, memorandum). The number of pending cases was higher, reported at about 54,559. See David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 SOUTHERN CALIFORNIA L. REV. 65, 98, table 4 (1981) (hereinafter Clark, *Adjudication to Administration*). Clark obtained some data related to the era from 1876 to 1900 from 1 American Law Institute, A STUDY OF THE BUSINESS OF THE FEDERAL COURTS 107 (1934).

[80] See Marc Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts" 1 J. Empirical Legal Stud. 459 (2004); Judith Resnik, Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts, 1 J. EMPIRICAL LEGAL STUD. 783 (2004) (hereinafter Resnik, *Declining Trial Rates*). For a discussion of changes to Rule 16 of the *Federal Rules of Civil Procedure*, governing pretrial procedures, see Judith Resnik, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III, 113 HARV. L. REV. 924, 934-43 (2000); Judith Resnik, Managerial Judges, 96 HARV. L. REV. 376, 378-80 (1982).

[81] Judicial Conference of the United States, Committee on Long Range Planning, Long Range Plan for the Federal Courts (1995).

[82] Administrative Office of the U.S. Courts (Implementation Status Reported by Committees of the Judicial Conference of the United States) *Implementation of the Long Range Plan for the Federal Courts, Status Report* (April 2008) at I-18.

[83] Data come from the Annual Reports of the Director: Judicial Business of the United States Courts at Tables C, D, and F, available at http://www.uscourts.gov/judbususc/judbus.html. See also Federal Judiciary webpage: Federal Court Management Statistics, http://www.uscourts.gov/fcmstat/index.html, and Judicial Facts and Figures, http://www.uscourts.gov/judicialfactsfigures/2008.html.

[84] See 2009 Annual Report of the Director: Judicial Business of the United States Courts at Table F, available online at http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc= /uscourts/Statistics/JudicialBusiness/2009/appendices/F00Sep09.pdf.

[85] See Marcia Coyle, *Immigration Judges Seek Article I Status*, NATIONAL LAW J., Aug 10, 2009, at 13. See also Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

[86] See, e.g., *Bensilimane v. Gonzales*, 430 F.3d 828, 833 (7th Cir. 2005); Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEOR. J. LEGAL ETHICS 3 (2008).

[87] See Margaret H. Marshall, At the Tipping Point: State Courts and the Balance of Power, The Benjamin N. Cardozo Lecture, Bar Association of the City of New York, Nov. 10, 2009.

[88] See William Glaberson, *Top New York Judge Urges Greater Legal Rights for Poor*, N.Y. TIMES, May 4, 2010, at A21; and also AMERICAN BAR ASSOCIATION, Task Force on Access to Civil Justice, Report to House of Delegates (Approved by H. of Delegates August 7, 2006), available online at http://www.abanet.org?legalservices/sclaid/downloads/06A112A.pdf.

[89] See, e.g., *Ashcroft v. Iqbal*, 556 U.S. __, 126 S.Ct. 1937 (2009). See generally Stephen Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109 (2009).

[90] See, e.g., *Alternative Dispute Resolution Act of 1998*, Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. § 651 (2006)).

[91] See D. Brock Hornby, *The Business of the U.S. District Courts*, 10 GREEN BAG 2d 453, 462 (2007). He explained that the work had shifted to offices where judges used "a computer and court administrative staff to monitor the entire caseload and individual case progress; conferring with lawyers (often by telephone or videoconference) in individual cases to set dates or limits; in that same office at a computer, poring over a particular lawsuit's facts, submitted electronically as affidavits, documents, depositions, and interrogatory answers; structuring and organizing those facts, rejecting some or many of them; finally, researching the law (at the computer, not a library) and writing (at the computer) explanations of the law for parties and lawyers in light of the sorted facts." Id. See also Patrick Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 S.M.U L. REV. 1405 (2002).

[92] See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

[93] See Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2004) (hereinafter Resnik, *Procedure as Contract*).

[94] Those agencies were the Social Security Administration, the Veterans Administration, the Equal Employment Opportunities Commission, and the Immigration Court. Details of these data are in Resnik, *Declining Trial Rates* at 798-811.

[95] See, e.g., Verizon Wireless, "Customer Agreement," online: http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp. For such an agreement, see Judith Resnik, *Whither and Whether Adjudication?* 86 B.U. L. REV. 1101, 1134-39 (2006). Similar examples can be found on the websites of many service providers.

[96] See e.g., *Wilko v. Swan*, 346 U.S. 427, at 438 (1953).

[97] See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

[98] See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, at 640 (1985); and *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, at 218 (1985). See generally Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. DISP. RESOL. 211, 246-53 (1995). Discovery on costs may be permissible, if the opponent to arbitration can persuade the court that such costs undercut the adequacy of the alternative. See *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, at 89-92 (2000).

[99] See Circuit *City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

[100] *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456 (2009).

[101] See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Preston v. Ferrer*, 128 S. Ct. 978 (2008)

[102] See *Stolt-Nielsen S.A., et al. v. AnimalFeeds International Corp.* (08-1198), 130 S. Ct. 1758, (2010).

[103] *21st Century Department of Justice Appropriations Act*, Nov. 2, 2002, 70 Stat. 1125, (codified at 15 U.S.C. §§ 1221 et seq).

[104] *Food Conservation and Energy Act of 2008*, Pub. L. 110-246, § 1105, 122 Stat. 1651, 2119 (amending 7 U.S.C. § 197(c)).

[105] *Arbitration Fairness Act of 2009*, H.R. 1020, 111th Cong. (2009).

[106]See Resnik, *Procedure as Contract* at 594.

[107] See Jeremy Bentham, "Rationale of Judicial Evidence" (1827), in John Bowring, ed., *The Works of Jeremy Bentham*, vol. VI (Edinburgh: William Tait, 1843), bk. II, ch. X, 351. The Bentham Project, of the University College London, is in the midst of reviewing thousands of sheets of Bentham's original writings and republishing a full set of his works.

[108] See generally JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY, trans. by William Rehg (1996); Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in Craig Calhoun, ed., HABERMAS AND THE PUBLIC SPHERE 109 (1992).

[109] See, e.g., *Sunshine in Litigation Act of 2009* (S. 537); *Sunshine in the Courtroom Act of 2005* (S. 829) 109th Cong. (March 30, 2006). See also *Sunshine in Litigation Act*, Fla. Stat. Ann. § 69.081 (West 2004).