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WARREN BURGER AND THE ADMINISTRATION OF JUSTICE

CARL TOBIAS*

CHIEF Justice Warren E. Burger was President Richard M. Nixon's first nominee to the United States Supreme Court. While running as a presidential candidate, Nixon campaigned on a promise to appoint jurists who would strictly construe the United States Constitution and exercise judicial restraint. By naming Warren Burger in 1969, President Nixon intended to honor that pledge and hoped to reverse the liberal judicial activism which he asserted the Supreme Court had practiced under Chief Justice Earl Warren. 1

It is a testament to Chief Justice Burger and to the institution of the Supreme Court that President Nixon's wish remained essentially unrealized. Indeed, Warren Burger's tenure as Chief Justice is replete with ironies. The Court which Warren Burger led moderated a few Warren Court precedents, particularly involving criminal law and procedure; however, it left intact, and even consolidated, much Warren Court jurisprudence.

The Burger Court was as activist as its predecessor in recognizing constitutional rights and actually elaborated certain legal theories that the Warren Court had only suggested. For example, Chief Justice Burger wrote or joined in opinions which declared new rights for women, emphasized separation of powers and interpreted the First Amendment. 2 Perhaps most ironic, the Chief Jus-

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tice, whom President Nixon appointed in the name of law-and-order, authored the decision that required President Nixon to divulge the taped White House conversations that ultimately lead to his resignation. 3

These and other actions of Warren Burger exasperated individuals who supported his appointment and pleased those who opposed it, even as additional activities of the Chief Justice infuriated both his proponents and detractors. In the final analysis, Warren Burger may have fully satisfied no one, except himself. Soon after Warren Burger's 1986 retirement, he characteristically reflected: "It's always been somewhat comforting to know . . . that I have been castigated by so-called liberals for being too conservative and castigated by so-called conservatives for being too liberal. Pretty safe position to be in." 4 Numerous legal scholars, historians, political scientists and pundits have thoroughly evaluated these important aspects of the Chief Justice's work. 5

I want to emphasize another dimension of Warren Burger's career as Chief Justice which is equally ironic and at least as signifi-

(interpreting First Amendment); see also Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 29-31 (1971) (holding busing is legitimate means of achieving desegregation). See generally The Burger Court: The Counter-Revolution That Wasn't at vii (Vincent A. Blasi ed., 1983) (arguing that Burger Court enlarged reach of earlier decisions of Warren Court on racial equality and First Amendment); The Burger Years at vii (Herman Schwartz ed., 1987) (considering legal impact of Burger Court decisions on "blacks, women, the press, criminal defendants, labor unions, and others").


5. See, e.g., The Burger Court: The Counter-Revolution That Wasn't, supra note 2, at xii (presenting series of commentaries by 12 close students of Burger Court's work); The Burger Years, supra note 2, at vii (compiling analyses by scholars and experts of Burger Court's rulings from both practical and theoretical perspectives); Albert W. Alschuler, Failed Pragmatism: Reflections on the Burger Court, 100 HARV. L. REV. 1436, 1437-41 (1987) (detailing Burger Court's "inconstant performance" and its "reluctance or inability to chart a clear course"); Abram Chayes, The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court, 96 HARV. L. REV. 4, 7-8 (1982) (describing Burger Court's decisions as "something less than hospitable" to procedures and elements of public law litigation).
cant. This feature is Warren Burger's enormous contribution to improving the administration of justice in the United States. The Chief Justice won justly-deserved credit, realized some of his greatest successes, and probably left the most lasting legacy in this unglamorous, thankless, and yet critical, area.

Warren Burger was fond of observing that he took seriously the title of Chief Justice of the United States, not merely the Supreme Court, and considered himself the steward of the whole judicial system, state and federal. It is quite ironic that the jurist whom Richard Nixon hoped would end an era of judicial activism employed judicial activism in the service of the administration of justice.

The plethora of institutions dedicated to enhancing the administration of justice established during Warren Burger's tenure testifies to his leadership. These entities include the Institute for Court Management, the National Institute of Corrections, the National College of the Judiciary, the National Center for State Courts, the State Justice Institute, the American Inns of Court and the Supreme Court Historical Society.

Warren Burger also staunchly supported and actively participated in the work of similar organizations, such as the Judicial Conference of the United States, the Federal Judicial Center (FJC) and the Administrative Office of the United States Courts (AO), which

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already existed when he became Chief Justice. Warren Burger presided over thirty-four meetings of the Judicial Conference of the United States, the principal policymaking arm of the federal courts. He correspondingly assumed major responsibility for converting the nascent, rather obscure Federal Judicial Center, whose board the Chief Justice chairs by statute, into an influential entity for research and writing on the Third Branch.

Warren Burger's perceptive appreciation of the need to encourage, increase and institutionalize dialogue between federal and state judges concomitantly led him to promote the creation of State-Federal Judicial Councils. Practically every one of the above organizations was established to improve the performance of all individuals—including judicial officers, as well as clerks of court, probation officials and marshals—who deliver federal and state civil and criminal justice.


11. See Imprint, supra note 7, at 1, 4 (remarking that Chief Justice Burger's impact was felt by courts at all levels); Greenhouse, supra note 1, at A1 ("[Chief Justice Burger] believed that judges could be helped to be more efficient if profes-
The creation of the many entities that I have examined and the legislative receptivity to numerous additional initiatives that the Chief Justice supported, attest to his facility in working with Congress. For instance, Warren Burger was an avid proponent of court administrators, and he successfully advocated for the establishment of the office of circuit executive. Moreover, when the Chief Justice perceived that district courts were encountering growing docket pressures, he convinced Senators and Representatives to expand the jurisdiction of magistrate judges. Warren Burger correspondingly persuaded Congress to create the United States Court of Appeals for the Federal Circuit to capitalize on the efficiencies that specialized courts can yield and to reduce somewhat the workloads of judges on the regional appellate courts.

The Chief Justice also convinced Senators and Representatives that they must devote additional resources to the Third Branch. For example, between the time of his 1969 appointment and 1980, Congress doubled the number of active federal judges and appropriated a five-fold increase in the federal courts’ budget. Warren professional management techniques were imported to the courts, from clerk’s offices to judges’ chambers.


Burger persuaded Senators and Representatives as well to authorize the position of Administrative Assistant to the Chief Justice in recognition of the administrative demands that are imposed on the office. 16 Furthermore, Warren Burger supported the establishment of the Judicial Fellows program, which enables scholars to engage in challenging work for a year at the Supreme Court, the FJC or the AO. 17

The Chief Justice, in his role as head of the judiciary, ardently and persistently promoted initiatives that were intended to facilitate effective court management and to foster efficiency. Congress sponsored most of these endeavors, but others proceeded primarily within the Third Branch. For instance, Warren Burger enjoyed substantial success in modernizing courts by advocating the application of technological innovations, such as increased computerization and streamlined docketing. 18


17. See Russell R. Wheeler & Howard R. Whitcomb, Judicial Administration: Text and Readings at xiv (1977) (stating that idea for book on judicial administration was developed during authors' participation in Judicial Fellows program created by Chief Justice Burger); Imprint, supra note 7, at 4 (explaining that Chief Justice Burger supported creation of Judicial Fellows program on recommendation of his assistant, Mark W. Cannon). See generally Gazell, supra note 13, at 467 (reciting Justice Burger's hope that Judicial Fellows would later make further contributions to development of judicial administration).

18. See Imprint, supra note 7, at 1 (relating Chief Justice Burger's efforts to increase court efficiency through improved technology and streamlined docketing); Mark W. Cannon, Creative Administrator, Nat'l L.J., July 17, 1995, at A22 (suggesting that Chief Justice Burger contributed more than did any of his predecessors in modernizing administration of justice); Reske, supra note 1, at 37 (stating that Chief Justice Burger modernized not only Supreme Court and federal courts, but state courts as well). See generally Cannon, supra note 7, at 40-41 (describing Chief Justice Burger's efforts to modernize both federal and state courts). For a further discussion of Chief Justice Burger's efforts to modernize the judiciary, see Reflections, supra note 6, at 1, 5.
Warren Burger's indefatigable efforts to enhance the quality of courts' operations led him to encourage a broad spectrum of studies relating to the courts. One prominent example was the Chief Justice's orchestration of the Pound Conference, a 1976 conclave which intensively evaluated perceived problems of the civil justice system, such as the litigation explosion and abuse of the discovery process.19

During the Pound Conference, Chief Justice Burger delivered the keynote address, titled *Agenda for 2000 A.D.—A Need for Systematic Anticipation*,20 that typified the topics which the meeting's attendees explored. The Chief Justice's presentation, those of other participants and exchanges during the session addressed the issues that were considered critical to civil dispute resolution at the time and anticipated many questions which have figured prominently in ensuing debate. Several students of federal civil procedure and the federal courts credit this convocation with initiating a constructive national conversation on civil justice that continues unabated.21

The Pound Conference may even have represented a watershed for modern federal civil procedure. Since 1938, when the Supreme Court adopted the original Federal Rules of Civil Procedure, the Court and Judicial Conference Committees, which developed recommendations for the Rules' improvement, maintained a national, uniform code of procedure, while judges had flexibly and pragmatically applied the Rules.22 During the mid-1970s, a number


20. See id. at 23 (questioning whether judicial system can meet demands of future, as well as exploring possibilities of change).


of judges and writers began re-evaluating this procedural model, and some observers suggested that it be narrowed.23

Considerable change subsequently materialized and assumed several forms. Particularly important were the rise of managerial judging, whereby district judges exercised greater control over litigation's pretrial phase, and the closely-related phenomenon of proliferating local procedures, many of which conflicted with applicable Federal Rules.24 Equally significant were the Supreme Court's promulgation and judicial enforcement of the 1983 Federal Rules Amendments,25 relating to sanctions, pretrial conferences

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23. See Subrin, supra note 21, at 1158 (describing "sea change" of 1970s when courts started requiring specific pleading for certain types of cases and sought to control and limit discovery). Of course, numerous participants in the Pound Conference suggested that expansive procedure be limited. For a further discussion of the Pound Conference, see supra notes 19-21 and accompanying text. See also Amendments to Federal Rules of Civil Procedure, 446 U.S. 995, 998-1000 (1980) (Powell, J., dissenting) (arguing that original discovery rules lead to delay and excessive expense and are in need of reform); Arthur R. Miller, The Adversary System: Dinosaur or Phoenix, 69 MINN. L. REV. 1, 8 (1984) ("The liberal and permissive Federal Rules of Civil Procedure ... may be contributing to the protraction of cases in today's era of complex regulation and behemoth disputes.").


and discovery, and the passage and implementation of the Civil Justice Reform Act of 1990 (CJRA).\(^{26}\) In short, issues ventilated during, and at the time of, the Pound Conference struck responsive chords and have continued to resonate.

Warren Burger also played an instrumental role in creating the Commission on Revision of the Federal Court Appellate System, popularly known as the Hruska Commission.\(^{27}\) When the Chief Justice recognized that a “crisis of volume” might threaten justice in the federal circuits, he urged that this entity be established to undertake a comprehensive evaluation of the appeals courts and to propose improvements.\(^{28}\)

Congress implemented the Commission’s recommendation that the former Fifth Circuit be divided in 1980,\(^{29}\) while the Commission practices that district judges pursued under the rubric of managerial judging. See Tobias, supra note 22, at 1594-95 (arguing that amendments compromised idea of uniform national procedure code).


mission's suggestion that the Ninth Circuit be split underlies perennial calls for bifurcation, one as recently as May 1995. Over the last twenty years, the Commission's efforts have framed much debate regarding the problems which expanding caseloads cause and the best means of treating those dockets.

Warren Burger, in his unremitting pursuit of workable reforms that would facilitate the administration of justice, willingly confronted and even actively engaged controversy. Perhaps the preeminent illustration was his fervent and frequent advocacy of an intermediate appellate court to relieve the Supreme Court's workload. The Chief Justice vigorously and persistently espoused the idea, although Congress never created the tribunal. During 1988, former Chief Justice Burger observed: "Apathy and inertia seem to surround proposals for improving the administration of justice unless there's a driving force behind them."

Texas, Louisiana and Mississippi, and Eleventh Circuit, composed of Florida, Georgia and Alabama).


32. See Reflections, supra note 6, at 7; Warren Weaver, Jr., Burger Supports Proposal for a New National Court of Appeals, N.Y. Times, June 4, 1975, at 17 (noting that new court would double number of nationally applicable legal rulings by resolving disputes that Supreme Court lacked time to hear). See generally Burger, supra note 10, at 77-83 (reproducing speech titled "The Report of the Freund Study Group on the Caseload of the Supreme Court," American Law Institute, Washington, D.C., May 15, 1973) (blaming population growth, increasing complexity of modern business and government, expansion of legislation protecting consumers and wide range of new legislation for Court's increasing workload); Thomas E. Baker & Douglas D. McFarland, The Need For a New National Court, 100 Harv. L. Rev. 1400, 1410 (1987) (referring to Chief Justice Burger's belief that intermediate appellate court is only solution to Court's excessive workload); Cannon, supra note 7, at 41 (arguing that creation of intermediate appellate court would "allow the Supreme Court to focus on the cases most deserving its attention while ensuring national review for other cases warranting it").

33. Reflections, supra note 6, at 7. Warren Burger also actively participated in prison reform and supported numerous other initiatives that improved the administration of justice. See Cikins, supra note 7, at 8 (highlighting Chief Justice Burger's determination to strengthen criminal justice system and ensure punishment of wrongdoers, while also providing offenders opportunity to reform); Friedman,
Some observers asserted that Warren Burger's imperious demeanor complicated his efforts to build consensus on the Supreme Court. However, the Chief Justice apparently never forgot his Midwestern origins. Warren Burger was one of seven children who secured his first job at the age of ten delivering newspapers. He later attended night classes in undergraduate and law school while selling life insurance during the day. The Chief Justice similarly worked assiduously to guarantee that all of the courts functioned efficiently, thereby enhancing the quality of justice and protecting taxpayers. In 1973, he stated: “By making the judicial system more productive, we are making the federal courts accessible to all Americans at less personal financial expense and less emotional expense—all in addition to saving citizens’ taxes.”

The present appears to be an especially troubled time for the increasingly beleaguered federal courts. Many district courts experience greater difficulties in resolving a steadily growing, more complex, civil docket and a substantial, albeit relatively static, criminal caseload, a situation that the 1994 crime legislation promises to exacerbate. Numerous federal judges considered the Civil Justice Reform Act of 1990 to be a congressional attempt at micro-managing the courts' internal operations and, therefore, an unwarranted

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35. Hutchison, supra note 6, at A20 (describing Chief Justice Burger as “a rags-to-riches story” who won scholarship to Princeton but stayed home to help family and save money); see also Reske, supra note 1, at 37 (detailing Chief Justice Burger’s educational and career background).  
intrusion by a coordinate branch of government.\textsuperscript{39} The statute's implementation has further fragmented the already balkanized system of federal civil procedure.\textsuperscript{40}

The Supreme Court's 1993 promulgation of an amendment prescribing automatic disclosure, which empowers all ninety-four federal districts to vary or to eschew the revision, has further undermined the national, uniform character of this procedural scheme.\textsuperscript{41} The disclosure amendment's adoption has correspondingly eroded the authority and prestige of the national rule revision entities, such as the Judicial Conference Advisory Committee on the Civil Rules, while dealing a deleterious symbolic and actual blow to the national rule amendment process.\textsuperscript{42} Had Senators and Representa-

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tives passed a legal reform in the *Contract With America* that would have significantly revised Federal Rule of Civil Procedure 11 only two years after the Supreme Court fundamentally amended the provision, Congress would have additionally undercut the power and respect which the rule revisors have traditionally enjoyed and may well have eviscerated the national amendment process.\(^43\)

Burgeoning appellate court dockets impose increasingly onerous duties on circuit court judges, complicating their efforts to decide appeals expeditiously, inexpensively and fairly and compromising the appellate ideal.\(^44\) Moreover, federal courts experts have discovered no efficacious means of treating the difficulties that these mounting circuit caseloads create.\(^45\)

Despite the growing number and severity of problems which the federal courts face, Congress persistently requires that they achieve more with fewer resources.\(^46\) Symptomatic is the continu-

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\(^{45}\) See *Baker, Rationing Justice*, supra note 28, at 295-96 (describing inability of Federal Courts Study Committee to proffer meaningful structural reform of appellate court system); Tobias, supra note 30, at 1395 (noting "a lack of consensus among federal court experts about precisely what difficulties growing dockets cause"). For a further discussion of the crisis of expanding caseloads, see supra notes 27-31 and accompanying text.

ing legislative expansion of civil and criminal jurisdiction without concomitant appropriations to accommodate the increasing, more complex, civil docket and the large, if rather stable, criminal caseload.\textsuperscript{47}

During these difficult times for the federal courts, individuals in the federal government's three branches, who are responsible for the federal civil and criminal systems, should honor Warren Burger by rededicating themselves to improving the administration of justice, an ideal which the Chief Justice so successfully pursued. On a comparatively general, theoretical plane, these public servants might continue applying former Chief Judge Clifford Wallace's insightful suggestion to the polycentric conundrum posed by federal court jurisdiction, expanding appellate dockets, and dwindling resources, including the judiciary's size.\textsuperscript{48} Judge Wallace recommended that a three-branch convocation be convened to explore "new federal law and its impact on the federal court system."\textsuperscript{49} A

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that funding level for fiscal year 1994 is more than $400 million short of amount necessary for full funding of all court programs). \textit{See generally} William H. Rehnquist, \textit{Seen in a Glass Darkly: The Future of the Federal Courts}, 1993 Wis. L. Rev. 1, 3 (arguing that resources are inadequate to meet "ever-increasing demands of the criminal justice system and a litigious citizenry"). For a further discussion of the increasing demands placed on the judicial system, see \textit{infra} note 52 and accompanying text.

\textsuperscript{47}. In fairness, certain legal reforms included in the ninth tenet of the CONTRACT WITH AMERICA are intended to address some problems, such as litigation abuse, which the federal courts confront. \textit{See} CONTRACT WITH AMERICA, \textit{supra} note 38; Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (purportedly limiting abusive securities litigation); H.R. 988, 104th Cong. (1995) (reforming federal civil justice system). \textit{See generally} Tobias, \textit{Common Sense}, \textit{supra} note 43, at 701 (arguing that 1994 Common Sense Legal Reforms would impose greater expense and delay in civil litigation). Additionally, implementing these reforms would create other difficulties—inappropriately restricting federal court access, undermining the authority and prestige of the national rule revision entities, and eroding the national amendment process. \textit{Id.} at 723 (predicting that legislation will have devastating impact on national rule revision process). For a further discussion of proposed legislation's effect on the rule amendment process, see \textit{supra} note 43 and accompanying text. Moreover, the second and fourth tenets of the CONTRACT WITH AMERICA promise to expand federal criminal jurisdiction. \textit{See} CONTRACT WITH AMERICA, \textit{supra} note 38, at 9 (proposing anti-crime package). For a further discussion of legislation's potential effect on federal criminal caseload, see \textit{supra} notes 37-38 and accompanying text.


\textsuperscript{49}. \textit{See} Wallace Letter, \textit{supra} note 48, at 742 (advocating convocation as opportunity to address problem of federal court docket control triggered by unchecked federalization). There have recently been several convocations.
relatively specific, practical illustration would be the imposition of a moratorium on federal civil rule revision, pending the conclusion of Civil Justice Reform Act experimentation, its thorough, expert evaluation and congressional resolution of the legislation's future.50

Indeed, "now more than ever,"51 as the nation approaches the twenty-first century, there is a compelling need to derive inspiration from the example of Warren Burger. The Chief Justice's "unprecedented and unflagging efforts to improve the legal system have left an unmatched legacy of efficient administration in the Federal Judiciary despite the constant growth in demand placed on the judicial system."52

Telephone Interview with Mark Mendenhall, Assistant Circuit Executive, United States Court of Appeals for the Ninth Circuit.

50. See Tobias, Common Sense, supra note 43, at 736 ("Awaiting the conclusion of the CJRA initiative could afford the concomitant benefit of rectifying or ameliorating the problems created by local procedural proliferation."); Stephen B. Burbank, Ignorance and Procedural Law Reform: A Call For a Moratorium, 59 BROOK. L. REV. 841, 842 (1993) (calling for moratorium on procedural law reform until such time as rulemakers have addressed issues of alternative reform strategies and their likely impacts); see also Tobias, supra note 22, at 1627-34 (suggesting ways to revise procedures that govern civil litigation). For a further discussion of Civil Justice Reform Act of 1990, see supra notes 26, 39-40 and accompanying text.

51. This phrase was President Nixon's re-election slogan in the 1972 Presidential Campaign.

52. Imprint, supra note 7, at 4 (reproducing Judicial Conference resolution praising Chief Justice Burger on occasion of his retirement).