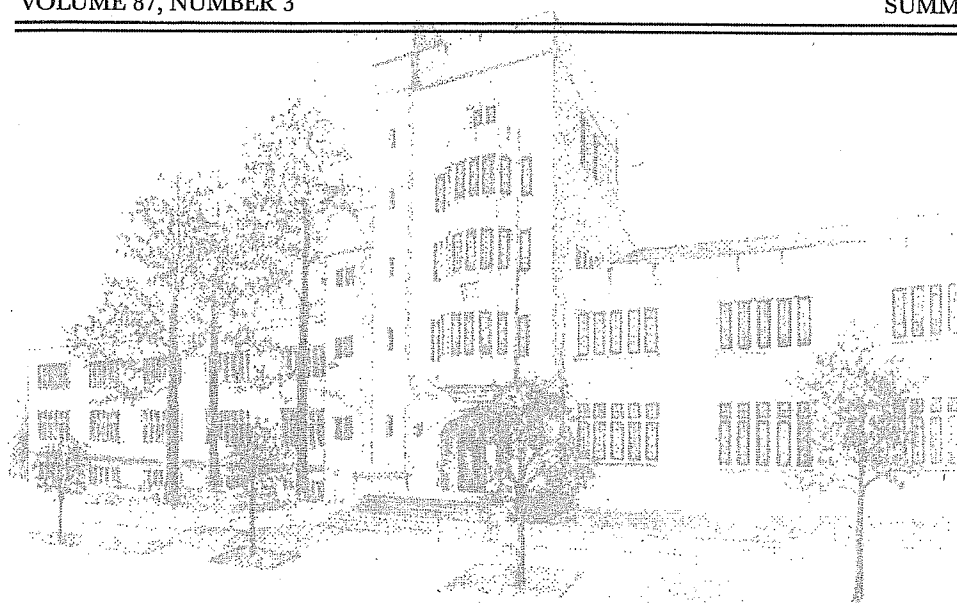

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BUILDING THE FEDERAL JUDICIARY
(LITERALLY AND LEGALLY):
THE MONUMENTS OF CHIEF JUSTICES
TAFT, WARREN, AND REHNQUIST

Judith Resnik



INDIANA UNIVERSITY

MAURER SCHOOL OF LAW
Bloomington.

The Addison C. Harris Lecture

Building the Federal Judiciary (Literally and Legally): The Monuments of Chief Justices Taft, Warren, and Rehnquist[†]

JUDITH RESNIK^{*}

ABSTRACT

The "federal courts" took on their now familiar contours over the course of the twentieth century. Three chief justices—William Howard Taft, Earl Warren, and William Rehnquist—played pivotal roles in shaping the institutional, jurisprudential, and physical premises. Taft is well known for promoting a building to house the U.S. Supreme Court and for launching the administrative infrastructure that came to govern the federal courts. Earl Warren's name has become the shorthand for a jurisprudential shift from state toward federal authority; the Warren Court offered an expansive understanding of the role federal courts could play in enabling access for a host of new claimants seeking an array of rights.

William Rehnquist is identified with limiting both rights and access in favor of state court and of executive authority. He has been less well appreciated for his role in changing the institutional capacity of the federal courts. During the Rehnquist era, the budget of the federal courts doubled as staff and facilities expanded, in part by way of the largest federal building program since the New Deal.

Over the course of the twentieth century and under the leadership of all three chief justices, the judiciary gained an increasingly robust corporate persona. Judges shifted their sights from "court quarters" to custom-designed courthouses

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^{*} Arthur Liman Professor of Law, Yale Law School. All rights reserved. Judith Resnik. This Lecture built on and is related to the book *Representing Justice: Inventions, Controversies, and Rights in City-States and Democratic Courtrooms* (2011), co-authored with Dennis Curtis. Thanks are due to Dean Lauren Robel, Dawn Johnsen, and Charlie Geyh, whose hospitality prompted this Lecture, as well as an earlier conference, *Congressional Power, in the Shadow of the Rehnquist Court: Strategies for the Future*. My Article from that earlier conference can be found at Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 (2003).

I owe a great debt to remarkable research assistants. Special thanks to Allison Tait, Jason Glick, Ruth Anne French-Hodson, and to Brian Holbrook, Ester Murdukhayeva, and Charles Tyler, to undergraduates Katherine Haas, Rose Malloy, and Dale Lund, to recently graduated students Adam Grogg and Elliot Morrison, and to Marin Levy who did intensive and thoughtful historical research into the many documents related to federal building projects.

I should add that I have been a participant in some activities about which I write. In addition to being an occasional litigator in the federal courts, I have testified before both Congress and committees of the Judicial Conference on issues related to topics addressed here. See, e.g., *Courtroom Use: Access to Justice, Effective Judicial Administration, and Courtroom Security: Hearing Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. (2010) [hereinafter *2010 Courtroom Use: Access to Justice*] (statement of Judith Resnik).

and, during Chief Justice Rehnquist's tenure, obtained billions of dollars to fund new construction. The Administrative Office of the United States Courts came into close contact with two other federal bureaucracies—the General Services Administration and the National Endowment for the Humanities—and developed a program of construction that made massive federal courthouses signature buildings of the federal government.

Changes of the last decades, however, interrupt the narrative of federal judicial growth spiraling ever upward. Flattening rates of filings, vanishing trials, and limitations imposed both by Congress and the Supreme Court on federal court authority make fragile both the monumental aspirations for federal adjudication and the continuing investment of resources in federal judges and in their courts. The cultural capital of the federal courts overshadows that of state and administrative adjudication, but, as federal jurisprudence continues to constrict access, the state courts—with jurists pressing for “Civil Gideon”—are advancing the very agendas that the Warren Court once made “federal” imperatives.

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I. TRANSFORMING THE JURISDICTIONAL AND JURISPRUDENTIAL LANDSCAPE

In 1850, the federal government owned about fifty buildings. None were labeled courthouses. Today, several hundred federal courthouses dot the landscape of the United States. Their existence marks both the transformation of the federal government and the commitment of all three branches to the importance of adjudication in this polity.

These many solid (and often stone) structures give an impression of longevity that masks their complex origins and relatively short history, just as the Ionic columns of the U.S. Supreme Court (figure 1) suggest a building style far removed from that in vogue in 1935 when its doors opened. The grandeur of that building forecast the role that the Court it sheltered has come to play in American life.

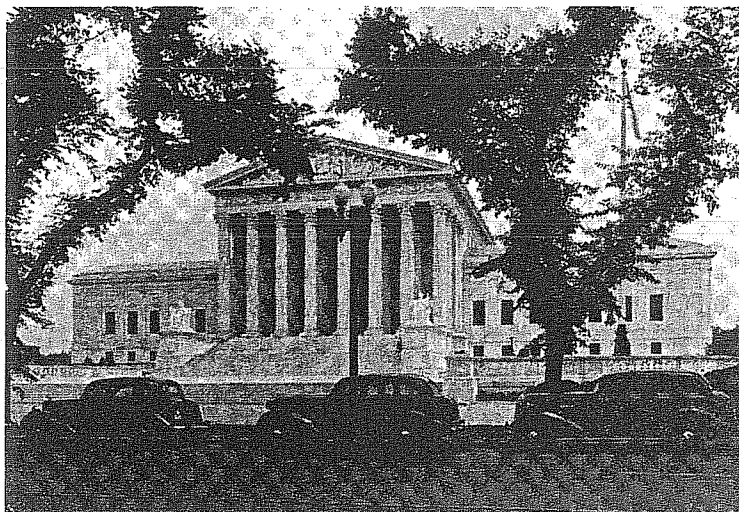


Figure 1: United States Supreme Court, Washington, D.C. Architect: Cass Gilbert, 1935.

Archival image from 1935 reproduced courtesy of the National Archives and Records Administration.

At the time, the structures for the lower courts, like their ambitions, were much more modest. Through the 1960s, federal judges were focused on obtaining what their reports called “court quarters,”¹ rather than on securing financing for the

1. See, e.g., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 18 (Mar. 1961); REPORT OF THE CONFERENCE OF SENIOR CIRCUIT JUDGES 18 (Sept. 1945); see *infra* note 203 and accompanying text.

The Judicial Conference and its predecessor, the Conference of Senior Circuit Judges, produced reports either yearly or biannually. These reports were first published (in 1924) by a law review, then in the Annual Reports of the Attorney General, and

architecturally important buildings that have since come to mark their housing stock. In the 1980s, however, when contemplating the rise in filings, the judiciary's leadership sought relief for what it termed a "housing crisis" and argued for more and better spaces for its expanding workforce and workload.²

By then, "the federal courts" had become a vivid part of legal and popular culture. The pervasive assumption was that an unending spiral of growth in the federal caseload needed to be matched by larger footprints for its buildings. That belief was grounded in the century's history. From 1901 to 2001, as shown in the chart entitled *Article III Authorized Judgeships: District, Circuit, and Supreme Courts, 1901, 1950, 2001* (figure 2), authorized judgeships grew from about 100 to more than 800 life-tenured positions.

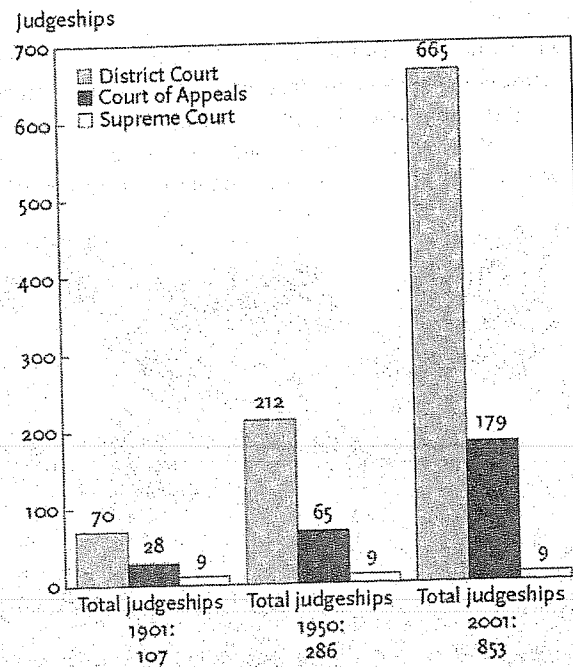


Figure 2: Article III Authorized Judgeships: District, Circuit, and Supreme Courts, 1901, 1950, 2001.

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subsequently as independent documents that, after 1939, were sometimes bound with the Annual Reports of the Administrative Office of the United States Courts, which came into being in 1939. The titles of the Conference reports vary somewhat; in some years the report is denoted the "Annual Report of the Proceedings of the Judicial Conference of the United States," and in other years, the "Report of the Proceedings of the Judicial Conference of the United States." Further, the name of the Conference changed from the Conference of Senior Circuit Judges to the Judicial Conference of the United States. For brevity, I will refer to each Judicial Conference report by the title JUDICIAL CONFERENCE REPORT, the relevant page, and the month and year of publication.

2. See DIR. OF THE ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT 66 (1989); JUDICIAL CONFERENCE REPORT 82-83 (Sept. 1989). Because these Administrative Office reports are also annual publications and also have some name variation, I will cite each as AO ANN. REP., followed by the relevant pages and year of publication.

As detailed in the next chart, *Civil and Criminal Filings in United States District Courts: 1901, 1950, 2001* (figure 3),³ caseloads followed a similar upward slope, as they climbed from the 1901 figure of under 30,000 civil and criminal cases to more than 300,000 in 2001.

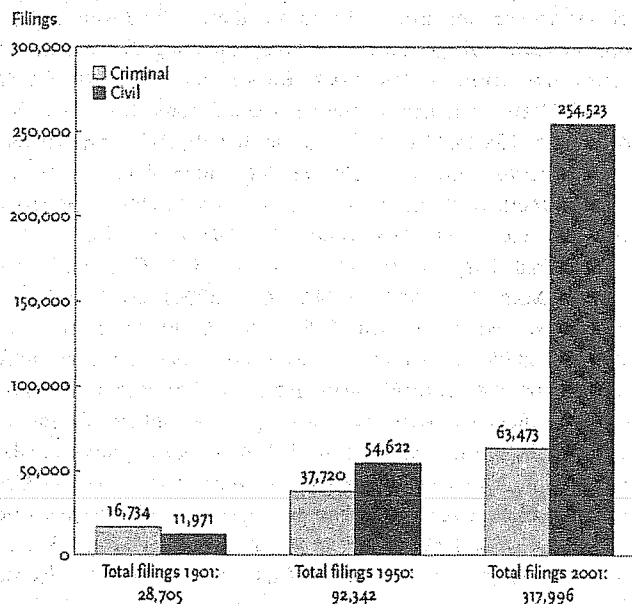


Figure 3: Civil and Criminal Filings in United States District Courts: 1901, 1950, 2001.

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Thus, in 1995, the first “Long Range Plan” produced by the judiciary’s policy-making body, the Judicial Conference of the United States, was preoccupied with how to handle the presumably ever-spiraling upward demands.⁴ That report predicted that by 2010, civil and criminal filings would exceed 600,000.⁵

During the last several years, however, filings have leveled off. In 2010 (as in 1995), some 325,000 to 350,000 civil and criminal cases were begun yearly, outstripped as they have been in the past by bankruptcy petitions that, by 2010, numbered almost 1.5 million. The decade-plus trend is captured by comparing two charts. Figure 4, *Federal Court Filings, 1950–2010*, sketches the last sixty years,

3. These data are derived from caseload statistics compiled by the Office of Judges Program, Statistics Division, Administrative Office of the United States Courts. *Federal Judicial Caseload Statistics*, U.S. COURTS, <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx>.

4. See JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS (1995) [hereinafter LONG RANGE PLAN], available at <http://www.uscourts.gov/uscourts/FederalCourts/Publications/FederalCourtsLongRangePlan.pdf> (republished at 166 F.R.D. 49 (1996)). The Judicial Conference there made more than ninety recommendations to Congress. For additional discussion, see *infra* notes 511–16 and accompanying text.

5. LONG RANGE PLAN, *supra* note 4, at 15 tbl.3.

and figure 5, *Federal Court Filings, 1995–2010*, provides a snapshot of the more recent time period.⁶ To translate the data into percentage increases, civil and

6. Comparisons between the projected filings and cases filed were made when the AO reviewed the implementation of the judiciary's future planning. See ADMIN. OFFICE OF THE U.S. COURTS, IMPLEMENTATION OF THE LONG RANGE PLAN FOR THE FEDERAL COURTS: STATUS REPORT I-18 (2008). The data in figures 4 and 5 come from various AO volumes, including AO ANN. REP. 138 tbl.C-1 (1950); *id.* at 165 tbl.D-1 (criminal data); AO ANN. REP. 217 tbl.13 (1980) (civil data); *id.* at 269 tbl.40 (criminal data); JUDICIAL CONFERENCE REPORT 4 (Mar. 1986) (both civil and criminal data); ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 1995, at 33 tbl.C-1 (1995) (civil data); *id.* at 57 tbl.D-1 (criminal data); ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2000, at 34 tbl.C-1 (2000) (civil data); *id.* at 58 tbl.D-1 (criminal data); ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2005, at 39 tbl.C-1 (2005) (civil data); *id.* at 63 tbl.D-1 (criminal data); ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2010, at 43 tbl.C-1 (2010) (civil data); *id.* at 68 tbl.D-1 (criminal data). Slight variations on the numbers reported can be identified by comparing these numbers with those found at *Federal Court Management Statistics (2011)*, U.S. COURTS, <http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx>, and at ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES: MULTI-YEAR STATISTICAL COMPILATIONS ON THE FEDERAL JUDICIARY'S CASELOAD THROUGH FISCAL YEAR 2008 (2009), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2008/alljudicialfactsfigures.pdf>.

Focusing on the years between 2001 and 2009, civil and criminal filings averaged 328,404. *Federal Judicial Caseload Statistics*, U.S. COURTS, <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx> (follow "Federal Judicial Caseload Statistics" for any year; then follow "Judicial Caseload Indicators" hyperlink). The high was 349,076 filings in 2005, and the low was 312,738 filings in 2006. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2006, at 6 (2006) [hereinafter *FEDERAL JUDICIAL CASELOAD STATISTICS (2006)*], available at <http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2006/front/mar06indicators.pdf>; ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2005, at 6 (2005), available at <http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2005/front/mar05toc.pdf>. The average for bankruptcy filings over the same period was 1,362,728; the year-to-year figures were more volatile. *Federal Judicial Caseload Statistics*, U.S. COURTS, <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx> (follow "Federal Judicial Caseload Statistics" for any year; then follow "Judicial Caseload Indicators" hyperlink). The high was 1,794,795 bankruptcy filings in 2006, a reporting period which included the five months between the time when President Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, and the time when the law went into effect. *FEDERAL JUDICIAL CASELOAD STATISTICS (2006)*, *supra*, at 6. The low was 695,575 bankruptcy filings in 2007. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2007, at 6 (2007), available at <http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2007/front/IndicatorsMar07.pdf>.

Filings in criminal cases increased in 2010 to an "all-time high" of 78,000. *Judiciary Makes Appeal for Fiscal 2011 Funding*, THIRD BRANCH, Nov. 2010, at 2, 3. Bankruptcy

criminal case filings grew about 10% from 1950 to 1965, about 95% from 1965 to 1980, about 50% in the interval from 1980 to 1995, and, since then, the growth has slackened off—to under 25% from 1995 to 2010.⁷ Further, while civil filings represented the major source of growth during the big spurt years of the 1960s to the 1980s, criminal filings constitute the primary basis for the more recent increases.⁸

filings also increased—a “staggering 63 percent since June 2008.” *Id.*

7. To be specific, from 1950 to 1965, filings in federal courts increased by 9.39% (23.9% increase in civil filings, and 11.63% decrease in criminal filings). From 1965 to 1980, total filings increased by 95.73% (149.4% increase in civil filings, and 13.24% decrease in criminal filings). From 1980 to 1995, they increased by 48.39% (47.13% increase in civil filings, and 55.78% increase in criminal filings). And from 1995 to 2010, they increased by 22.57% (13.68% increase in civil filings, and 71.55% increase in criminal filings). See ADMIN. OFFICE OF THE U.S. COURTS, 2010 FEDERAL JUDICIAL WORKLOAD STATISTICS tbl.F-2 (2010) [hereinafter FED. WORKLOAD STATS. (2010)]; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 135 tbl.C-1, 195 tbl.D-1 (1995); AO ANN. REP. 370 tbl.C-1, 415 tbl.D-1 (1980); AO ANN. REP. 174 tbl.C-1, 213 tbl.D-1 (1965); AO ANN. REP. 138 tbl.C-1, 165 tbl.D-1 (1950).

8. See FED. WORKLOAD STATS. (2010), *supra* note 7; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS (1995); AO ANN. REP. (1980); JUDICIAL CONFERENCE REPORT 46 (Sept. 1965); JUDICIAL CONFERENCE REPORT 3–5 (Sept. 1950). As noted, civil filings rose about 14%, while criminal filings grew about 72%. The map of bankruptcy filings is somewhat more complex because of the changing contours of the bankruptcy statute that has varied eligibility rules and created new judicial officers—bankruptcy judges. From 1950 to 1965, bankruptcy filings grew 440%, from 33,392 to 180,323. From 1965 to 1980, bankruptcy filings increased about 162%, reaching 472,400. In the following two fifteen-year periods, from 1980 to 1995 and from 1995 to 2010, filings increased 82% and 83%, respectively. As of 2010, filings were 1,572,597.

By way of context, state court filings rose about 39% from the 1980s to the 1990s; rose about 9% from the 1990s to 2000; and, in the interval from 2000–2008, rose more than 35%. See NAT’L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 45 tbl.1 (2010) [hereinafter STATE CT. CASELOAD STATS. (2008)]; NAT’L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS, 2001, at 138 tbl.7 (2001) [hereinafter STATE CT. CASELOAD STATS. (2001)]; NAT’L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1990, at 108 tbl.7 (1992) [hereinafter STATE CT. CASELOAD STATS. (1990)]; NAT’L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1980, at 55 tbl.13 (1984) [hereinafter STATE CT. CASELOAD STATS. (1980)]. The numbers include domestic cases, and in the most recent interval, criminal filings rose at twice the rate of civil filings.

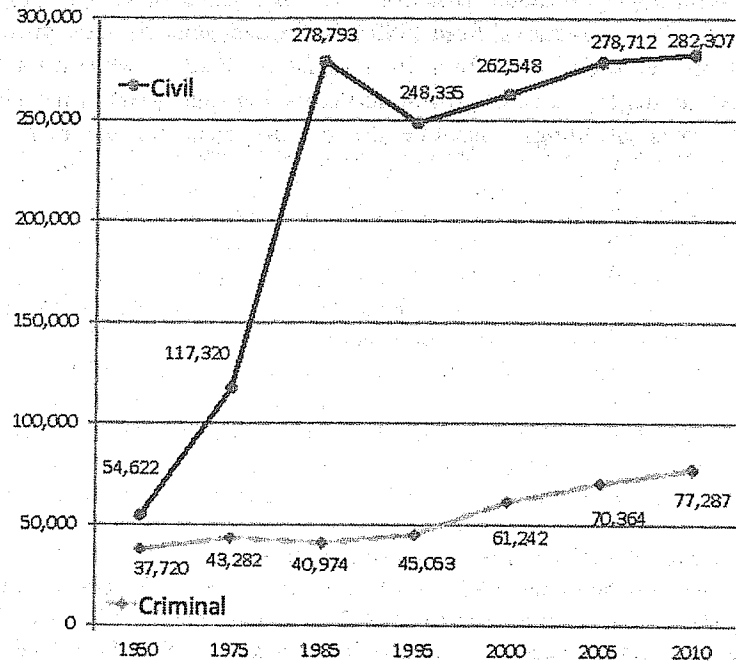


Figure 4: Federal Court Filings, 1950–2010.

Copyright © 2010 Judith Resnik. Source: Administrative Office of the U.S. Courts.

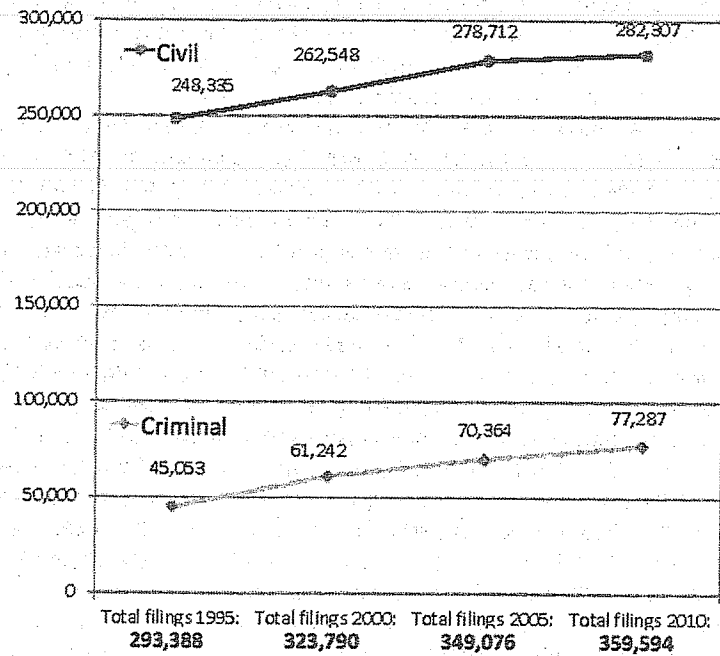


Figure 5: Federal Court Filings, 1995–2010.

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Various explanations can be proffered for this relative flattening, such as shifts in doctrine and statutes that have narrowed access to the federal courts, the expense of lawyers, and the elaboration of alternative dispute resolution methods, as well as a host of other variables that range from the role played by regulatory oversight and availability of insurance to the ups and downs of the economy. Yet the slower rise in the demand curve interrupts a narrative of ever-expanding federal court activity.

Moreover, during the last fifteen years when the increase in filing rates slowed, a key investor in the federal courts—the U.S. Congress—has imposed new limits on the judiciary’s statutory authority.⁹ Further, even as the judiciary has been relatively successful in maintaining its budgetary allotments,¹⁰ members of Congress have questioned the need for new courtrooms and proposed cutting back construction funds.¹¹ Congress has also been reluctant to add judgeships requested

9. See, e.g., Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2636 (codified as amended at 28 U.S.C. § 2241 (2006)), *invalidated in part by* Boumediene v. Bush, 553 U.S. 723 (2008); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 356, 110 Stat. 3009-546, 3009-644 (codified in scattered sections of 8 U.S.C.); Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, § 804, 110 Stat. 1321, 1321-073 (1996) (codified as amended at 28 U.S.C. § 1915 (2006)).

10. Support for operating budgets in both fiscal year 2009 and in fiscal year 2010 was 96% and 98% of the amount sought, respectively. See *Update: Fiscal Year 2009 and 2010 Budgets*, THIRD BRANCH, Apr. 2009, at 4, 4; *Judiciary Makes Case for Fiscal Year 2009 Funding*, U.S. COURTS (Mar. 12, 2008), http://www.uscourts.gov/News/NewsView/08-03-12/Judiciary_Makes_Case_for_Fiscal_Year_2009_Funding.aspx; *Judiciary To Get \$6.9 Billion in FY 2010 Appropriations*, U.S. COURTS (Dec. 15, 2009), http://www.uscourts.gov/News/NewsView/09-12-15/Judiciary_To_Get_6_9_Billion_In_FY_2010_Appropriations.aspx. The 2011 appropriations of \$6.91 billion was 94% of what the federal judiciary had requested. See *Federal Judiciary Funded to End of Fiscal Year*, THIRD BRANCH, Apr. 2011, at 1, 1; *Expanding Caseload Fuels Judiciary Request for Resources in 2011*, U.S. COURTS (Mar. 18, 2010), http://www.uscourts.gov/News/NewsView/10-03-18/Expanding_Caseload_Fuels_Judiciary_Request_for_Resources_in_2011.aspx. Further, the \$6.91 billion for 2011 was “about 1 percent above a FY 2010 hard freeze.” *Federal Judiciary Funded to End of Fiscal Year*, *supra*, at 1. Included was \$82 million for new construction and \$280 million for repairs and renovation. *Id.* at 3. For fiscal year 2012, the judiciary sought \$7.3 billion in appropriations, an increase of \$299 million over the 2011 budget. *Judiciary Warns of Impact of Deep Cuts in 2012*, THIRD BRANCH, Apr. 2011, at 1, 2. Included were salaries, staff, defender services, court security, and rent for space. *Id.*

11. See, e.g., *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 Subcomm. on Econ. Dev., Pub. Bldgs., and Emergency Mgmt. of the H. Comm. on Transp. and Infrastructure*, 111th Cong. (2010) [hereinafter *2010 Eliminating Waste and Managing Space in Fed. Courthouses*]; *Courtroom Use: Access to Justice, Effective Judicial Administration, and Courtroom Security: Hearing Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. (2010) [hereinafter *2010 Courtroom Use: Access to Justice*].

and has refused to provide salaries for judges to keep pace with inflation. The fiscal constraints of 2011 impose additional pressures for cutbacks.¹²

In this Harris Lecture, I reflect on the edifice known as the federal courts, whose shape and import have changed radically over the past century. The federal courts loom large even as state systems receive the vast bulk of filings and address a wider array of legal questions. State courts receive almost 100 million cases, including traffic filings.¹³ *State Trial Court Filings, 1976–2008* (figure 6) reflects that volume, as does *Comparing the Volume of Filings: State and Federal Courts, 2001* (figure 7),¹⁴ which offers a one-year snapshot to put the federal civil, criminal, and bankruptcy filings in the context of the state court workload.

State Court Filings, 1976–2008

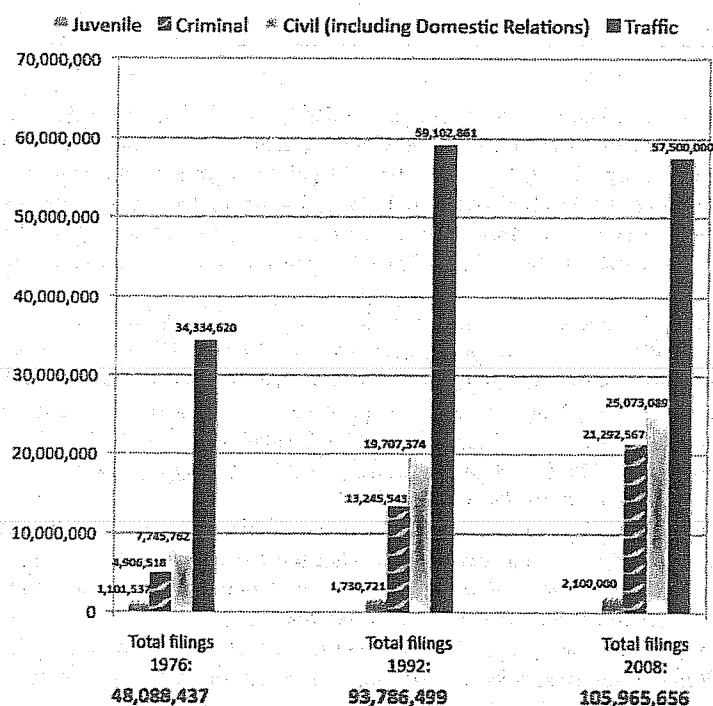


Figure 6: State Trial Court Filings, 1976–2008.

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12. See, e.g., *Hard Choices and Difficult Issues: The Judiciary Considers Its Financial Future*, THIRD BRANCH, Oct. 2011, at 1.

13. STATE CT. CASELOAD STATS. (2008), *supra* note 8, at 45 tbl.1, 54 tbl.3.

14. Thanks are owed to Ruth Anne French-Hodson and Jason Glick for obtaining and mapping the data and to David Rottman and the National Center for State Courts for providing information and direction. As figure 6, which looks at a time frame beginning in 1976, reflects, state court data collection does not offer the ability to have national figures on filings throughout the twentieth century, and the obvious caveats apply to the materials thereafter—that collection and county vary from jurisdiction to jurisdiction.

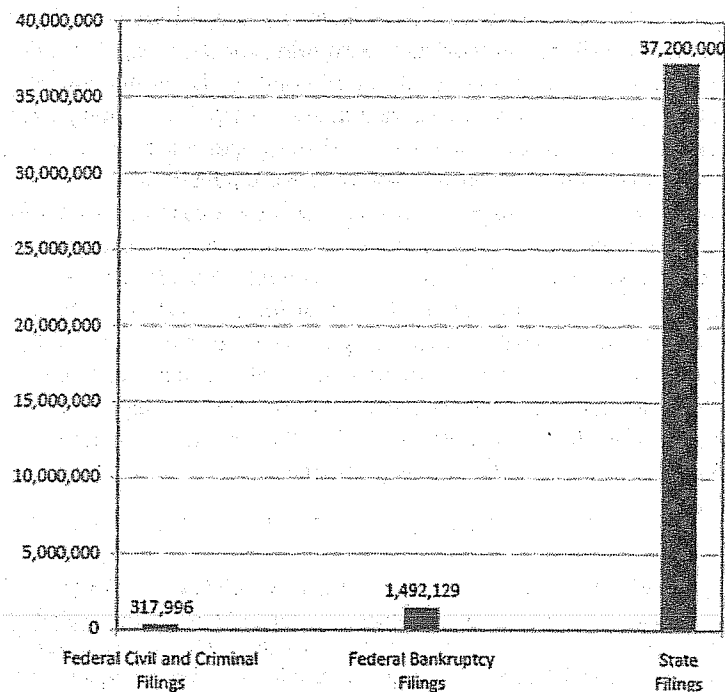


Figure 7: Comparing the Volume of Filings: State and Federal Courts, 2001.

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Yet the federal courts, with their relatively modest caseloads, dominate legal law and culture. As I will detail below, federal courthouses, like the hundreds of statutes on federal court jurisdiction, are twentieth-century artifacts of interactions among the judiciary's leadership, the legislative and administrative branches, and the private sector. Thus, my discussion underscores the degree of interbranch agreement and of coventuring that the edifice of the federal courts reflects.¹⁵ Three chief justices of the twentieth century—William Howard Taft, Earl Warren, and William Rehnquist—were pivotal in transforming the landscape (literal and figurative) of the federal courts. During their tenures, new doctrines, jurisdictional provisions, infrastructures, procedural practices, and physical spaces reshaped the federal courts.¹⁶

Chief Justice Taft, who had served as the country's president, has long been appreciated within the legal academy for his administrative vision—memorialized

15. In contrast, scholarship is often focused on the conflicts among the branches. *See, e.g.,* CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM* (2006).

16. Several studies of the office of the Chief Justice address its holders—often with a focus on the role in relationship to the other justices and the decisions rendered by the Court. *See generally* Joel K. Goldstein, *Leading the Court: Studies in Influence as Chief Justice*, 40 STETSON L. REV. 717 (2011).

in his restructuring of the Supreme Court's docket, his orchestrating of the creation of a conference of judges (with the chief justice as its head) as a policy voice for the branch, and his insistent promotion of a building for the Court.¹⁷ Further, while attentive to state governance and deeply committed to the protection of property rights, the Taft Court's jurisprudence accelerated the twentieth century's tilt toward national control, as the Court took upon itself the important role of adjusting the distribution of power between state and federal governments.¹⁸

Earl Warren is the chief justice associated with the expansion of access to the federal courts and with the elaboration of individual rights through (inter alia) *Brown v. Board of Education*¹⁹ (ordering school desegregation), *Gideon v. Wainwright*²⁰ (requiring the provision of counsel for state felony defendants), and *Fay v. Noia*²¹ (permitting federal habeas corpus review of state court judgments).²² These pillars of the Warren Court's jurisprudence obliged states and their courts to enforce federal access and equality norms—thus constraining state power and putting what in the 1970s came to be called “federalism” concerns second to federal commitments to individual rights protection.²³

17. See generally Robert C. Post, *Mr. Taft Becomes Chief Justice*, 76 U. CIN. L. REV. 761 (2008) [hereinafter Post, *Mr. Taft*]; Kenneth W. Starr, *William Howard Taft: The Chief Justice as Judicial Architect*, 60 U. CIN. L. REV. 963 (1992). The “conventional image” of Taft is “a stubborn defender of the status quo, champion of property rights, apologist for privilege, [and] inveterate critic of social democracy.” ALPHEUS THOMAS MASON, *WILLIAM HOWARD TAFT: CHIEF JUSTICE* 13 (1964). Mason linked the “dualism” of Taft as court reformer and as conservative to Taft's view that courts could be instrumental in staving off criticism of the social order. Were courts more efficient, they could meet “legitimate demands for evenhanded justice” as they also could protect private property and “help disarm its most dangerous enemies—socialists, communists, and progressives.” *Id.* at 13–14. Taft's interest in judicial reform prompted him to decline appointment to be an associate justice, for he wanted to preside as the Court's chief. *Id.* at 17.

18. See Robert Post, *Federalism in the Taft Court Era: Can It Be “Revived”?*, 51 DUKE L.J. 1513 (2002) [hereinafter Post, *Federalism in the Taft Court Era*]. Mason also focused on the ways in which Taft's reading of the Commerce Clause provided the foundations for federal regulatory authority to later decades. MASON, *supra* note 17, at 16.

19. *Brown v. Board of Education*, 347 U.S. 483 (1954).

20. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

21. *Fay v. Noia*, 372 U.S. 391 (1963).

22. This list is far from complete. See generally EARL WARREN AND THE WARREN COURT: THE LEGACY IN AMERICAN AND FOREIGN LAW (Harry N. Schreiber ed., 2007); David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845 (2007). William Brennan is recognized as central (“Warren's intellectual chief-of-staff”) to contributions associated with Warren. Dennis J. Hutchinson, *Hail to the Chief: Earl Warren and the Supreme Court*, 81 MICH. L. REV. 922, 928–29 (1983). Some of Warren's critics disagree with an assessment of his impact. See, e.g., Philip B. Kurland, *Earl Warren, The “Warren Court,” and the Warren Myths*, 67 MICH. L. REV. 353 (1968). Kurland argues that “no evidence” supported Warren's influence beyond the vote “conferred upon him,” and that rather than making the Court, the Court “formed him.” *Id.* at 354.

23. The term “federalism” did not enter the discourse in federal court decisions until 1939, and was then used to describe a political system rather than a justification for constitutional interpretation until the 1970s. See, e.g., *Hale v. Bimco Trading, Inc.*, 306 U.S. 375, 378 (1939). A central example of the shift to federalism serving as a rationale for

William Rehnquist, likewise understood as a powerful chief justice, is credited with smoothly running the Supreme Court.²⁴ Rehnquist's jurisprudence, favoring state court authority and private ordering, turned the Court away from many of the Warren-era precedents.²⁵ Rehnquist Court decisions, "deregulating the states,"²⁶ limited federal remedial authority.²⁷ William Rehnquist is thus recognized, in the words of Linda Greenhouse, as the "Architect of [the] Conservative Court",²⁸ under his leadership, the Court reduced the jurisdictional footprint of the federal courts. That shift could be understood either to have properly reinstalled an earlier vision of limited authority or to undermine what Norman Spaulding has termed the "countermonuments" of the post-Civil War Reconstruction amendments that insisted on national implementation of equality norms.²⁹

Rehnquist was not only a doctrinal "architect" but also an institution builder who, working with Ralph Mecham, the Director of the Administrative Office of the United States Courts (AO),³⁰ and the group of judges selected for its Executive

ceding authority to states is Justice Black's reliance on the phrase "Our Federalism" that, when coupled with equity concerns, required federal courts not to enjoin state court criminal proceedings absent extraordinary circumstances. *Younger v. Harris*, 401 U.S. 37, 44 (1971). See generally Judith Resnik, *What's Federalism For?*, in *THE CONSTITUTION IN 2020*, at 269 (Jack M. Balkin & Reva B. Siegel eds., 2009); Judith Resnik, *Federalism(s), Feminism, Families, and the Constitution*, in *WOMEN AND THE UNITED STATES CONSTITUTION: HISTORY, INTERPRETATION, AND PRACTICE* 127 (Sybil A. Schwarzenbach & Patricia Smith eds., 2003).

24. Rehnquist was said to assign opinions evenhandedly and to ensure that all were filed before a term ended. See, e.g., Craig M. Bradley, *Introduction to THE REHNQUIST LEGACY* 1, 1-5 (Craig Bradley ed., 2006). Discussion of Rehnquist's role in dealing with the entire judiciary comes from Russell R. Wheeler, *Chief Justice Rehnquist as Third Branch Leader*, 89 JUDICATURE 116 (2005).

25. See Frank B. Cross, Thomas A. Smith & Antonio Tomarchio, *Warren Court Precedents in the Rehnquist Court*, 24 CONST. COMMENT. 3, 16 (2007).

26. See R. Shep Melnick, *Deregulating the States: The Political Jurisprudence of the Rehnquist Court*, in *INSTITUTIONS AND PUBLIC LAW* 69, 69-95 (Tom Ginsburg & Robert A. Kagan eds., 2005); Erwin Chemerinsky, *Assessing Chief Justice William Rehnquist*, 154 U. PA. L. REV. 1331 (2006); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1153-55 (2006). An overview of the television coverage of the Rehnquist years is provided in Jennifer Segal Diascro, *The Legacy of Chief Justice Rehnquist: A View from the Small Screen*, 92 JUDICATURE 106 (2008).

27. See Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003). Rehnquist also presided over the cutback in the number of decisions issued each year. See David M. O'Brien, *A Diminished Plenary Docket: A Legacy of the Rehnquist Court*, 89 JUDICATURE 134 (2005). During the Burger era, the Court dealt with some 175 cases a year; by Rehnquist's era's end, the number was down to under 80. *Id.* at 134. O'Brien reported that the Warren Court decided about 4.5% of the filings, or 110 cases per term, whereas the Burger Court decided 2-3%, and the Rehnquist Court decided under 1% of the filings, which grew to about 9400 cases. *Id.* at 135.

28. Linda Greenhouse, *Court in Transition: Remembering Rehnquist: William H. Rehnquist, Architect of Conservative Court, Dies at Age 80*, N.Y. TIMES, Sept. 5, 2005, at A16.

29. Spaulding, *supra* note 27, at 2000-26.

30. Mecham, the sixth person to serve as the Director of the AO, was appointed in 1985,

Committee, succeeded in gaining significant budgetary allocations. In 1971, the federal judiciary received \$145 million; by 2005, its budget was \$5.7 billion,³¹ rising from under one-tenth to two-tenths of one percent of the federal budget, as during the Rehnquist era staff positions more than doubled from 15,000 to 32,000.³² Further, the Rehnquist Administration obtained what one newspaper called the “largest public-buildings construction campaign since the New Deal: a 10-year, \$10 billion effort to build more than 50 new Federal courthouses and significantly alter or add to more than 60 others.”³³ The federal judiciary thereby had the “fastest growth in square footage” of building of any sector under the aegis of the General Services Administration (GSA).³⁴ Between 1996 and 2006, the space dedicated to the courts doubled.³⁵ While the “bailouts” and “stimulus” packages of the last few years may make those numbers seem smaller, the sums devoted specifically to federal courts outstripped those provided to other federal agencies under the GSA.³⁶

under the tenure of Chief Justice Warren Burger and by a committee on which Associate Justices Byron White and William Rehnquist served. *THE HISTORY OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS: SIXTY YEARS OF SERVICE TO THE FEDERAL JUDICIARY* 115 (Cathy A. McCarthy & Tara Treacy eds., 2000) [hereinafter *HISTORY OF THE AO*]. Mecham had been an experienced lobbyist, working as “a Washington representative for the Atlantic Richfield Company” before being appointed to direct the AO. John W. Winkle III, *Interbranch Politics: The Administrative Office of U.S. Courts as Liaison*, 24 *JUST. SYS. J.* 43, 46 (2003).

31. Wheeler, *supra* note 24, at 120.

32. *Id.*

33. Randy Gragg, *Monuments to a Crime-Fearing Age*, *N.Y. TIMES MAG.*, May 28, 1995, at 36, 36. The amount of funds spent and the number of projects have been tallied differently depending on the time spans. For example, during the decade between 1996 to 2006, the judiciary gained “46 new courthouses or annexes at a cost of \$3.4 billion,” with more then underway. *The 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 Econ. Dev., Pub. Bldgs. and Emergency Mgmt. of the H. Comm. on Transp. and Infrastructure*, 109th Cong. 1 (2006) [hereinafter *2006 Future of the Federal Courthouse Construction Program Hearings*] (statement of Rep. Bill Shuster, Chairman, Subcomm. on Econ. Dev., Pub. Bldgs. and Emergency Mgmt.). From 1985 to 1999, fifty-two court projects “totaling \$3.5 billion” were reported completed—producing a courthouse-building program that was the “largest in U.S. history,” and listed among the “major accomplishments” of the AO. *HISTORY OF THE AO*, *supra* note 30, at 113. As of 2005, the Government Accountability Office described the actual outlays, between 1993 and 2005, to be \$4.5 billion for seventy-eight courthouse projects. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-673, *COURTHOUSE CONSTRUCTION: INFORMATION ON PROJECT COST AND SIZE CHANGES WOULD HELP TO ENHANCE OVERSIGHT I* (2005).

34. *2006 Future of the Federal Courthouse Construction Program Hearings*, *supra* note 33, at 269 (statement of David L. Winstead, Comm’r Pub. Bldgs. Serv., U.S. Gen. Servs. Admin.).

35. *Id.*

36. The GSA oversees about 40% of the federal work space and has various limits on its charter; for example, unless requested to provide services, it does not have statutory authority over the Senate or the House of Representatives, the Central Intelligence Agency, the Department of Defense, the U.S. Postal Office, or the Federal Bureau of Prisons. See 40 U.S.C. § 113(d)–(e) (2006).

Institutional analyses of the courts tend to explore the interactions between Congress and the judiciary, the effect of doctrines on behavior, and the role played by political affiliations and world views in court decision making.³⁷ Attention is paid to judicial preference formation, economic demands for law, and the incentives that foster investment in judicial authority from other branches of government. My discussion enlarges the focus to include the corporate output of the judiciary as well as its adjudicative decisions.

Here, I probe how the federal courts came to capture political, cultural, and economic capital and, despite their relatively small volume of cases, became the dominant image of “the courts” in twentieth-century national discourse. I begin with a brief review of nineteenth-century federal activities, serving as a reminder of how small the federal judiciary once was. Thereafter, I trace the twentieth-century growth in federal adjudicatory authority, interrelated with federal building programs through which the national government turned itself into one of the major real estate owners and managers in the world and by which Congress chose repeatedly to invest in making federal courthouses architecturally significant symbols.

Understanding the interaction of jurisdiction, architecture, and ideas about judicial power entails excavating the work of three agencies that are themselves creatures of the twentieth century: the Judicial Conference of the United States, which gained its own Administrative Office in 1939 and elaborated its structure in 1948 and in 1957; the GSA, brought into being in 1949; and the National Endowment for the Arts (NEA), chartered in the 1960s. These entities cooperated and competed for dollars and authority as they accorded the private sector roles in shaping government buildings. After sketching how the federal judiciary under Chief Justice Rehnquist obtained both funds and control over the design of its buildings, I explore the puzzle of how these aspects of his work (Bill Rehnquist, the Builder-of-Federal-Judicial-Girth, if you will) fits with a more familiar narration of Rehnquist-the-Reluctant, famous for constraining the deployment of federal judicial authority.

This structural account aims not to provide untold insider stories of which jurist persuaded which member of Congress to support a particular court project, nor to detail administrative styles of chief justices as their biographers might. Rather, I am interested in probing the interactions between doctrines and infrastructures, between interpretations of judicial role and the constitutive practices and places of judges, and between ideas of federal adjudication and their materialization—produced and reflected in the differences in the institutions that William Howard Taft, Earl Warren, and William Rehnquist inhabited.³⁸ Further, I hope not only to inscribe an understanding of the political and cultural impact of their achievements

37. See generally Tom Ginsburg & Robert A. Kagan, *Institutionalist Approaches to Courts as Political Actors*, in *INSTITUTIONS AND PUBLIC LAW: COMPARATIVE APPROACHES* 1, 1–16 (Tom Ginsburg & Robert A. Kagan eds., 2005).

38. This socio-legal account has parallels in work on other court systems. See, e.g., Antoine Vauchez, *Keeping the Dream Alive: The European Court of Justice and the Transnational Fabric of Integrationist Jurisprudence*, *EUR. POL. SCI. REV.* (forthcoming 2012), available at <http://journals.cambridge.org/action/displayFulltext?type=1&pdfType=1&fid=8306567&jid=EPR&volumeId=-1&issueId=-1&aid=8306565>.

but also to open questions about the durability of their diverse aspirations for “the federal courts” and to consider the role state courts are coming to play (in some respects ironically) as heirs to Earl Warren’s legacy.

II. FROM THE 1830S TO THE 1930S; FROM MARINE HOSPITALS AND CUSTOM HOUSES TO A SKYSCRAPER FEDERAL COURTHOUSE IN NEW YORK AND THE SUPREME COURT BUILDING IN WASHINGTON

As the title of this Lecture suggests, central to the narrative of the building of the federal courts is William Howard Taft, who served from 1909 to 1913 as president before, in 1921, becoming the chief justice of the United States.³⁹ Many people identify Taft with one particular building, that of the 1935 Supreme Court, which opened a few years after his death.

What may be less familiar is that this was the Supreme Court’s very first building. During the nineteenth century, both Congress and the Executive had dedicated spaces, but it was not until the twentieth century that the Supreme Court got “a room of its own” (*pace* Virginia Woolf). As historians have detailed, the justices first camped in a market hall in New York City.⁴⁰ Upon going to Philadelphia in the 1790s, the justices sat inside its City Hall and borrowed the courtroom of that state’s Supreme Court.⁴¹ When the justices moved to Washington, they used a committee room inside the Capitol before taking up residence, in 1810, in the remodeled former chambers of the Senate.⁴²

Just as the Supreme Court borrowed and shared quarters before 1935, so did lower federal courts during much of their first 150 years. In the eighteenth century, when justices still rode circuit, they joined district judges holding court in local hotels, homes, or state buildings⁴³ whose availability depended on “cooperation” from those separate governments.⁴⁴ (The federal system was similarly dependent on

39. Post, *Mr. Taft*, *supra* note 17, at 761–62. Taft retired as Chief Justice on February 3, 1930 and died five weeks later. 2 HENRY F. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT: A BIOGRAPHY* 1078–79 (1939).

40. Katherine Fischer Taylor, *First Appearances: The Material Setting and Culture of the Early Supreme Court*, in *THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE* 357, 357, 373–76 (Christopher Tomlins ed., 2005).

41. Robert P. Reeder, *The First Homes of the Supreme Court of the United States*, 76 *PROC. AM. PHIL. SOC’Y* 543, 551–53 (1936). The justices “first assembled on February 1, 1790 in the Merchants Exchange Building” in New York City, which was then the country’s capital. *The Court as an Institution*, SUPREME COURT OF THE U.S. (2011), <http://www.supremecourt.gov/about/institution.pdf>.

42. Taylor, *supra* note 40, at 357. In 1860, the Court moved up one level, as the Senate again gave over cast-off space. *Id.*; see also ROBERT SHNAYERSON, *THE ILLUSTRATED HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 86–88 (1986).

43. When the Circuit Court for the District first convened, it likely worked in the “room in the Capitol assigned to the Supreme Court.” JEFFREY BRANDON MORRIS, *CALMLY TO POISE THE SCALES OF JUSTICE: A HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA CIRCUIT* 7, 10 (2001). In the 1820s, the District got its own City Hall, which also housed courts, the register of wills, and other municipal offices. *Id.* at 29.

44. PETER GRAHAM FISH, *FEDERAL JUSTICE IN THE MID-ATLANTIC SOUTH: UNITED STATES COURTS FROM MARYLAND TO THE CAROLINAS, 1789–1835*, at 32 (2002).

local jailers from whom it rented space, sometimes on an as-needed, weekly basis.⁴⁵)

The physical environment reflected that the federal judiciary was then small in terms of jurisdiction, staff, and rule making. Ambivalence had surrounded the creation of a national judicial force and, to cushion the potential abrasion, federal courts not only used local buildings but also local litigation practices. Before the 1930s, for example, the federal district court in Virginia largely conformed its rules of practice to those of state courts, just as the federal court in New Jersey relied on New Jersey rules.⁴⁶

A. Constituting the Federal Building Authority

A lack of buildings specifically for federal judges ought not to be equated with the absence of federal government construction, undertaken by virtue of a power conferred by the Constitution. Article I, Section 8 authorizes Congress “[t]o establish Post Offices and post Roads,” as well as to create a capital city and to acquire land for both civilian and military purposes (“the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings”).⁴⁷ In the early part of the eighteenth century, the business of building fell under the auspices of the Treasury Department and Customs Services that, like the federal judiciary, were statutory creations of the 1789 Congress.⁴⁸ Initially, Congress authorized projects building by building.⁴⁹

45. *Id.* at 237–38. Rental space was also used for court marshals. For example, an 1853 act authorized funding and provided a budget, that “the marshall shall not incur an expense of more than twenty dollars in any one year for furniture, or fifty dollars for rent of building” without getting prior authorization from the Secretary of the Interior. Act of Feb. 26, 1853, ch. 80, § 2, 10 Stat. 161, 165.

46. Initially, federal conformity to state practice was “static,” in that federal courts had to follow the practices of states as of 1789 even when states no longer did so in their own courts. This static conformity was replaced after the Civil War with a dynamic conformity, permitting federal courts to follow the rule changes for common law cases that occurred in each of the states in which they sat. *See generally* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1037–39 (1982). The caveat is that, as of 1822, federal courts sitting in equity began to share common rules, although how similar their practices were is more difficult to ascertain. *See* Kristin A. Collins, “A Considerable Surgical Operation”: Article III, Equity, and Judge-Made Law in the Federal Courts, 60 DUKE L.J. 249, 273 (2010).

47. U.S. CONST. art. I, § 8, cl. 7, 17, 18. A few opinions have engaged with these provisions. *See, e.g.,* Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525 (1885), discussed in GEORGE CAMERON COGGINS, CHARLES F. WILKINSON, JOHN D. LESHY & ROBERT L. FISCHMAN, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 147–52 (6th ed. 2007).

48. The history of federal construction comes from several sources, including LOIS CRAIG, *THE FEDERAL PRESENCE: ARCHITECTURE, POLITICS, AND SYMBOLS IN UNITED STATES GOVERNMENT BUILDING* (1978); ANTOINETTE J. LEE, *ARCHITECTS TO THE NATION: THE RISE AND DECLINE OF THE SUPERVISING ARCHITECT’S OFFICE* 14–29 (2000); 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); DARRELL HEVENOR SMITH, *THE OFFICE OF THE SUPERVISING ARCHITECT OF THE TREASURY: ITS*

The first federal structures outside of Washington were supported by a 1789 congressional fund for marine hospitals to take care of "men, who, by their labor . . . in peace and war, contribute so largely to the wealth and power of the nation."⁵⁰ (This legislation serves as a reminder that contemporary national health care legislation has roots in federally financed programs from the eighteenth century.⁵¹) The other major group of federal buildings were for the Customs Office, where transactions related to taxing imports took place.

The importance of customs officers can be seen from the buildings dedicated to them, which were among the largest federal structures of their time.⁵² Customs officials not only collected duties on imported goods but also "served as the eyes and ears of the federal government at the local level."⁵³ Their portfolio included reporting on conditions of roads and of local industries, as well as serving as agents for marine hospital funds, superintendents of lighthouses, and overseers of new building construction.⁵⁴

As revenues grew and the nation gained a modicum of stability, ambitions for more important edifices followed. Like their European predecessors, the leaders of the new country were self-conscious about their image. Many thought that the virtues of the United States were best expressed through somber classicism acknowledging the country's debt to "the ancient Greek republic."⁵⁵

By the 1830s, a specially designated federal employee, Robert Mills, "served more or less officially" in a position he called "architect of the public buildings."⁵⁶ Mills admired Greek symmetry, as Thomas Jefferson had famously deployed in a courthouse he designed in Virginia. Mills was committed to making Jefferson's ideal of classical architecture the "national style"; when "the full temple form was not used, at least the great colonnade was."⁵⁷ Mills was also a source of some

HISTORY, ACTIVITIES, AND ORGANIZATION 3 (1923). The Craig volume was part of a project of the NEA, which supported the volume's publication. As discussed *infra* notes 218-20, the NEA decided to review "the government's attempts to house its services and activities" because of the view that federal buildings in the 1970s were architecturally dreary. Nancy Hanks, *Foreword to CRAIG, supra*, at vii (Hanks served as the chairman of the NEA from 1969 to 1977).

49. See, e.g., Act of Feb. 13, 1807, ch. 14, § 5, 2 Stat. 418, 419. Congress there 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" and appropriated \$20,000 for the building. *Id.*

50. See LEE, *supra* note 48, at 28 (quoting William M. Meredith, Secretary of the Treasury, describing, in 1849, the rationale for the Act of July 16, 1798, ch. 77, 1 Stat. 605). That act was repealed in 1884. See Act of June 26, 1884, ch. 121, § 15, 23 Stat. 53, 57.

51. See THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 2-3, 7-11 (1992).

52. CRAIG, *supra* note 48, at 63, 202-03. Smaller facilities were also enlarged, such as the Custom House in Boston and in New York. LOWRY, *supra* note 48, at 48-50, 48 fig.44, 49 fig.45.

53. LEE, *supra* note 48, at 14.

54. *Id.* at 14-29.

55. LOWRY, *supra* note 48, at 38.

56. CRAIG, *supra* note 48, at 56.

57. *Id.* at 50. Craig also noted that the "closer" to Washington, the more federal

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centralization of standards, such as requiring that buildings be made with materials more fireproof than not.⁵⁸

By the middle of the nineteenth century, the federal government owned eighteen marine hospitals and twenty-three custom houses, with fifteen more structures underway.⁵⁹ Congress used these buildings to support what Lois Craig has called a “federal presence,”⁶⁰ as the construction was a sign of a flourishing nation,⁶¹ engaged in various regulatory activities.⁶² The buildings around the country joined those dedicated in Washington, D.C. for the legislative and executive branches as exemplars of the federal government.⁶³

B. “Furnishings” for the Federal Judiciary After the Civil War

The word “courthouse” was hardly mentioned in the congressional records authorizing buildings in the pre-Civil War era. Some federal legislation for custom houses made reference to payments for furnishings for judges⁶⁴—thus revealing that a courtroom and chambers were to be tucked somewhere inside. In addition, Congress occasionally provided expressly for building courts and jails in its territories.⁶⁵

structures “spoke in the classical tongue,” while “frontier customhouses were utilitarian structures.” *Id.* at 51.

58. *Id.* at 56; LEE, *supra* note 48, at 35. See generally FED. JUDICIAL CTR., CONSTRUCTING JUSTICE: THE ARCHITECTURE OF FEDERAL COURTHOUSES 1 [hereinafter CONSTRUCTING JUSTICE] (on file with the author) (a description of the historical photographs exhibited at the Federal Judicial Center).

59. LOWRY, *supra* note 48, at 52; SMITH, *supra* note 48, at 3. In 1841, Congress insisted on some regularization of the decisions to buy land. In order to have the legal authority to purchase and build government structures, Congress imposed the requirement that the Attorney General provide opinions on the “validity of the title.” *Id.*

60. CRAIG, *supra* note 48.

61. LEE, *supra* note 48, at 29–35; see also LOWRY, *supra* note 48.

62. While the nationalization story of the post-Civil War period dominates, national administrative capabilities existed prior to the Civil War, of which the Customs Office was one example; others included the regulatory systems for patents, land claims, and steamboats. See Jerry L. Mashaw, *Administration and “The Democracy”: Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568, 1633–43 (2008). Inspection and regulation of steamboats was the federal government’s “first major health and safety regulatory program.” *Id.* at 1581. Between 1830 and 1860, the population of the United States doubled, and federal expenditures more than quadrupled during those same thirty years. See U.S. DEP’T OF COMMERCE, BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 1104 (1975).

63. LEE, *supra* note 48, at 29–35.

64. For example, when Act of Mar. 3, 1851, ch. 32, 9 Stat. 598, 609 (1851), appropriated money for a custom house in Savannah, Georgia, it noted that funds were to be used for “furniture and fixtures for the accommodation of the officers of the revenue, as also for the post-office, and United States courts.” See also ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 82 (2d ed. 2002).

65. Illustrative is the designation, in 1832, by Congress of acreage in Little Rock for the “erection of a courthouse and jail” for the Territory of Arkansas. Act of June 15, 1832, ch. 79, 4 Stat. 531, 531 (1832). Provisions were also made in 1839 for funds for a courthouse in Alexandria, Virginia. OFFICE OF COMM’R OF PUB. BLDGS., EXPENDITURE—PUBLIC

The meager references 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,⁶⁶ including two to California, which gained statehood that year.⁶⁷

In 1852, the Treasury Department created a unit called the Office of Supervising Architect and centralized decision making about federal buildings. Soon thereafter, government records called specifically for courthouse construction.⁶⁸ Chartering the Supervising Architect was both evidence of the development of federal bureaucracy and (as Max Weber has taught us) an example of how once in place, a bureaucracy generates agendas for its own growth.⁶⁹ One measure of the Supervising Architect's impact comes from an 1875 congressional provision that no funds be spent on public buildings without approval from the Secretary of the Treasury, "after drawings and specifications together with detailed estimates of the cost thereof, shall have been made by the Supervising Architect."⁷⁰

The violence and dislocation occasioned by the Civil War halted many national initiatives, building included. But winning the Civil War sparked interest in imposing and in showing federal authority. Thus, two creatures of the first

BUILDINGS, H.R. DOC. NO. 26-32 (1839).

66. 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. This count does not include federal judges in the territorial courts, including those in the District of Columbia. *See Chronological History of Authorized Judgeships in the U.S. District Courts*, U.S. COURTS, <http://www.uscourts.gov/judgesandjudgeships/authorizedjudgeships/chronologicalhistoryofauthorizedjudgeshipsindex.aspx> [hereinafter *Chronological History of Authorized Judgeships in the U.S. District Courts*].

67. Act of Sept. 28, 1850, ch. 86, § 2, 9 Stat. 521, 521. A reorganization reduced the number to one in 1866 but returned it to two in 1886. *See* Act of Aug. 5, 1886, ch. 928, § 1, 24 Stat. 308, 308; Act of July 27, 1866, ch. 280, § 1, 14 Stat. 300, 300. As noted above, five other states (Florida, Louisiana, New York, Pennsylvania, and Virginia) also had two judgeships allotted. *Chronological History of Authorized Judgeships in the U.S. District Courts*, *supra* note 66.

68. For example, in 1855, the Secretary of Interior and postmaster general called for "sites for court houses and post offices" in Philadelphia, New York, and Boston. S. EXEC. DOC. NO. 33-30 (1855).

69. Prior to the Office's creation, federal officials who worked on federal building had various titles, including "Architect of the Department" and "Supervising Architect." LEE, *supra* note 48, at 41. No statutory authority supported the Secretary of Treasury when he first created the Office of Supervising Architect, but legislation in the 1860s and thereafter made mention of the job. SMITH, *supra* note 48, at 6-7. For example, Act of Mar. 14, 1864, ch. 30, § 6, 13 Stat. 22, 27, provided for "one superintending architect, one assistant architect," several clerks, and a messenger.

The first to hold the position, Ammi B. Young, served from 1852 until 1862 as the "chief designer of all federal buildings" that fell within the Treasury Department's control. LEE, *supra* note 48, at 47. Young, credited with designing some seventy buildings, also made ironwork the preferred material to provide fireproofing and permanency. LEE, *supra* note 48, at 59-60; *CONSTRUCTING JUSTICE*, *supra* note 58, at 1-2.

70. Act of Mar. 3, 1875, ch. 130, 18 Stat. 371, 395; *see also* SMITH, *supra* note 48, at 7-8.

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 of federal norm enforcement.⁷¹ In 1867, Congress gave federal courts authority to hear habeas corpus petitions from individuals held in state custody.⁷² In 1871, Congress authorized federal courts to hear cases alleging deprivations of civil rights,⁷³ and in 1875, Congress gave the federal courts what has come to be known as “general federal question jurisdiction” to hear claims (if the amount in controversy sufficed) alleging violation of rights arising under federal law.⁷⁴

To implement such new provisions as well as to enforce federal criminal law, better organization of federally employed lawyers was needed. In 1870, Congress created the Department of Justice to add resources to and a measure of control over the dispersed system that had long existed by virtue of individual presidential

71. See generally Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 513 (2002) (explaining how “nonjudicial actors . . . empowered the institution of the federal judiciary” (emphasis in the original)). In his view, the result was a judiciary committed to economic nationalism that expressed and extended the views of the reigning political party. *Id.* at 521–22. Alison LaCroix has argued that the focus on courts was continuous with earlier conceptions that identified judicial power and federal court jurisdiction as essential to the nation—as evidenced by the briefly lived Act of 1801 that did create federal question jurisdiction. See Alison L. LaCroix, *The New Wheel in the Federal Machine: From Sovereignty to Jurisdiction in the Early Republic*, 2007 SUP. CT. REV. 345, 345–50, 387–94. The task of administering courts fell in 1849 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. *History of the Federal Judiciary: Judicial Administration and Organization*, FED. JUD. CENTER, http://www.fjc.gov/history/home.nsf/page/admin_09.html.

72. Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (codified at 28 U.S.C. §§ 2241–2254 (2006)).

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

74. See Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (1875) (codified at 28 U.S.C. § 1331 (2006)). As noted above, LaCroix underscored that the 1801 Judiciary Act gave circuit courts jurisdiction of “all cases in law and equity, arising . . . [under] the Constitution . . . [and t]he laws of the United States . . . and [t]reaties made, or which shall be made under their authority.” LaCroix, *supra* note 71, at 372 (quoting the Judiciary Act of 1801, ch. 4, § 11, 2 Stat. 89). Because the bill was so quickly repealed and the 1875 legislation has endured, the post-Civil War enactment is credited as the beginning of general federal question jurisdiction. Congress has also thought it appropriate, when viewing the courts as unreliable in carrying out its will, to divest jurisdiction. A well-known example is the case of *Ex Parte McCardle*, in which William McCardle, the editor of the Vicksburg Times, was detained in the 1860s by the occupying military authorities. They objected to his anti-Reconstruction editorials, and he in turn argued that the Military Reconstruction Act was unconstitutional. While his case was pending before the U.S. Supreme Court, Congress withdrew the jurisdictional provision that had provided a route to the Court, and the justices concluded that Congress had the power to do so. See *Ex Parte McCardle*, 74 U.S. 506 (1869); Daniel J. Meltzer, *The Story of Ex parte McCardle: The Power of Congress to Limit the Supreme Court’s Appellate Jurisdiction*, in *FEDERAL COURTS STORIES* 57 (Vicki C. Jackson & Judith Resnik eds., 2010).

appointments of United States Attorneys for each of the federal districts.⁷⁵ The 1870 legislation also centralized most of the court-related work in the Justice Department, which took over the Interior Secretary's "supervisory powers . . . over the accounts of the district attorneys, marshals, clerks, and other officers of the courts of the United States."⁷⁶

To gain efficacy in requesting funds for the courts from Congress, the Justice Department began compiling information about the federal courts. Beginning in 1871, the attorney general provided annual reports to Congress. The Justice Department reported that, in 1876, almost 29,000 cases were pending on the docket; in 1900, the reports indicated that pending cases had risen to about 55,000.⁷⁷ Pending cases do not equate with filings; in the beginning of the twentieth century, just under 30,000 new civil and criminal cases were commenced.⁷⁸

75. Act of June 22, 1870, ch. 150, 16 Stat. 162. 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. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92-93. While Congress thus invented an office not mentioned in the Constitution, Congress did not provide either staff for the attorney general or authority over government lawyers, then called "district attorneys" (and now called United States Attorneys) who had the power to represent the United States in the lower federal courts. ANTONIO VASAI, JUSTICE MGMT. DIV., THE FIFTIETH ANNIVERSARY OF THE U.S. DEPARTMENT OF JUSTICE BUILDING: 1934-1984, at 2 (1984); Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 566-70. As Bloch noted, the 1789 Act did not expressly grant authority to the president to appoint these lawyers, but the president took it upon himself to do so, arguably relying on the authority to appoint officers under Article II, § 2. Likewise, there was no explicit provision in the Act for a confirmation process but it was "assumed" that the Senate would provide "advice and consent." *Id.* at 568 n.24. Today, statutes provide for presidential nomination and senatorial confirmation. 28 U.S.C. § 503 (2006) (establishing the Office of the Attorney General); *id.* § 541 (establishing the position of United States Attorneys). Both before and after the creation of the Department of Justice in 1870, attorneys general worked in various spaces, such as in offices at the Treasury Department. VASAI, *supra*, at 4. The Department of Justice did not get a building of its own until 1934. *Id.* at 16-17.

76. § 15, 16 Stat. at 164. Congress also gave the Justice Department authority over commissions.

77. David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 98 tbl.4 (1981). Clark also detailed the change in the mix of cases, as the proportions of criminal and civil cases varied over time, as did the ratio of civil filings by private parties to those brought by the government. *Id.* at 88-148.

78. Data on the number of filed cases in 1901 are extrapolated from data on pending and terminated cases. The 1901 data are drawn from a two-volume empirical study by the American Law Institute (ALI). See 1 AM. LAW INST., A STUDY OF THE BUSINESS OF THE FEDERAL COURTS 107 (1934) (data on criminal cases); 2 AM. LAW INST., A STUDY OF THE BUSINESS OF THE FEDERAL COURTS 111 (1934) (data on civil cases). The ALI statistics comport with those in the 1900 and 1901 Reports of the Attorney General during the era when the Department of Justice was charged with administration of the federal courts. See DEP'T OF JUSTICE, ANNUAL REPORT OF THE ATTORNEY-GENERAL OF THE UNITED STATES FOR THE YEAR 1900, at 66 ex. A (1900); DEP'T OF JUSTICE, ANNUAL REPORT OF THE ATTORNEY-

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The number of judges increased along with the docket. While several federal districts continued to have a single judge, between 1857 and 1886, thirteen states gained a second authorized federal trial judgeship.⁷⁹ All told, by 1886, the federal judicial workforce consisted of sixty-four judges—a tiny part of the expanding federal civilian workforce. In 1861, some 37,000 individuals were employed; by 1891, almost 160,000 were on the federal payroll.⁸⁰

Another technique to make material new federal authority was construction. Recall that, by the 1850s, the federal government owned about fifty buildings. "Between 1866 and 1897 . . . the federal government built nearly three hundred new buildings throughout the Union."⁸¹ Spaces inside (and sometimes whole buildings) went to courts, used by Congress to make meaningful the North's victory over the South. Appropriations for buildings rewarded loyal congressmen by giving them "federal presents" (as one commentator put it) for local constituents.⁸² "For example, Memphis received a courthouse even though no federal courts were held there."⁸³

In the early 1900s, 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."⁸⁴ In the 1902 Act alone,

GENERAL OF THE UNITED STATES FOR THE YEAR 1901, at 64 ex. A (1901). The numbers for civil and criminal filings for 1901 were derived by subtracting the number of cases pending at the end of 1900 from the sum of the cases terminated in and pending at the end of 1901. That method yielded 16,734 criminal cases (the same number reported by Clark, *supra* note 77, at 103 tbl.6) and 11,971 civil cases (or 1302 fewer civil cases than Clark had reported, *id.*).

79. Alabama got its second district judge in 1886. See Act of Aug. 2, 1886, ch. 842, 24 Stat. 213. In 1871, Arkansas was given a second judge. See Act of Mar. 8, 1871, ch. 106, § 5, 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 also received a second judgeship, 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 the U.S. District Courts*, *supra* note 66.

80. CRAIG, *supra* note 48, at 163. She traced the federal employment workforce from an 1816 baseline of 4847 employees to the 1911 group of 395,905 employees. *Id.*

81. LOWRY, *supra* note 48, at 58.

82. THOMAS J. SCHLERETH, *VICTORIAN AMERICA: TRANSFORMATIONS IN EVERYDAY LIFE, 1876–1915*, at 76 (Richard Balkin ed., 1991).

83. CRAIG, *supra* note 48, at 163.

84. LOWRY, *supra* note 48, at 80. Some prior bills had authorized that buildings be constructed in several different locations. See, e.g., Act of Aug. 4, 1854, ch. 242, § 2, 10 Stat. 546, 571 (1854) (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 Mar. 4, 1913, Pub. L. No. 62-427, 37 Stat. 739. A third such bill, the Public Buildings Act of 1926, Pub. L. No. 69-281, 44 Stat. 630, authorized construction of several kinds of federal buildings: "courthouses, postoffices, immigration stations, customhouses, marine hospitals, quarantine stations, and other public buildings." § 1, 44 Stat. at 630. While that list of buildings was similar to those found in bills from the late nineteenth century, the order in which they were listed had changed; the 1926 legislation put courthouses at the front.

Congress authorized more than 150 new buildings. That "wholesale authorization" gave every member of Congress "the possibility of providing his district with a federal building, regardless of need."⁸⁵ Surveys to assess needs in advance of appropriations were not authorized until 1926.⁸⁶

The new judgeship lines created jobs that the president, with senatorial input and approval, could award.⁸⁷ Further, the statutory requirement that appointees reside in the districts in which they worked mitigated the perception of control from Washington.⁸⁸ Given these pork-barrel opportunities, coupled with local hopes that courthouses were draws for commercial development, towns and cities vied to be the sites for federal construction.⁸⁹ Thus, the growth in federal power through federal jurisdictional statutes and federal judgeships produced and justified interest in new funding for more buildings.⁹⁰

C. Professionalizing Architects Seeking Public Patronage

Localities were not the only ones lobbying for funds. "Private architects insistently sought a piece of the public action."⁹¹ Within a decade of the creation of the Office of Supervising Architect, architects aimed for federal patronage while avoiding government control. In 1867, the American Institute of Architects (AIA), which (despite its name) had functioned more as a local New York society,⁹² became national in scope and in ambition.

85. LOWRY, *supra* note 48, at 80. As for the style of the buildings, many designs adopted the Beaux-Arts style popularized by the Chicago Exposition of 1893. *See id.* at 81-82; CRAIG, *supra* note 48, at 203, 210-15. Some 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, *supra* note 48, at 239-40.

86. CRAIG, *supra* note 48, at 163.

87. Congress continued to create new judgeships thereafter. One count was that there were 1.3 federal judges per million people at the beginning of the twentieth century and 2.2 judges per million in 1980. *See Clark, supra* note 77, at 69-71 tbl.1.

88. *See* 28 U.S.C. § 134 (2006). This provision has been a requirement since the Judiciary Act of 1789.

89. CONSTRUCTING JUSTICE, *supra* note 58, at 2.

90. As compared to the availability of state court facilities, federal courts were sparse and often at great distance, imposing costs on some litigants that made federal jurisdiction an attractive draw for others. *See* EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958, at 244 (1992).

91. CRAIG, *supra* note 48, at 149.

92. LEE, *supra* note 48, at 100. *See generally* MARY N. WOODS, FROM CRAFT TO PROFESSION: THE PRACTICE OF ARCHITECTURE IN NINETEENTH-CENTURY AMERICA 28-36 (1999). As Woods explained, the term "architect" derives from a Greek term meaning "master carpenter" and was once used in reference to various craftspersons. The term did not denote a person with special design authority until the Renaissance in Italy. *Id.* at 5. In early America, the term included various people working on design. The specification of the reference to particular kinds of designers came through the work of organizations like the AIA, which called for training and credentials as qualifications to use the appellation architect. *Id.* at 6-8. Woods cited Louisa Tuthill as one of the first—in 1848—to call on "young men to become professional architects," and hence to have both a "lucrative and