

Inventing Democratic Courts

**2012 Judicial Conference
U.S. Court of Appeals for the Armed Forces
March 7, 2012**

Judith Resnik & Dennis E. Curtis
Yale Law School
© All Rights Reserved

These materials relate to the book **Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms**, by Judith Resnik and Dennis E. Curtis (Yale University Press, 2011).

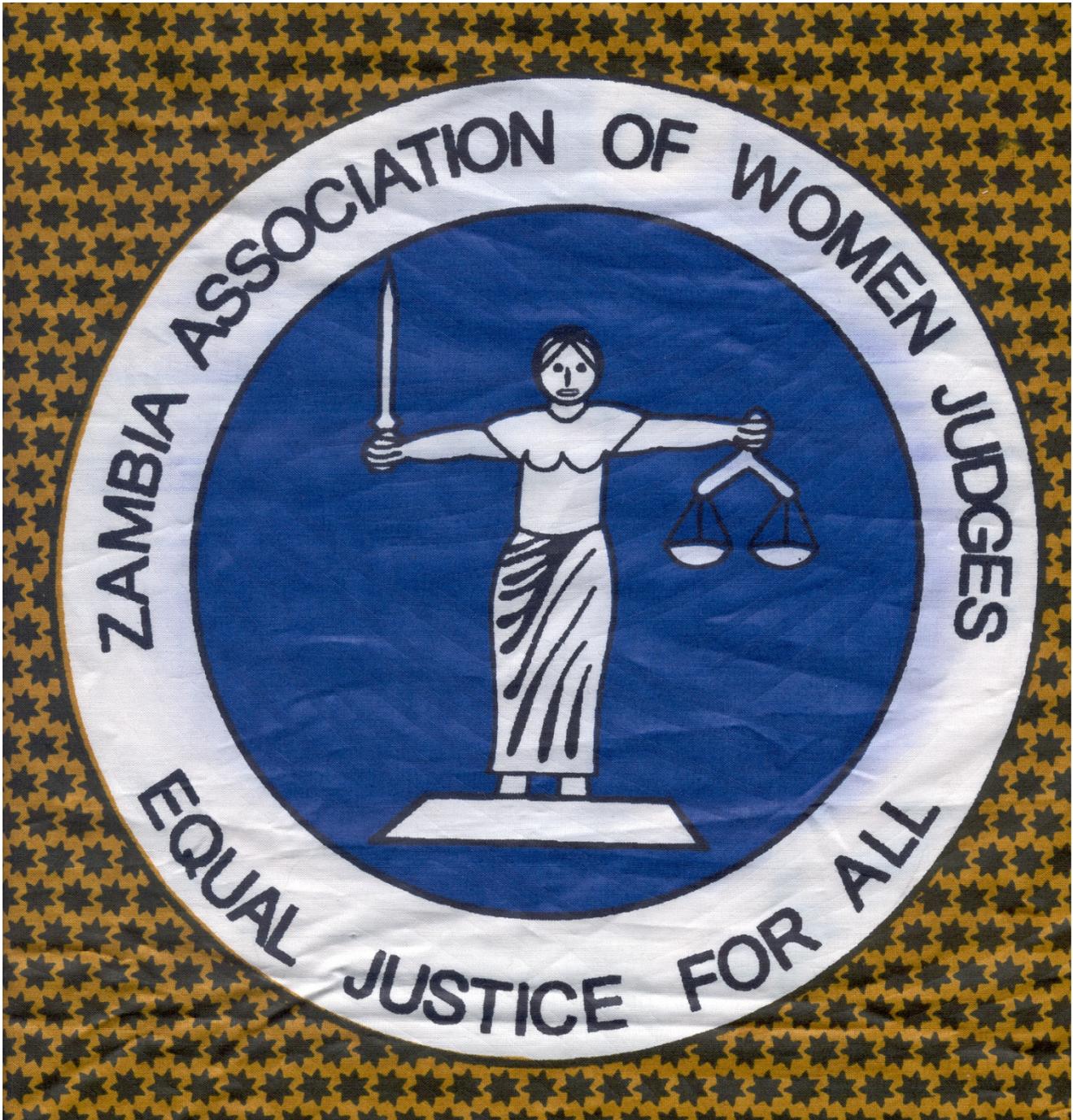
February 22, 2012



The Lady of Justice, William Eicholtz, 2002, Victoria County Court, Melbourne, Australia. Photographer: Ken Irwin. The Lady of Justice photograph by Ken Irwin is reproduced with the permission of William Eicholtz, Sculptor; and the Liberty Group -- Owner and Manager of the Victorian County Court Facility.



Lady Justice (unofficial title), Artist Unknown, circa 1988, High Court of Zambia, Lusaka. Photographer: Elizabeth Brundige. Photograph reproduced courtesy of the photographer and with the agreement of the court.



Decorative cloth with repeated pattern of the High Court's figure of Lady Justice, made for the Zambia Association of Women Judges. Cloth provided by Elizabeth Brundige and reproduced courtesy of the Zambia Association of Women Judges. Facsimile by Yale University Press.



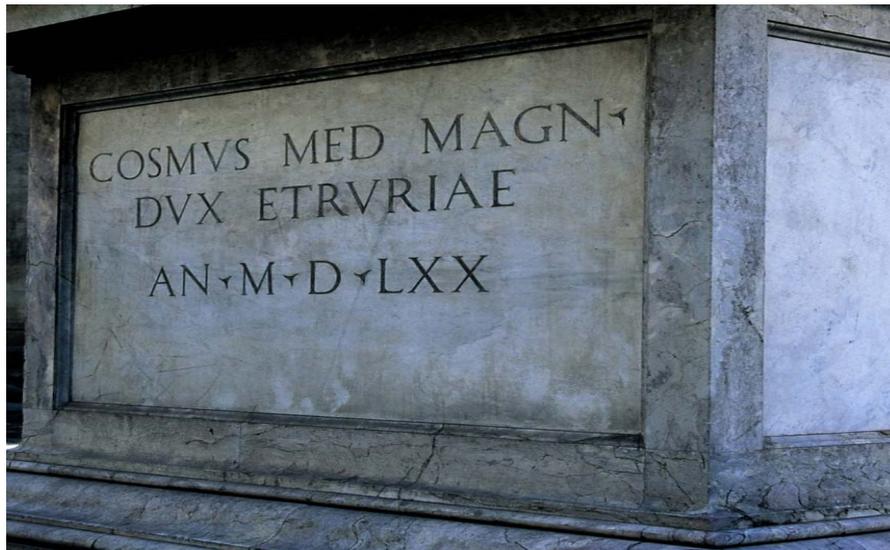
Justice, Alfredo Ceschiatti, 1961, Supreme Federal Tribunal, Three Powers Square, Brasilia, Brazil. Photograph provided and reproduced courtesy of the Directoria de Patrimônio Histórico e Artístico-DePHA.



Supreme Court of Japan, Shinichi Okada, 1974, Tokyo, Japan (left); Justice, Katsuzou Entsuba, 1974 (right).
Copyright: Supreme Court of Japan. Photograph reproduced with the permission of the court.



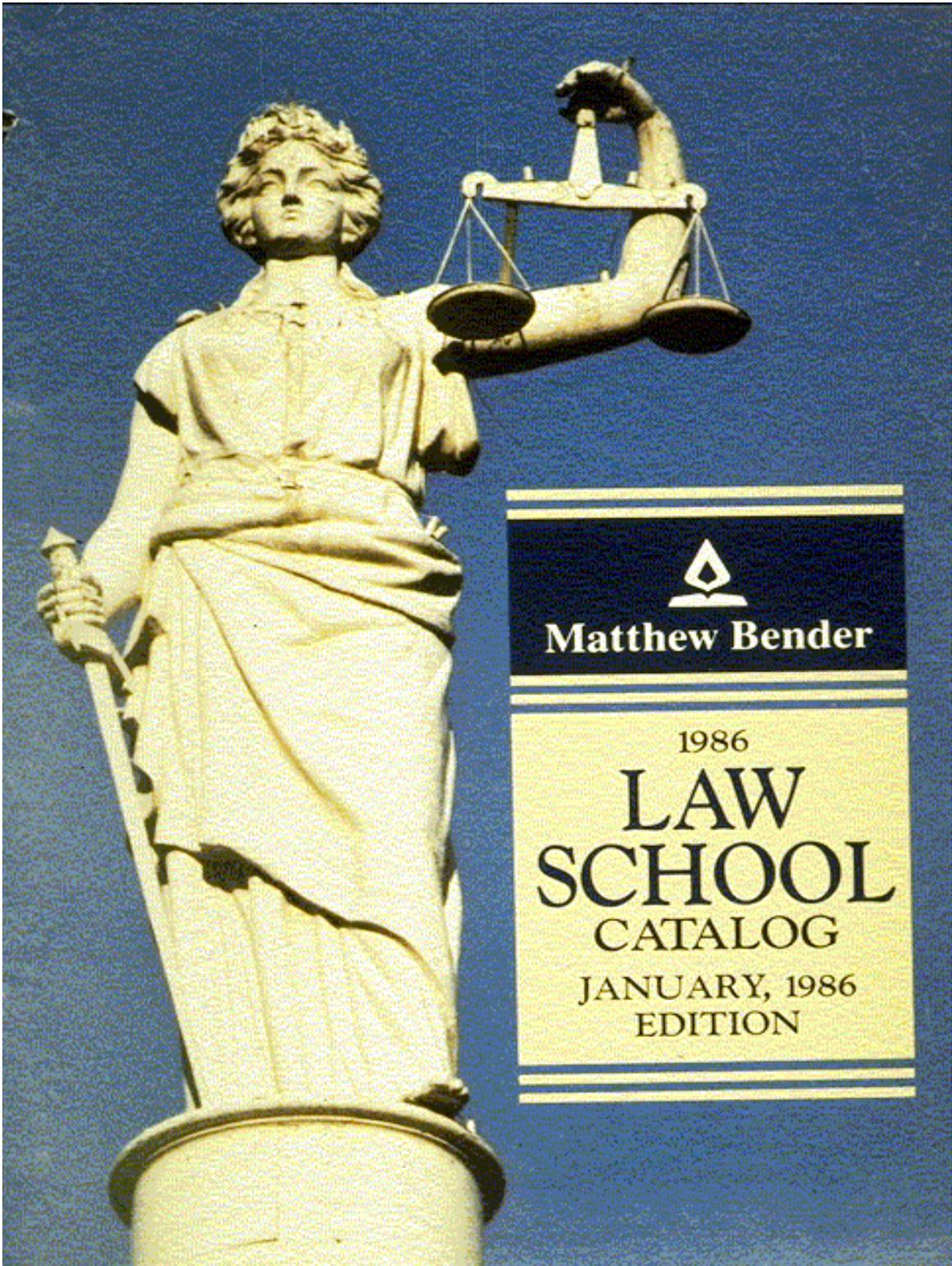
“Mural of Saddam Hussein with the scales of justice,” *New York Times*, April 27, 2003 at A24, accompanying the news story, “U.S. Seeks Solid Core to Fix Iraq’s Broken Legal System,” by Bernard Weinraub. Photographer: Ozier Muhammad. Copyright: The New York Times Agency. Photograph reproduced with the permission of the New York Times Agency.



Column of Justice (Cosimo de Medici as Justice), attributed to Romolo del Tadda, circa 1570, Piazza della Santa Trinita, Florence, Italy. Photographers: Allison Tait and Alvin H. Schulman.



Queen Anne as Justice, Antonio Verrio, circa 1704, Queen Anne's Drawing Room Ceiling, Hampton Court Palace, Surrey, England. Copyright: Historic Royal Palaces. Image reproduced with the permission of Historic Royal Palaces under license from the Controller of Her Majesty's Stationery Office. 8



Justice, on the New York City Hall, from the cover of a Matthew Bender Advertising Catalogue published in 1986, sculpted by John Dixey of William H. Mullins Studio circa 1812, renovated in in the 19th and 20th centuries. The image is reproduced with the permission of Matthew Bender & Company, Inc., a member of the LexisNexis Group.



Lady Justice Lucy, (in honor of Charles Schulz) Jim and Judy Brooks, 2003, William Mitchell College of Law, St. Paul, Minnesota. Photograph provided by the William Mitchell College of Law and reproduced with its permission. 10



“Mesopotamian Scales,” from *Gods, Demons, and Symbols of Ancient Mesopotamia: An Illustrated Dictionary*, by Jeremy Black and Anthony Green, Illustrations by Tessa Rickards, 1992. Copyright: University of Texas Press and the Trustees of the British Museum, 1992. Image reproduced with the permission of both copyright holders.



Detail of Maat from the Papyrus Nodjnet, Book of the Dead. Copyright: The Trustees of the British Museum. Image reproduced with the permission of the copyright holders.



Saint Michael Weighing the Souls at the Last Judgment, Master of the Zurich Carnation, circa 1500, Kunsthau, Zurich, Switzerland. Copyright: Bridgeman-Giraudon/Art Resource, New York.



Justice, Cornelis Matsys, circa 1544
Courtesy of the Warburg Institute Photographic Collection



Logo of the International Criminal Court, circa 1998. Image reproduced courtesy of the International Criminal Court and provided courtesy of its Public Information and Documentation Section.



Camp Justice, Guantánamo Bay, 2009. Photographer: Travis Crum, reproduced with his permission.



Logo, Department of Defense, Office of Military Commissions.



Logo, U.S. Court of Appeals for the Armed Forces. Image from the website of the U.S. Court of Appeals for the Armed Forces.

Adjudication and Democracy

Proto-democratic norms



Arch above the entrance to the Gouda Town Hall (Stadhuis), Gouda, the Netherlands, 1459. Architect: Jan Keldermans. Inscription circa 1695. Image reproduced with the permission of the Streekarchief Midden-Holland (Regional Archive Middle Holland), Gouda, inv.nr 6668.

The Charter or Fundamental Laws, of West New Jersey, Agreed Upon – 1676, Ch. XXIII

"That in all **publick courts of justice** for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province **may freely come** into, and attend . . . , and hear and be present, at all or any such tryals as shall be there had or passed, **that justice may not be done in a corner nor in any covert manner . . .** that all and every person and persons inhabiting the said Province, shall, as far as in us lies, be free from oppression and slavery."



New London County Courthouse, New London, Connecticut, 1784.

Architect: Isaac Fitch. Relocated to present-day location in 1839. Additions added in 1909 by Dudley St. Clair Donnelly, and in 1982 by Hirsch and Persch.

Source: <http://historicbuildingsct.com/?p=1574>

“All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.”

Constitution of Conn., art. I, § 12 (1818)

Constitution of Conn., art. I, § 10 (1960)

“[C]ourts-martial shall be open to the public.”

Manual of Courts-Martial, Rule 806 (2012)

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .”

U.S. Constitution, Amendment 6 (1791)



United States Custom House, Galveston, Texas, 1861.

Supervising Architect: Ammi B. Young; converted for use as a federal courthouse in 1917.
Image reproduced courtesy of the National Archives and Records Administration.



United States Courthouse and Post Office, Des Moines, Iowa. Supervising Architects: Alfred B. Mullett, James G. Hill, and Mifflin E. Bell, 1867-1871, enlarged 1885-1890, demolished 1968. Image reproduced courtesy of the National Archives and Records Administration.



United States Court of Appeals for the Armed Forces, Judiciary Square, Washington, D.C. (as of 1952). Designed by Elliott Woods, 1910. Formerly home to the U.S. Court of Appeals for the District of Columbia Circuit.



United States Post Office and Court House, Denver, Colorado, 1892.

Supervising Architects: Mifflin E. Bell and Will. A. Freret. Image reproduced courtesy of the Denver Public Library, Western History Collection; photographer: Wm. Henry Jackson, WH-1573.



United States Post Office and Courthouse, renamed in 1994 the Byron R. White United States Courthouse, Denver, Colorado. Architects: Tracy, Swartwout & Litchfield, 1916. Image reproduced courtesy of the National Archives and Records Administration.

Federal Judges, Jurisdiction, Caseloads, and Buildings: 1850s-1930s

New Federal Jurisdictional Grants

- 1867: Habeas Corpus, individuals in state custody
- 1871: Civil Rights Act
- 1875: Federal Question Jurisdiction
- 1870: Creation of Department of Justice

Federal Trial Court Caseload

- 1876: 29,000
- 1900: 55,000
- 1930: 150,000

Federal Lower Court Judges

- 1850: 37
- 1886: 64
- 1861: 37,000 federal employees
- 1891: 160,000 federal employees

Federally Built/Owned Buildings

- 1850s: 56 buildings
- 1897: 350+ buildings
- 1902: 150 more authorized to be built
- 1912: 1126 new projects underway

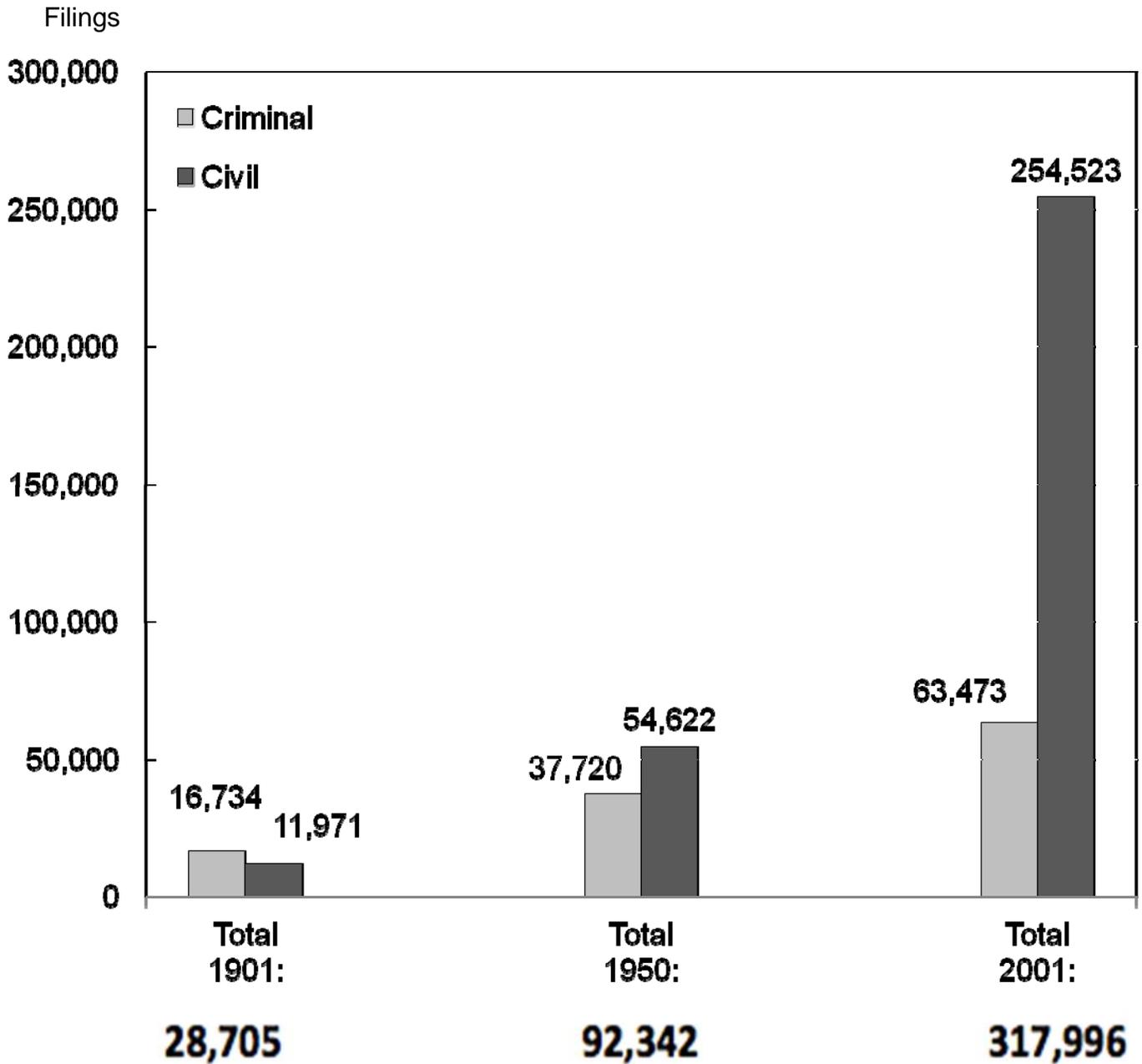


United States Courthouse, renamed in 2001 the Thurgood Marshall United States Courthouse, New York City, New York. Architect: Cass Gilbert, 1936. Image reproduced courtesy of the National Archives and Records Administration.



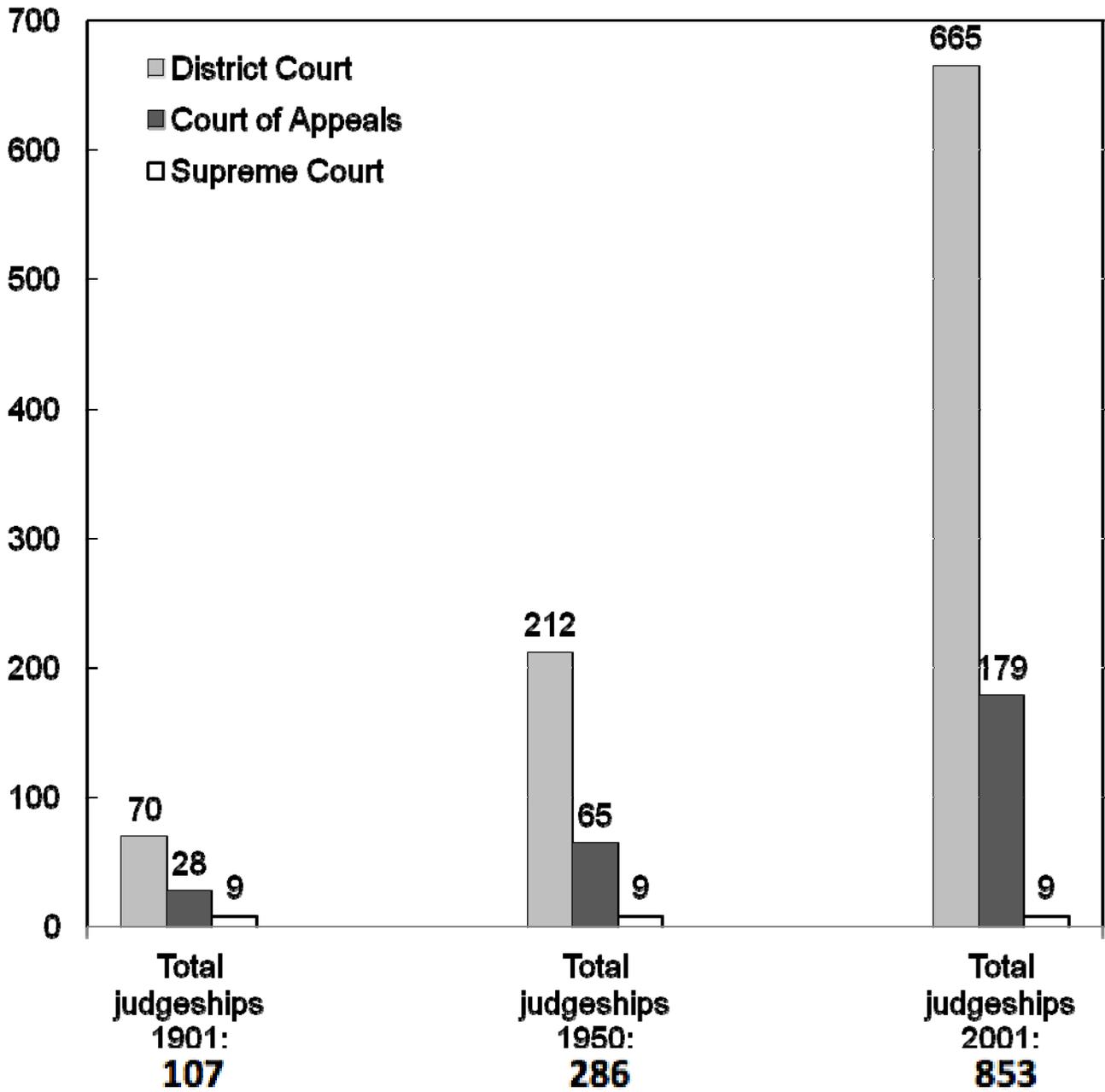
U.S. Supreme Court, Washington, D.C. Architect: Cass Gilbert, 1935. Archival image from 1935 reproduced courtesy of the Federal Judicial Center.

Federal Court Filings: 1901, 1950, 2001



Federal Court Judgeships: 1901, 1950, 2001

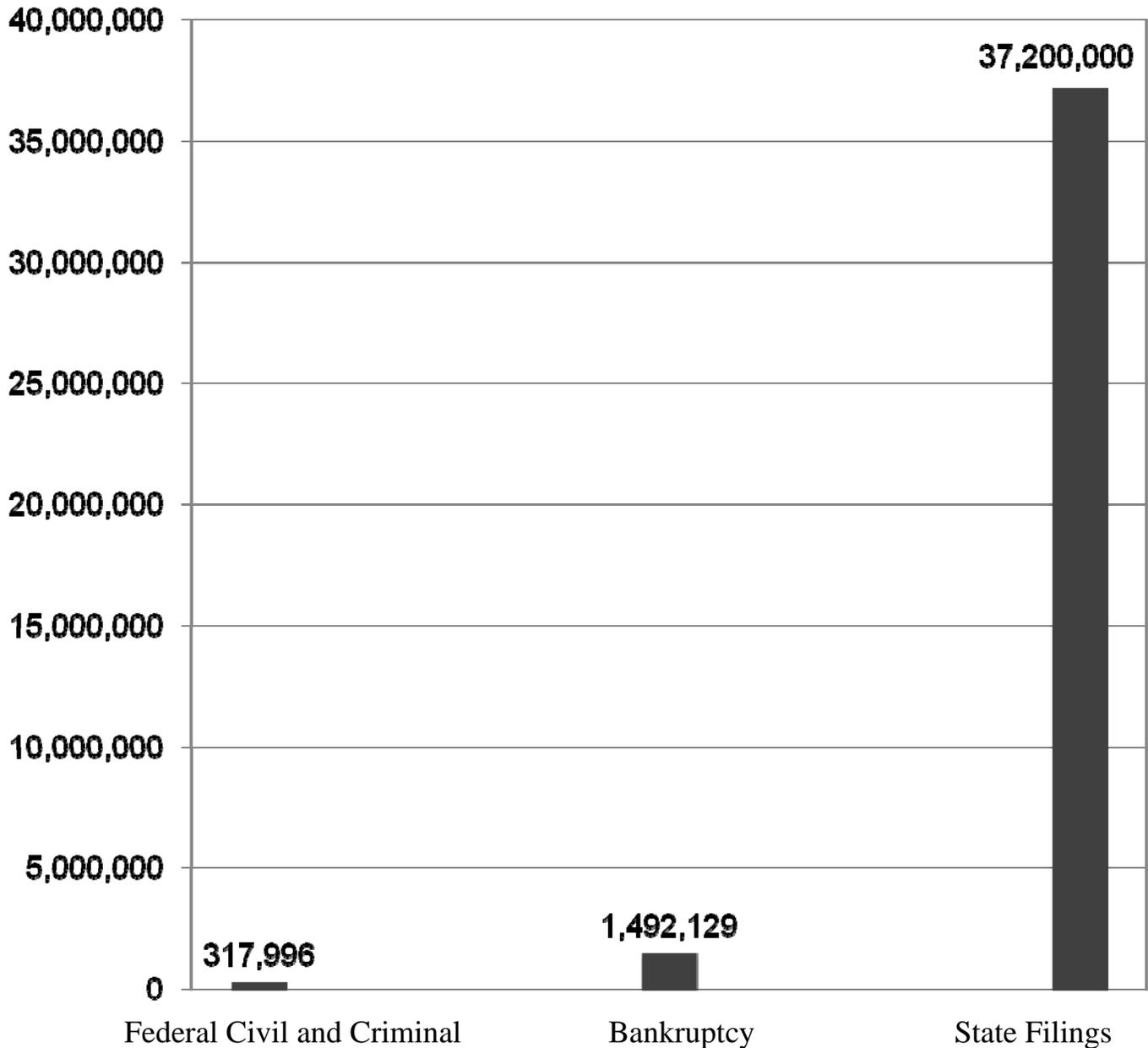
Judgeships





Thomas F. Eagleton Federal Courthouse, St. Louis, Missouri, 2000. Architects: Hellmuth, Obata + Kassabaum, Inc. Photographer: The Honorable David D. Noce, U.S. Magistrate Judge for the Eastern District of Missouri. Photograph courtesy of and reproduced with the permission of the photographer.

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



Sources: Administrative Office of the U.S. Courts; National Center for State Courts. State figures are estimates, as not all states report data in all categories. State figures do not include traffic cases.



Exterior of the Town Hall (Royal Palace) of Amsterdam, 1655. Architect: Jacob van Campen,, Amsterdam, the Netherlands. Photograph reproduced with the permission of the Amsterdam City Archives.



Prudence and Justice, attributed to Artus Quellinus, crowning front tympanum (looking toward Dam Square) of the Town Hall (Royal Palace) of Amsterdam, the Netherlands. Photograph reproduced with the permission of the Amsterdam City Archives.



Arrest of the Corrupt Judge, left panel of the diptych *The Justice (Judgment) of Cambyses*, Gerard David, 1498, Musea Brugge, Belgium. Copyright: Musea Brugge, Groeningemuseum. Image reproduced with the permission of the copyright holder.



Flaying of the Corrupt Judge, right panel of the diptych *The Justice (Judgment) of Cambyses*, Gerard David, 1498, Musea Brugge, Belgium. Copyright: Musea Brugge, Groeningemuseum. Image reproduced with the permission of the copyright holder.

. . . It is the right of every citizen to be tried by judges as **free, impartial, and independent** as the lot of humanity will admit. . . . [T]he judges of the supreme judicial court should hold their offices as long as they behave themselves well, and that they should have honorable salaries ascertained and established by standing laws.

Constitution of Mass., art. XXIX (1780)

The judges, both of the supreme and inferior courts, **shall hold their offices during good behaviour**, and shall, at stated times, receive for their services, a compensation, which shall **not be diminished** during their continuance in office.

U.S. Constitution, art. 3, § 1 (1789)

The judges of the Supreme Court, and of the Superior Court, **shall hold their offices during good behavior**.

Constitution of Conn., art. V, § 3 (1818)

The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

"In the determination of his civil rights . . . or of any criminal charge . . . , **everyone** is entitled to a **fair** and **public** hearing within a reasonable time by an **independent** and **impartial** tribunal established by law. Judgment shall be **pronounced publicly** but the press and public may be excluded . . . in the interests of morals, public order or national security in a democratic society . . ."

art. 6(1), 213 U.N.T.S. 221, 228.

Adjudication in Democracy

(1700-1980)

From Rites to Rights: democratic changes and challenges to adjudication

- Independent judges
- Public processes
- Fair processes
- Equal access for all

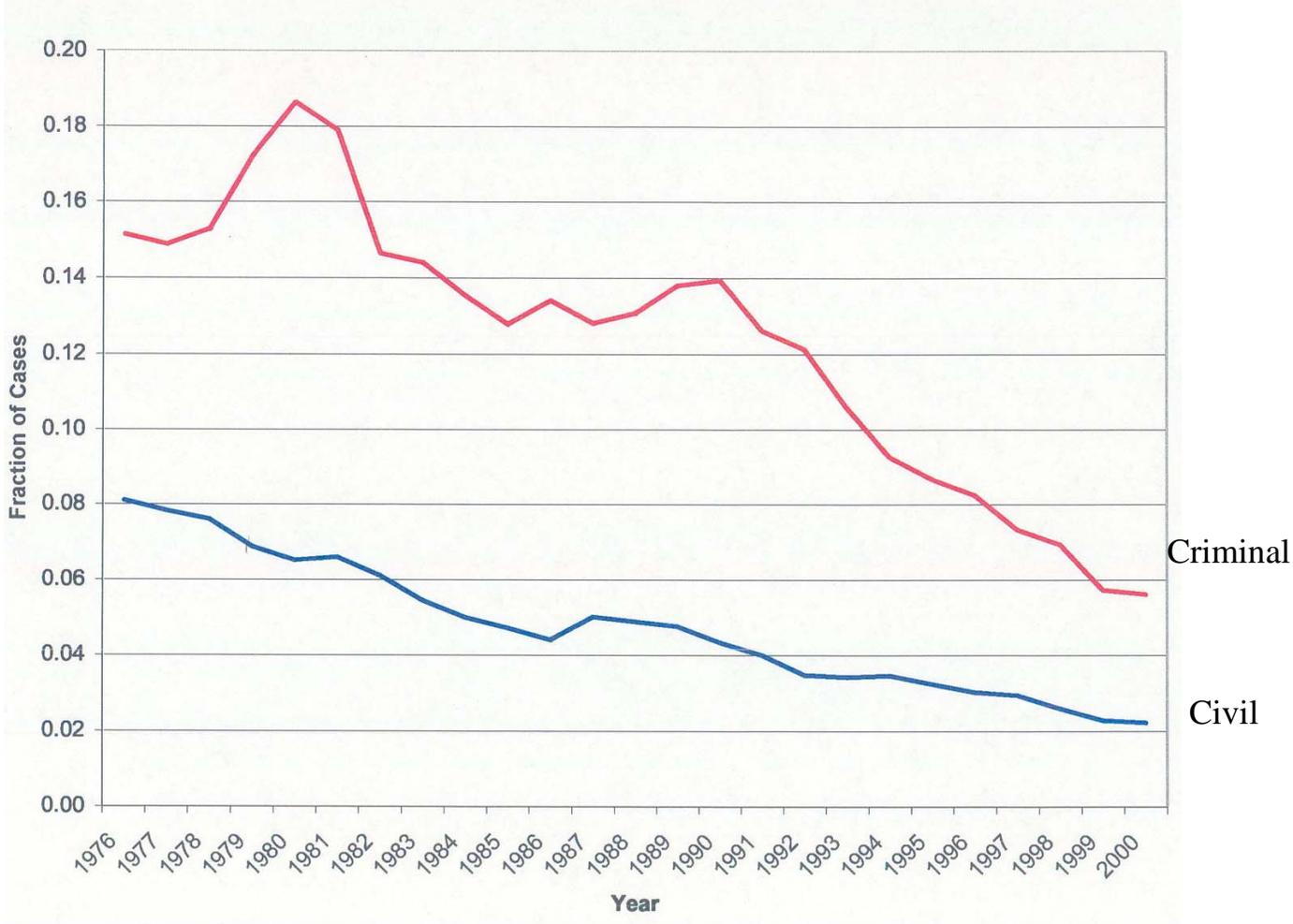


Contemporary United States Courthouses; U.S. General Services Administration (2009). Provided courtesy of the U.S. General Services Administration with the help of Thomas Grooms. Courthouses depicted are (clockwise starting in top left): John Joseph Moakley U.S. Courthouse (Boston), Alfonse D. Amato U.S. Courthouse, U.S. Courthouse (Tallahassee), Wayne Lyman Morse U.S. Courthouse (Eugene), William Bryant U.S. Courthouse (Middle photo, Washington, D.C.), Wilkie D. Ferguson U.S. Courthouse (Miami), U.S. Courthouse (Corpus Christi), U.S. Courthouse (Richmond)



Interior of a courtroom. John Joseph Moakley Federal Courthouse, Boston, Massachusetts. Photograph Copyright: Steve Rosenthal, 1998. Photograph reproduced with the permission of the photographer.

Civil and Criminal Trial Rates United States Federal Courts 1976-2000



Provided by the Honorable Patrick Higginbotham, June 2002

Privatization

(1980-2010)

- Reconfiguring court procedure towards settlement
- Devolution to agencies
- Outsourcing

Example of cellular phone contract, 2002

Your Cellular Service Agreement

Please read carefully
before filing in a safe place.

YOUR CELLULAR SERVICE AGREEMENT

This agreement for cellular service between you and [your] wireless [company] sets your and our legal rights concerning payments, credits, changes, starting and ending service, early termination fees, limitations of liability, settlement of disputes by neutral arbitration instead of jury trials and class actions, and other important topics. PLEASE READ THIS AGREEMENT AND YOUR PRICE PLAN. IF YOU DISAGREE WITH THEM, YOU DON'T HAVE TO ACCEPT THIS AGREEMENT.

IF YOU'RE A NEW CUSTOMER, THIS AGREEMENT STARTS WHEN YOU OPEN THE INSIDE PACKAGE OF ANY CELL PHONE YOU RECEIVED WITH THIS AGREEMENT IF YOU DON'T WANT TO ACCEPT AND BE BOUND BY THIS AGREEMENT, DON'T DO ANY OF THOSE THINGS. INSTEAD, RETURN ANY CELL PHONE YOU RECEIVED WITH THIS AGREEMENT (WITHOUT OPENING THE INSIDE PACKAGE) TO THE PLACE OF PURCHASE WITHIN 15 DAYS.

IF YOU'RE AN EXISTING CUSTOMER UNDER A PRIOR FORM OF AGREEMENT, YOUR ACCEPTING THIS AGREEMENT IS ONE OF THE CONDITIONS FOR OUR GRANTING YOU ANY OF THE FOLLOWING CHANGES IN SERVICE YOU MAY REQUEST: A NEW PRICE PLAN, A NEW PROMOTION, ADDITIONAL LINES IN SERVICE, OR ANY OTHER CHANGE WE MAY DESIGNATE WHEN YOU REQUEST IT (SUCH AS A WAIVER OF CHARGES YOU OWE). . . . YOU CAN GO BACK TO YOUR OLD SERVICE UNDER YOUR PRIOR AGREEMENT AND PRICE PLAN BY CONTACTING US ANY TIME BEFORE PAYING YOUR FIRST BILL AFTER WE MAKE THE CHANGE YOU REQUESTED. OTHERWISE, IF YOU PAY YOUR BILL, YOU'RE CONFIRMING YOUR ACCEPTANCE OF THIS AGREEMENT. IF YOU DON'T WANT TO ACCEPT THIS AGREEMENT, THEN DON'T MAKE SUCH A CHANGE AND WE'LL CONTINUE TO HONOR YOUR OLD FORM OF AGREEMENT UNLESS OR UNTIL YOU MAKE SUCH A CHANGE. . . .

INDEPENDENT ARBITRATION

INSTEAD OF SUING IN COURT, YOU'RE AGREEING TO ARBITRATE DISPUTES ARISING OUT OF OR RELATED TO THIS OR PRIOR AGREEMENTS. THIS AGREEMENT INVOLVES COMMERCE AND THE FEDERAL ARBITRATION ACT APPLIES TO IT. ARBITRATION ISN'T THE SAME AS COURT. THE RULES ARE DIFFERENT AND THERE'S NO JUDGE AND JURY. YOU AND WE ARE WAIVING RIGHTS TO PARTICIPATE IN CLASS ACTIONS, INCLUDING PUTATIVE CLASS ACTIONS BEGUN BY OTHERS PRIOR TO THIS AGREEMENT, SO READ THIS CAREFULLY. THIS AGREEMENT AFFECTS RIGHTS YOU MIGHT OTHERWISE HAVE IN SUCH ACTIONS THAT ARE CURRENTLY PENDING AGAINST US OR OUR PREDECESSORS IN WHICH YOU MIGHT BE A POTENTIAL CLASS MEMBER. (We retain our rights to complain to any regulatory agency or commission.) YOU AND WE EACH AGREE THAT, TO THE FULLEST EXTENT POSSIBLE PROVIDED BY LAW:

(1) ANY CONTROVERSY OR CLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT, OR TO ANY PRIOR AGREEMENT FOR CELLULAR SERVICE WITH US . . . WILL BE SETTLED BY INDEPENDENT ARBITRATION INVOLVING A NEUTRAL ARBITRATOR AND ADMINISTERED BY THE AMERICAN ARBITRATION ASSOCIATION ("AAA") UNDER WIRELESS INDUSTRY ARBITRATION ("WIA") RULES, AS MODIFIED BY THIS AGREEMENT. WIA RULES AND FEE INFORMATION ARE AVAILABLE FROM US OR THE AAA;

(2) EVEN IF APPLICABLE LAW PERMITS CLASS ACTIONS OR CLASS ARBITRATIONS, YOU WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST US . . . AND WE WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST YOU. . . .

(3) No arbitrator has authority to award relief in excess of what this agreement provides, or to order consolidation or class arbitration, except that an arbitrator deciding a claim arising out of or relating to a prior agreement may grant as much substantive relief on a non-class basis as such prior agreement would permit. NO MATTER WHAT ELSE THIS AGREEMENT SAYS, IT DOESN'T AFFECT THE SUBSTANCE OR AMOUNT OF ANY CLAIM YOU MAY ALREADY HAVE AGAINST US OR ANY OF OUR AFFILIATES OR PREDECESSORS IN INTEREST PRIOR TO THIS AGREEMENT. THIS AGREEMENT JUST REQUIRES YOU TO ARBITRATE SUCH CLAIMS ON AN INDIVIDUAL BASIS. In arbitrations, the arbitrator must give effect to applicable statutes of limitations and will decide whether an issue is arbitrable or not. In a Large/Complex Case arbitration, the arbitrators must also apply the Federal Rules of Evidence and the losing party may have the award reviewed by a panel of 3 arbitrators.

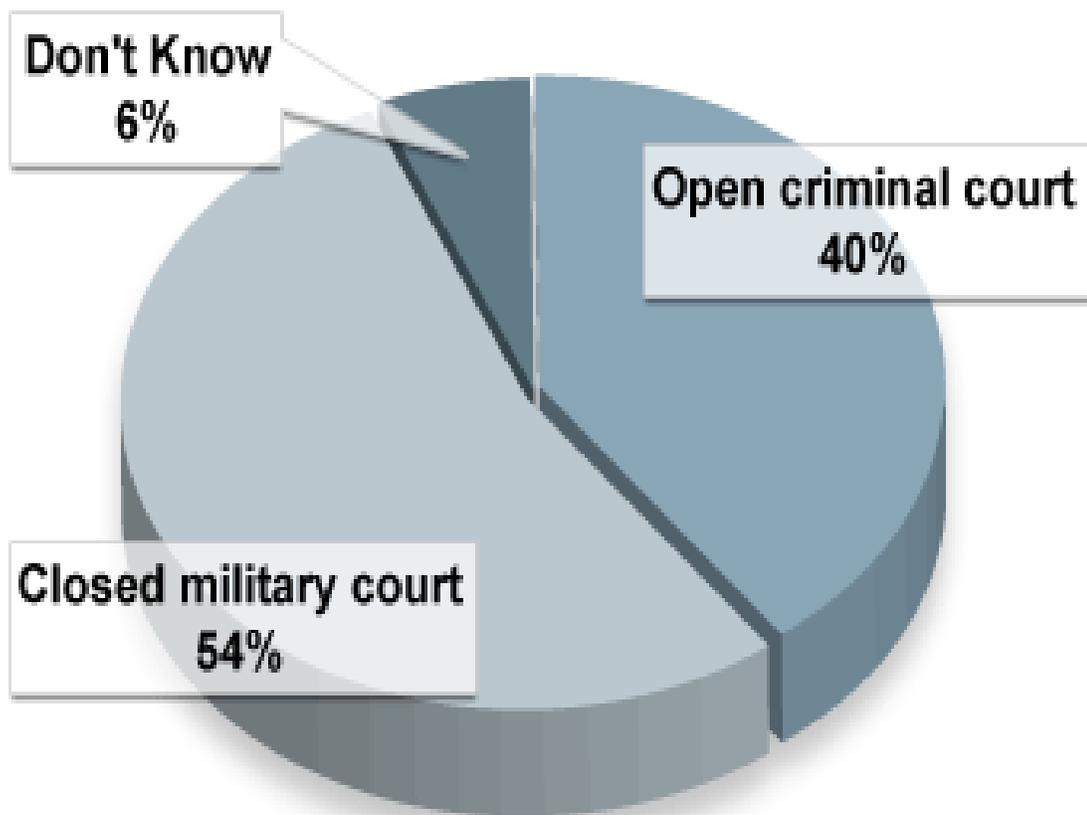
(4) IF FOR SOME REASON THESE ARBITRATION REQUIREMENTS DON'T APPLY, YOU AND WE EACH WAIVE, TO THE FULLEST EXTENT ALLOWED BY LAW, ANY TRIAL BY JURY. A JUDGE WILL DECIDE ANY DISPUTE INSTEAD;

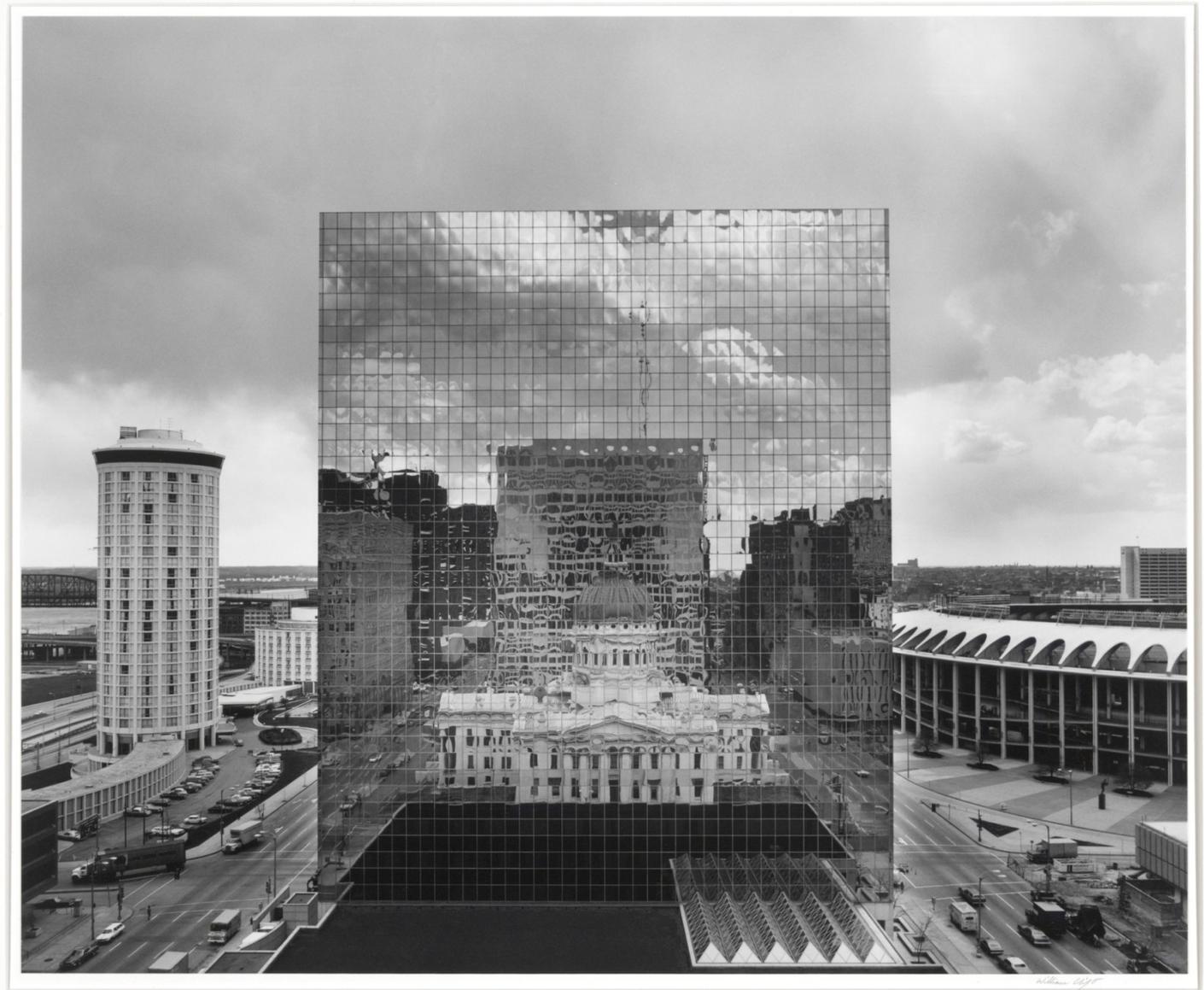
(5) NO MATTER WHAT ELSE THIS AGREEMENT SAYS, IT DOESN'T APPLY TO OR AFFECT THE RIGHTS IN A CERTIFIED CLASS ACTION OF A MEMBER OF A CERTIFIED CLASS WHO FIRST RECEIVES THIS AGREEMENT AFTER HIS CLASS HAS BEEN CERTIFIED, OR THE RIGHTS IN AN ACTION OF A NAMED PLAINTIFF, ALTHOUGH IT DOES APPLY TO OTHER ACTIONS, CONTROVERSIES, OR CLAIMS INVOLVING SUCH PERSONS.

CBS NEWS

Poll: Most Oppose Terror Trials in Open Court (Nov.17, 2009)

Suspected Terrorists Should Be Tried In...





William Clift, Reflection, Old St. Louis County Courthouse reflected in the Equitable Building, taken in 1976 in conjunction with the Seagram Court House Project.