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Warren E. Burger and the Administration of Justice

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Warren E. Burger and the Administration of Justice

*Edward A. Tamm**

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INTRODUCTION

We of the legal profession occasionally worship too freely at the altar of tradition. Reasoned respect for the beliefs and practices of the past too frequently becomes veneration for age's sake. We sometimes move forward too slowly and reform too little, ignoring the need for change until we are overwhelmed by the disaster our procrastination has provoked. In no area of the law is this institutional failing more glaring than in the field of judicial administration. It has long been apparent that the demands imposed by an ever-increasing caseload were ill-served by the courts' existing administrative structure. However, we chose to ignore the woeful inadequacies of long-prevailing practices.

Some reforms were attempted over the years, but it was not until Warren E. Burger was appointed Chief Justice of the United States that sustained progress in the administration of justice began to be made on a national scale.

At his 1969 Senate nomination hearing, Judge Warren E.

Burger, then a member of the United States Court of Appeals for the District of Columbia Circuit, responded to a question posed by Senator James Eastland:

Mr. Chairman, if I were to be confirmed by the Senate, I would conceive my judicial duties to be . . . basically the same as they have been as a member of the U.S. court of appeals —deciding cases.

Above and beyond that . . . the Chief Justice of the United States is assigned many other duties, administrative in nature. I would think he has a very large responsibility to try to see that the judicial system functions more efficiently. He should certainly be alert to trying to find these improvements. He cannot do it alone, of course, but through the new . . . Federal Judicial Center, and [through] another very encouraging sign, the activity of the Subcommittee on the Courts under the chairmanship of Senator [Joseph D.] Tydings. I would think it was the duty of the Chief Justice to use every one of these tools to make our system work better. And I would expect to devote every energy and every moment of the rest of my life to that end should I be confirmed.¹

Twelve years have passed since Burger gave that response to the United States Senate and was confirmed as Chief Justice of the United States. Although the pace of change in judicial administration has traditionally been notoriously slow, it is time to begin evaluating how Chief Justice Burger's performance compares with his pledge to work energetically "to make our system work better."² This article offers a partial and tentative assessment of the results of Burger's efforts in the field of judicial administration since he became Chief Justice.³ Although this must be regarded as a preliminary review, because we are too close in time and involvement to offer a truly detached historical perspective, it appears that Burger has thus far made sig-

1. *Nomination of Warren E. Burger: Hearing Before the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 5 (1969) [hereinafter cited as *Nomination Hearing*].

2. *Id.*

3. Comparatively little has been written analyzing Burger and the administration of justice. Among the works are: Gazell, *Chief Justice Burger's Quest for Judicial Administrative Efficiency*, 1977 DET. C.L. REV. 455; Kurland, *The Lord Chancellor of the United States*, TRIAL, Nov.-Dec. 1971, at 11; Landever, *Chief Justice Burger and Extra-Case Activism*, 20 J. PUB. L. 523 (1971); Miller, *Lord Chancellor Warren Earl Burger*, SOCIETY, Mar.-Apr. 1973, at 18; Swindler, *Fifty-one Chief Justices*, 60 KY. L.J. 851 (1972); Swindler, *The Court, the Constitution, and Chief Justice Burger*, 27 VAND. L. REV. 443 (1974).

nificant strides in fulfilling his 1969 pledge.⁴ In part I we introduce some background on the highest judicial office directly concerned with the administration of justice. Thereafter, we consider changes generated at least in part by Burger under these headings: (II) Court Management and Efficiency; (III) Interbranch Communication and Legislation Affecting the Courts; (IV) Strengthening State Courts and Reducing Friction Between State and Federal Courts; (V) Campaigning for Improvements in the American Bar—Influence on Legal Education; and (VI) Other Areas of Interest.

I. THE OFFICE OF THE CHIEF JUSTICE

From the time of John Jay, when the entire federal judicial establishment consisted of nineteen judges (including six Supreme Court Justices), the duties and expectations placed on the Chief Justice of the United States have been greater than those of the Associate Justices.⁵

To many, the Chief Justice symbolizes the Court during the years in which he presides; to some, he personifies American justice. Each year the Chief Justice must, like his colleagues, sift through thousands of petitions for review, decide cases on the merits, write opinions, and act on emergency motions from one or more circuits. In addition, he presides over all public sessions and conferences of the Court. He is responsible, when he is in the majority, for assigning the writing of Court opinions. He must see to it that the Court's work gets out, and he is responsible for a variety of "housekeeping" duties connected with the flow of cases. A variety of statutes require that he approve the hiring, termination, and setting of compensation of the Supreme Court's employees, and he is also ultimately responsible for office building security.⁶ A Regent of the Smithsonian Institution by statute,⁷ the Chief Justice is by tradition its Chancellor; he is also a trustee of the National Gallery of Art⁸ and by tradition is

4. *Nomination Hearing*, *supra* note 1, at 5.

5. See, e.g., Danelski, *The Influence of the Chief Justice in the Decisional Process*, in *COURTS, JUDGES, AND POLITICS* 695 (3d ed., W. Murphy & C. Pritchett eds. 1975); Meador, *The Federal Judiciary and Its Future Administration*, 65 *VA. L. REV.* 1031 (1979); Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 *SUP. CT. REV.* 123.

6. See, e.g., 28 U.S.C. §§ 671-677 (1976). See also 40 U.S.C. § 131 (1976).

7. 20 U.S.C. §§ 41-44 (1976).

8. He is a trustee of the National Gallery of Art, National Portrait Gallery, and Hirschorn Museum. See, e.g., 20 U.S.C. § 72 (1976 & Supp. III 1979); 20 U.S.C. § 76cc(b)

a trustee of the National Geographic Society.⁹

However, what most clearly differentiates the Chief Justice from his colleagues on the Court are his duties as head of the federal court system, which numbers 648 active and 194 senior judges and 2,836 supporting staff. By statute, he is Chairman of the Judicial Conference of the United States¹⁰ and Chairman of the Board of the Federal Judicial Center.¹¹ Although the entire Court has the authority to appoint and remove the Director of the Administrative Office of United States Courts,¹² traditionally the Chief Justice alone appoints and removes the Director and oversees that office. The Chief Justice is frequently required to appoint representatives of the judicial branch to statutory tripartite and other commissions.¹³ He makes hundreds of assignments, designates judges for temporary service outside their own courts, and is responsible for certifying the disability of judges who receive medical retirement.¹⁴ When Congress creates a temporary or special court, such as the Temporary Emergency Court of Appeals, the "Wiretap" Panel, or the multidistrict litigation panels, the authority to designate the judges is vested in the Chief Justice.¹⁵ Thus, the Office of Chief Justice entails much more than merely being a member of the Supreme Court.

It was William Howard Taft who gave content to the modern Office of Chief Justice, bringing to it the strong leadership qualities, prestige, and status of a former President. In his day, however, there were only 114 federal judges—fewer than were in either the Fifth or Ninth Circuits in 1980—and the administrative "housekeeping" functions of the federal courts were conducted by the Department of Justice. Taft openly and effectively "lobbied" for legislation such as that creating the Conference of Senior Judges and the bill to give the Supreme

(1976). For 10 years Burger served as Chairman of the National Gallery.

9. Burger is also Honorary Chairman of the Institute of Judicial Administration (at New York University), the National Judicial College (at the University of Nevada), the Supreme Court Historical Society, and the Advisory Board of Project '87. He serves as Chairman of the Visiting Committee of the Institute for Court Management, which he founded in 1969.

10. 28 U.S.C. § 331 (1976 & Supp. III 1979).

11. 28 U.S.C. § 621 (1976 & Supp. III 1979).

12. 28 U.S.C. § 601 (1976).

13. *See, e.g.*, 44 U.S.C. § 3318(a)(1)(E) (1976) (authorizing the Chief Justice to appoint one member to the National Study Commission on Records and Documents of Federal Officials).

14. *See, e.g.*, 28 U.S.C. §§ 291-295, 372 (1976 & Supp. III 1979).

15. 28 U.S.C. § 1407 (1976).

Court certiorari jurisdiction. He advised Presidents and Attorneys General about a variety of matters affecting the judiciary, including the appointment of judges and justices. In differing respects and degrees, each of Taft's successors—Charles Evans Hughes, Harlan Fiske Stone, Fred M. Vinson, and Earl Warren—has lived up to the expectations set by Taft that the Chief Justice take some notable role in the leadership of the federal judiciary.¹⁶

Perhaps only once in a generation does a person "fit" a position as well as Warren Burger fit the position of Chief Justice in 1969. When he took office, the time was ripe for vigorous leadership. The litigation explosion and the growing public impatience with various aspects of the American court system indicated the general need for reform. At the same time, Burger's multifarious experiences had alerted him to many of the specific problems that needed to be addressed. As a practitioner for twenty-three years, he had observed flaws in court operations; as an appellate judge reviewing the trial records of thousands of cases and sitting occasionally by assignment as a trial judge, he had related theory to practice, observing, for example, the waste of juror time, the costly, cumbersome business of repeated continuances, pretrial motions made seriatim for purpose of delay, and time wastage caused by lawyers unprepared or inadequately trained for advocacy; and as an adjunct law teacher, he had sensed the deficiencies of legal education in relating theory to practical life. The times required a resourceful Chief Justice like Burger who was prepared to carry on Chief Justice Taft's tradition of actively seeking to improve the administration of justice.

Although Burger has interacted less directly with the executive and legislative branches than Taft did, in other respects he had expanded upon Taft's role by increasing the range of his activities. Not only has he actively headed the federal court system; he has also led the campaign for changing and strengthening state courts and legal systems. He has spurred the bar to raise its ethical standards and has called on both law schools and the bar to improve their training of lawyers.

The Chief Justice has remained true to his initial pledge to lead the fight to improve and reshape the administration of jus-

16. See generally P. FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* (1973).

tice in the United States.¹⁷ Immediately upon taking office he rejected any thought of assuming a cloistered role.¹⁸ At the first meeting of the American Bar Association (ABA) that he attended as Chief Justice in August 1969, Burger spoke out on behalf of introducing more modern court management methods, urging that an Institute for Court Management be created to train court administrators. He also took steps to promote a reexamination of the American penal system. He even chastised law schools for doing an inadequate job of preparing their students for the realities of litigation. Justice Clark described the result: "In my 22 years of attending these [ABA] conventions, I've never seen anyone who so quickly and effectively built a fire under this group as Burger."¹⁹ Similar responses appeared in a *Time* magazine story headlined *A Highly Visible Chief*.²⁰

The years since that August 1969 speech have been what Burger himself has called the third period of ferment in judicial administration of this century. The first period was dominated by Roscoe Pound and later Arthur Vanderbilt. The second period, in the 1920's and 30's, was the work of men like Moley, Vanderbilt, Parker, Taft, and Hughes, with Felix Frankfurter and Charles Clark advocating procedural change.²¹ The third period can be dated from around 1968, the year in which the federal magistrate system and the judicial panel on multidistrict litigation were created, and the year the Federal Judicial Center began operations. While Chief Justice Earl Warren deserves credit for those particular institutions, other names are associated with the changes that have occurred since then—Justice Tom Clark, Attorney General Griffin Bell, Chief Judges Irving Kaufman and Henry Friendly, State Chief Justice William O'Neill (Ohio), Senator Howell Heflin (Alabama), Edward McConnell (Director, National Center for State Courts), and professors and government officials such as Professors Daniel Meador, Maurice Rosenberg, and A. Leo Levin. It is against this general backdrop, and also mindful of our present circumstances, that we assess the results of Chief Justice Burger's work in the area of judicial administration.

17. N.Y. Times, July 2, 1969, at 1, col. 7.

18. N.Y. Times, June 20, 1969, at 17, col. 1.

19. TIME, Aug. 22, 1969, at 58.

20. *Id.*

21. Burger, *Symposium*, 1974 ARIZ. ST. L.J. 519-20.

II. COURT MANAGEMENT AND EFFICIENCY

The Chief Justice has brought new dimensions to the concept of court "management." He has spoken out and worked for professional management, the streamlining of court practices on calendaring and pretrial proceedings, and the use of modern technology. Arguing that "there is nothing incompatible between efficiency and justice," and that efficiency need not lead to dehumanization,²² Burger has stressed the values of productivity:

Why are we concerned about productivity? A more productive judicial system is essential for justice . . . giving litigants their relief promptly, rather than forcing them to wait endlessly while memories grow dim and witnesses move or die. . . . [T]he more efficiently we operate the courts, the faster we terminate cases and the less we tie up lawyers and witnesses in litigation. 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.²³

As a result of a wide range of programs, the average federal judge increased the disposition rate by more than thirty percent during the first eight years of Warren Burger's tenure as Chief Justice. He emphasized that this has come about for several reasons: judges have worked harder and have received special training in new techniques, senior (retired) judges have continued working, new procedures have been employed, chief judges have administered better, parajudicial personnel have been employed, and they and other personnel have received better training than before.²⁴ These developments grew from constant emphasis on management concepts in seminars and judicial meetings.

22. Address by Warren E. Burger, National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 9, 1976) (Pound Conference), reprinted in *THE POUND CONFERENCE* 23, 32 (A. Levin & R. Wheeler eds. 1979).

23. Press release by Warren E. Burger, Thirty Percent Increase in Case Handling per Federal Judgeship (Oct. 1973). For the purposes of this and a number of the following footnote references, it should be noted that the Information Service of the Federal Judicial Center (Washington, D.C.) includes in its collection various published and unpublished speeches and addresses by federal judges, including the Chief Justice.

24. Address by Warren E. Burger, American Bar Association Mid-Year Convention, 1977 Report to The American Bar Association (Feb. 13, 1977), reprinted in 63 A.B.A.J. 504, 508 n.5 (1977).

A. Professional Court Managers

When Burger came into office, he considered the question of why American justice takes so long. He attributed the delays in part to "the lack of up-to-date, effective procedures and standards for administration or management, and the lack of trained managers."²⁵

One of his speeches given at the ABA meetings in Dallas in 1969—less than two months after he became Chief Justice—was entitled *Court Administrators: Where Would We Find Them?* He called for a "corps of trained administrators or managers . . . to manage and direct the machinery so that judges can concentrate on their primary professional duty of judging."²⁶ Looking for "a place where court administrators can be trained just as hospital administrators have long been trained,"²⁷ Burger urged that an institute for court management be created at once.²⁸

In a public interview, Burger later described the development of this institute, beginning with his August 10, 1969, speech. He noted: "I drew a rough blueprint for the program while I was on vacation in September. We had the first meetings in October, and on December 7, 1969, the final meeting approving the structure, selecting a director and setting up the plan of operations was completed."²⁹

25. Address by Warren E. Burger, American Bar Association Convention, *Court Administrators: Where Would We Find Them?* (Aug. 12, 1969), reprinted in 5 LINCOLN L. REV. 1, 2 (1969).

26. *Id.* at 1.

27. Address by Warren E. Burger, American Bar Association Annual Meeting, *The State of the Federal Judiciary—1970* (Aug. 10, 1970), reprinted in 56 A.B.A.J. 929, 933 (1970).

28. Earl Warren and others had favored incorporating the training of court administrators into law school training, but little has been done about it. See Address by Earl Warren, Harvard Law School Sesquicentennial Banquet, *The Administration of the Courts* (Sept. 23, 1967), reprinted in 51 JUDICATURE 196, 200-01 (1968). In 1968 Edward C. Gallas had emphasized the need for professional managerial training. Gallas, *The Profession of Court Management*, 51 JUDICATURE 334 (1968). James A. Gazell stated:

The seeds of this development were implicit in the public remarks of Earl Warren while he was Chief Justice of the United States Supreme Court, the publications of prestigious national commissions, the slow emergence of the field as a profession, and the availability of extensive employment opportunities. However, the birth of I.C.M. resulted directly from an American Bar Association address made . . . by . . . Warren E. Burger.

Gazell, *University and Law School Education in Judicial Administration: A Case of National Proliferation*, 1976 DET. C.L. REV. 423, 437-38 (footnotes omitted).

29. Interview with Chief Justice Warren E. Burger, U.S. NEWS & WORLD REP., Dec. 14, 1970, at 42 [hereinafter cited as *Interview*].

The idea was vigorously supported by ABA President Bernard G. Segal. Two months after Burger's speech an ABA task force had met. When the Board for the new structure was set up, members included James Webb (National Aeronautics and Space Administration), John Macy (Civil Service Chairman), Edward McConnell (long-time administrator of New Jersey courts), and, as Chairman, former Attorney General Herbert Brownell. By January 14, 1970, Burger and ABA President Bernard Segal announced a two-year pilot project to train court executives.³⁰ Ernest C. Friesen, Jr., Director of the Administrative Office of the United States Courts, was recruited to head the new institute.

Thus, the Institute for Court Management (ICM) had been created within four months of Burger's speech; within six months it was in operation. It was the result of a joint effort by the ABA, the Institute of Judicial Administration, and the American Judicature Society. The ICM was initially funded by a \$750,000 grant from the Ford Foundation. Its first training course—a full-time, intensive, six-month program at the University of Denver—began on June 15, 1970, just over ten months after the Dallas speech. The first certificates were presented by the Chief Justice to a class of thirty-one in December 1970.³¹ The *Baltimore Sun* editorialized, "Quietly, as was fitting, there was a ceremony at the Supreme Court on Saturday which marks a real leap ahead in the history of the federal judiciary."³²

The past twelve years have been marked by an explosion of training programs for court managers and by a vast increase in the use of court administrators.³³ In 1969 there were trained court administrators in only four states.³⁴ By May 1980, 350 persons had completed both phases of the ICM Court Executive program. As of 1980, seven of ten circuit executives in the federal courts of appeals were graduates of the ICM, as were fourteen state court administrators.³⁵

In order to make people already skilled in management

30. N.Y. Times, Jan. 15, 1970, § 1, at 16, col. 4.

31. THIRD BRANCH, Jan. 1971, at 1.

32. The Sun (Baltimore), Dec. 15, 1970, § A, at 29, col. 1.

33. See Remarks by Warren E. Burger, Economic Club of New York Dinner Meeting (Jan. 23, 1974) (unpublished material collected in SPEECHES OF CHIEF JUSTICE WARREN BURGER in Brigham Young University Law Library).

34. New York, New Jersey, California, and Colorado.

35. Telephone interview with Harvey Solomon, Executive Director of the Institute for Court Management, Denver, Colo. (Mar. 18, 1981).

available to the field of court administration, Burger encouraged federal departments to send outstanding individuals to the ICM. William A. (Pat) Doyle, for example, was recruited from the Department of the Navy. After his ICM training, he became the first circuit executive of the Third Circuit. A retired Navy captain, Charles E. Nelson, a graduate of the first ICM class, became executive of the District of Columbia Circuit. Likewise, many states, recognizing the need for trained personnel and having for the first time a source from which to draw trained personnel, swiftly moved to modernize their systems.

Approximately sixty percent of those certified by the ICM now serve as administrators or on the administrative staffs of courts of general, limited, and special jurisdiction.³⁶ In the meantime, a number of universities have started additional court management programs, including the University of Denver College of Law, Colorado State University, American University, the University of Southern California, and the John Jay College of Criminal Justice. Numerous undergraduate colleges now offer programs in judicial administration.³⁷ It can fairly be said that a new profession has been born.

B. Circuit Executives

The first reference to the idea of circuit managerial officers can be traced to a suggestion by Chief Justice Charles Evans Hughes in 1938 that each circuit council have an administrative officer.³⁸ That suggestion was revived in 1968 with a proposal in an American Bar Foundation Report that each court of appeals should have an administrative officer responsible for administering the court's business.³⁹ By the time the then new Chief Justice spoke to the ABA in August 1969, legislation to provide administrators for the federal courts had been introduced and was under study by the Subcommittee on Judicial Machinery of the

36. *Id.*

37. See Gazell, *Developmental Syndromes in Judicial Management*, 38 BROOKLYN L. REV. 587, 612-17 (1972); Gazell, *University and Law School Education in Judicial Administration: A Case of National Proliferation*, 1976 DET. C.L. REV. 423, 440-53; Oglesby & Gallas, *Court Administration—A New Profession: A Role for Universities*, 10 AM. BUS. L.J. 1, 11-15 (1972); Yegge, *Professional Training for the Court Administrator*, 60 JUDICATURE 123 (1976).

38. See Martineau, *The Federal Circuit Executive: An Initial Report*, 57 JUDICATURE 438 (1974).

39. AMERICAN BAR FOUNDATION, *ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS* 3-4 (1968).

Senate Committee on the Judiciary.

Concerning the pending legislation, Burger made the point that if it were enacted there would be virtually no qualified persons available for appointment. Noting that we had thirty-eight trained astronauts, he pointed out: "If that legislation were passed at once we would not begin to fill the positions. We should indeed pass the legislation but we must also take immediate steps to ensure a supply of administrators. We cannot legislate court administrators any more than we can legislate astronauts; they must be trained."⁴⁰ Burger vigorously pressed for enactment of the legislation, and his support for an academy to train court administrators probably speeded up the bill's passage.

The Chief Justice's support for circuit executives rested on his belief that "[t]he management of busy courts calls for careful planning and definite systems and organization with supervision by trained administrator-managers."⁴¹ He believed that the new position would spare judges the burden of performing many administrative tasks, thus saving money: "We should not use 'judge time' to accomplish tasks that others with less [legal] training can do at less expense to the public."⁴² He also believed that the legislation would "provide a person who [would], in time, be able to develop new methods and new processes, which busy judges could not do in the past."⁴³

In 1970, Congress passed the Circuit Court Executive Act in the closing hours of the 91st Congress.⁴⁴ The law authorized, but did not require, each judicial circuit to appoint a circuit executive from among persons certified by a statutory board of certification. Congress cut the number of authorized positions from the twenty-nine requested by Burger (including eighteen district court positions) to eleven.⁴⁵ Under the new law, the circuit executive was to exercise such administrative powers and perform

40. Address by Warren E. Burger, *supra* note 25, at 4. "The very existence of this facility [the ICM] aided substantially in securing the passage by Congress of the Court Executives Act . . ." Address by Warren E. Burger, American Bar Association, *State of the Federal Judiciary—1971* (July 5, 1971), reprinted in 57 A.B.A.J. 855 (1971).

41. Address by Warren E. Burger, *supra* note 27, at 932.

42. Address by Warren E. Burger, *supra* note 25, at 3.

43. Address by Warren E. Burger, National Conference on the Judiciary, *Deferred Maintenance* (Mar. 12, 1971), reprinted in 57 A.B.A.J. 425, 428 (1971).

44. Act of Jan. 5, 1971, Pub. L. No. 91-647, 84 Stat. 1907 (codified at 28 U.S.C. § 332(e)-(f) (1976)).

45. THIRD BRANCH, Jan. 5, 1971, at 1.

such duties as were to be delegated by the circuit council.⁴⁶ The new legislation required that a statutory panel examine and certify managers qualified for the new position. Fifty-two court executives were certified by March 1972 from more than seven hundred candidates.⁴⁷

The chief judges of the circuits have reacted favorably to the circuit executives, who have alleviated administrative burdens, expedited new procedures, helped to increase communication among judges, and assisted the district courts. The new positions are not a panacea, however, for all ailments.⁴⁸ Burger himself cautioned: "It will take time—perhaps several years—before these circuit executives develop their role and function. More than that, it will take patience and understanding and tolerance among judges and the Bar to make this concept productive."⁴⁹ Nevertheless, Burger has supported expansion of the program to the district courts,⁵⁰ and in 1981 Congress appropriated funds for five district executive positions on an experimental basis.⁵¹ Burger has also strongly endorsed the use of trained court administrators for state courts: "The time must come when every state will have one of its most qualified judges as overseer of administration backed by a staff of trained court administrators."⁵²

In its consensus statement, the 1971 Williamsburg Conference on the Judiciary endorsed the use of state-wide court administrators.⁵³ The National Center for State Courts has made a

46. Martineau, *supra* note 38, at 439. The law suggested, but did not mandate, such illustrative duties as the administration of the business of the courts of appeals, "liaison with the various groups in the circuit, and serving as Secretary of the circuit council." *Id.*

47. *Id.* at 440. By September 1, 1972, eight of eleven circuit executives had been chosen. *Id.* William A. Doyle (3d Circuit), Samuel W. Phillips (4th Circuit), and William B. Luck (5th Circuit) were all ICM graduates.

48. See McDermott & Flanders, *The Impact of the Circuit Executive Act*, in FEDERAL JUDICIAL CENTER REPORT 79-1 (Apr. 1979).

49. Address by Warren E. Burger, American Bar Association Annual Meeting, *Report on Problems of the Judiciary* (Aug. 11, 1972), reprinted in 58 A.B.A.J. 1049, 1050 (1972).

50. Address by Warren E. Burger, American Bar Association Annual Meeting, *Report on the Federal Judicial Branch—1973* (Aug. 6, 1973), reprinted in 59 A.B.A.J. 1125 (1973).

51. The following five districts have been offered funding for this position: Northern District of Illinois, Central District of California, Eastern District of Michigan, Southern District of New York, and Southern District of Florida. By April, 1981, none of this funding had been formally accepted and utilized by any of these districts.

52. Remarks by Warren E. Burger, *supra* note 33.

53. LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE, JUSTICE IN THE STATES (W. Swindler ed. 1971).

similar endorsement. There are now state court administrators in every state but one.⁵⁴

C. *The Office of Administrative Assistant to the Chief Justice*

In 1972 Congress and the President officially recognized the need of the Chief Justice to have an administrative assistant.⁵⁵ As Chief Justice, Earl Warren used three law clerks, one secretary and two messengers.⁵⁶ Warren Burger realized that the demands upon the Office of the Chief Justice were so considerable that he could not effectively exercise his office to full capacity without assistance. Burger remarked in an interview, "One more thing: The Office of the Chief Justice desperately needs a high-level administrative deputy or assistant. I devote four to six hours a day on administrative matters apart from my judicial work, and it is not possible—not physically possible—to continue this schedule very long."⁵⁷

A bill authorizing the Chief Justice to appoint an administrative assistant at a salary of up to that earned by a district judge, then \$40,000, became law in March 1972.⁵⁸ Burger called the creation of the position an important breakthrough.⁵⁹ It was filled shortly thereafter by Dr. Mark W. Cannon, then director of the private, nonprofit Institute of Public Administration in New York City.

The duties of the Administrative Assistant to the Chief Justice include supplying the Chief Justice with background research, serving as liaison with organizations dealing with judicial administration, fostering public education about the judicial system, and assisting the Chief Justice with internal management of the Supreme Court.⁶⁰ In appointing the first incumbent, the

54. All states except Mississippi have state court administrators.

55. 28 U.S.C. § 677 (1976). Act of Mar. 1, 1972, Pub. L. No. 92-238, 86 Stat. 46 (codified at 28 U.S.C. § 677 (1976)).

56. Cannon, *An Administrator's View of the Supreme Court*, 22 FED. B. NEWS 109-11 (1975). Chief Justice Warren also received part-time assistance from the law clerk assigned to retired Justice Stanley Reed.

57. *Interview*, *supra* note 29, at 44.

58. Act of Mar. 1, 1972, Pub. L. No. 92-238, 86 Stat. 46 (codified at 28 U.S.C. § 677 (1976)). See 3 CONGRESSIONAL QUARTERLY SERVICE, CONGRESS AND THE NATION 304 (1973).

59. Remarks by Warren E. Burger, *supra* note 33.

60. The Office of Administrative Assistant to the Chief Justice (Dec. 15, 1976) (unpublished leaflet).

Chief Justice deliberately sought a nonlawyer with extensive governmental experience. Cannon, a Ph.D. in political science, had worked in Congress and as a consultant to state and foreign governments.

D. Judicial Fellows Program

The 1973 creation of the Judicial Fellows Program, paralleling similar programs in the executive and legislative branches, brought younger talent and interdisciplinary perspectives into the federal court system. The program was proposed by Mark Cannon and strongly supported by Burger. It was established to provide added creative staff assistance to the Office of the Administrative Assistant to the Chief Justice, the Directors of the Federal Judicial Center, and the Administrative Office of the United States Courts; to interest scholars of other disciplines in the problems of judicial administration; to assist scholars' teaching and writing by giving them first-hand experience in the field of judicial administration; and, in a pioneering way, to expose those serving in judicial capacities to the insights of persons trained in other disciplines.

In eight years there have been twenty Judicial Fellows. The majority had law degrees, and some were practicing law at the time of their selection. Many were on university faculties when chosen, a number with interdisciplinary backgrounds as well as practical experience. Still others had served as state supreme court law clerks or court administrators. One was even a state court judge.

The Judicial Fellows Program has made many contributions, including: (1) providing improved access to the rapidly increasing volume of research information on court management and the judicial process, some of which is the work of nonlawyers; (2) bringing talented young professionals into judicial administration careers; (3) permitting college and law school teachers to take their insights as Judicial Fellows back to the classroom; (4) stimulating research on the operation of courts; and (5) better informing the public about the work of the courts.⁶¹

61. See M. Cannon, *Judicial Fellows Report, First Four Years: 1973-1977* (1978) (unpublished); Cannon & Morris, *Inside the Courts: The Judicial Fellows Program*, 12 PS 6, 10-11 (1979); *The Judicial Fellows Program, 1979-1980* (unpublished brochure).

E. Conference of Metropolitan Chief Judges

The Conference of Metropolitan Chief Judges (METCHIEFS), consisting of the chief judges of the largest federal district courts (currently twenty-nine courts whose dockets comprise more than sixty percent of the federal court's business),⁶² was convened by the Chief Justice in Denver, Colorado. Its function is to act as a clearinghouse for new ideas and concepts in organizing the work flow among the judges themselves, to facilitate communications between the judges and the Federal Judicial Center, to pool experience, and to develop strategies to attack common problems.

The first meeting of the METCHIEFS in 1971 outlined critical stages of the criminal process and identified several key problem areas. For example, the members proposed a shift from a master calendar to individual calendars in district courts⁶³ in order to fix responsibility and conserve judges' time. They also developed means to conserve jurors' time and advocated expanded use of the single pretrial motion procedure.

The Chief Justice, who frequently attends the meetings, has strongly praised the work of the METCHIEFS Conference: "These meetings . . . help to formulate more definite programs to assure that litigation in the federal courts will be handled expeditiously, efficiently and with appropriate consideration."⁶⁴ He noted that "[t]heir efforts have already helped save several millions of dollars and have substantially improved productivity."⁶⁵ Finally, Burger also observed, "That group has contributed immensely to the improvements within the federal system and has been one of the major factors in the [then] thirty percent improvement in the productivity of federal judges in a span of five years."⁶⁶

F. Magistrates

Under the Federal Magistrates Act of October 17, 1968,⁶⁷

62. The chief judges of the federal district courts designated under title 28, section 133, of the U.S. Code to have six or more judges are invited to participate in the METCHIEFS.

63. See *THIRD BRANCH*, May 1978, at 1-2.

64. *THIRD BRANCH*, Sept. 1972, at 2.

65. Remarks by Warren E. Burger, *supra* note 33.

66. Address by Warren E. Burger, American Law Institute (May 23, 1975) (unpublished).

67. Pub. L. No. 90-578, 82 Stat. 1107 (codified in scattered sections of 18, 28

the old system of United States Commissioners (whose duties were limited to issuing warrants, holding preliminary hearings, and trying petty offenses) was replaced by a magistrate system with broader jurisdiction. This change was praised by the Chief Justice: "Congress wisely created the new office of United States magistrate . . . to relieve judges of some of their duties so that judges can devote more time to presiding over trials and other purely judicial work."⁶⁸

Nearly half the federal district courts now regularly delegate a substantial portion of their civil pretrial duties to federal magistrates, while another quarter do so occasionally. Magistrates, who have proven invaluable in improving pretrial procedures and moving cases through discovery are conducting an increasing number of trials. They provide the practical advantage to litigants of being more conveniently located geographically and more accessible than district court judges.⁶⁹

At the Chief Justice's urging, the jurisdiction of magistrates has been enlarged.⁷⁰ Specific functions delegated to magistrates vary from district to district, ranging from ministerial and advisory functions to full, substantive roles. In criminal cases this latter role encompasses issuing warrants, fixing bail, holding preliminary hearings, and conducting trials for petty offenses. In civil cases it includes conducting pretrial discovery and acting as special masters.⁷¹

In the leading study of the magistrate system, author Peter G. McCabe concludes:

The federal magistrate program . . . "plays an integral and important role in the Federal judicial system." The success of the program to date has surpassed the high hopes of the Congress in providing an effective forum for the disposition of minor federal criminal cases and providing much-needed assistance to district judges.

The district courts have made imaginative and effective

U.S.C.).

68. Address by Warren E. Burger, *supra* note 50, at 1126.

69. In the year ending June 30, 1977, one-quarter of a million proceedings were handled by magistrates, including the trial of 85,880 petty offenses and 17,000 misdemeanors. There were only 148 appeals from these trials to the district judges.

70. 28 U.S.C. § 636 (1976 & Supp. III 1979). See also *THIRD BRANCH*, Nov. 1976, at 1.

71. See Memorandum from William E. Foley to All Circuit Judges and District Judges (Oct. 12, 1979) (unpublished). See also McCabe, *The Federal Magistrate Act of 1979*, 16 *HARV. J. LEGIS.* 343 (1979).

use of magistrates and have delegated to them a progressively wider range and greater number of court proceedings under the existing law.⁷²

G. Jury Reforms

During the past ten years the size of juries in federal and state civil trials has been reduced, with very significant dollar savings in juror and judicial time.⁷³ The reduction of jury size in the federal courts was not achieved by statute, nor by Supreme Court rulemaking, but rather through massive experimentation begun by local rule in the Minnesota District Court by Chief Judge Edward Devitt with the backing of the Chief Justice.

By the time the Supreme Court upheld the constitutionality of juries with fewer than twelve members,⁷⁴ the Minnesota experiment had been adopted by other districts. The Chief Justice has suggested taking a closer look at the British legal system, which largely eliminated the jury in civil cases in 1937.⁷⁵ In March 1971, the Judicial Conference endorsed the recommendations of its Committee on Operations of the Jury System, headed by Second Circuit Chief Judge Irving Kaufman, approving in principle the reduction of jury size in civil cases. By May 1971, eleven districts had followed Minnesota's lead.⁷⁶ The use of six-member juries by local rulemaking was upheld by the Supreme Court on June 21, 1973, in a case involving a local rule of the District Court of Montana.⁷⁷ As of the beginning of 1981, eighty-six of the ninety-five federal judicial districts had adopted rules providing for smaller civil juries. Most of these rules provided for six-person juries; a few provided for eight-per-

72. McCabe, *supra* note 71, at 399.

73. Peter Sperlich is critical of these changes. P. Sperlich, *The Changing American Jury: Observing the Eighth Anniversary of the Beginning of Its End* (Aug. 1978) (unpublished paper delivered at American Political Science Association, New York City). See also Gazell, *supra* note 3, at 487.

74. *Williams v. Florida*, 399 U.S. 78, 86 (1970).

75. Address by Warren E. Burger, Testimonial Dinner in Philadelphia for Chief Justice John C. Bell, Jr., of the Supreme Court of Pennsylvania, *Agenda for Change* (Nov. 14, 1970) (unpublished material collected in *SPEECHES OF CHIEF JUSTICE WARREN BURGER* in Brigham Young University Law Library).

76. See *THIRD BRANCH*, Apr. 1971, at 4; *THIRD BRANCH*, Dec. 1970, at 1; *N.Y. Times*, May 16, 1971, at 33, col. 1.

77. *Colegrove v. Battin*, 413 U.S. 149, 152 (1973); *THIRD BRANCH*, June 1975, at 5-6; *THIRD BRANCH*, July 1973, at 7. The Supreme Court upheld the constitutionality of nonunanimous verdicts in criminal cases in *Apodaca v. Oregon*, 406 U.S. 404, 410-12 (1972); and *Johnson v. Louisiana*, 406 U.S. 356, 359-65 (1972).

son juries.⁷⁸ This reform saves millions of dollars annually in jury costs and simplifies and speeds jury selection.

H. Innovative Procedures in the Federal Courts

As caseloads have increased in the federal courts, the Chief Justice has advocated a variety of new devices to attempt to meet the demands. These devices, coupled with the contributions of senior judges and the extra effort by all federal judges, have improved output. Chief Justice Burger has encouraged courts to employ these new techniques and has publicized successful procedures worthy of adoption. A number of devices have been employed by district courts and judges.

1. The individual calendar

Under the individual calendar all aspects of a case are assigned to a particular judge promptly after the case is filed. The individual calendar system discourages judge-shopping, focuses responsibility on a specific judge, and enables that judge to become familiar with the problems of a case before trial. It reduces lawyer time in explaining (both orally and in writing) the background of a case on each pretrial motion. For example, Chief Judge George Hart of the United States District Court for the District of Columbia credited the individual calendar with reducing that court's pending civil caseload after three years from 307 cases per judge to 149, and the criminal caseload from 101 per judge to 33.⁷⁹ Virtually all large federal courts have adopted the individual calendar.

2. The omnibus pretrial hearing

The omnibus (or single) pretrial hearing procedure in criminal cases requires that all pretrial motions be submitted by an early, fixed date. The procedure was pioneered by the late Chief Judge James Carter in San Diego (when he was a district judge) and by Chief Judge Adrian Spears of San Antonio. It was also endorsed by the ABA Committee on Standards for Criminal Justice as part of the Standard on Discovery and Pre-Trial Pro-

78. Telephone interview with Joe Spaniol, Administrative Office of the U.S. Courts (Mar. 18, 1981). *But see* Gazell, *supra* note 3; P. Sperlach, *supra* note 73.

79. THIRD BRANCH, May 1973, at 6 (discussing report of Judge George Hart). *See also* THIRD BRANCH, Sept. 1969, at 1.

cedure. Judge Spears has stated, "Use of the omnibus [hearing] has virtually eliminated the written motion practices; saved counsel and court time and effort; exposed latent procedural and constitutional problems; provided discovery for an informed plea; and substantially reduced the congestion of the trial calendar."⁸⁰

The omnibus hearing clearly discourages spacing out pre-trial motions for dilatory purposes. The Chief Justice has praised this procedure and has urged all federal judges to employ it.⁸¹ Its use is now widespread.

3. *Other innovative techniques*

Other new techniques credited with improving productivity at the district court level include court reporter management and the use of video-taped depositions.⁸²

The courts of appeals have also been forced to innovate in order to cope with their exploding caseloads. All circuits now have central legal staffs. In addition, the circuits have developed procedures to expedite preparation and transmission of the record on appeal. The Second and Fifth Circuits have been among the most innovative. One major device for increasing productivity at the circuit level has been the screening of cases. This procedure allows many cases to be decided on the basis of typewritten briefs, without oral argument, and often without opinion or with only a short opinion. Beginning in May 1969, the Fifth Circuit screened all cases by assigning them in equal numbers to four panels of three judges. The panels divided the cases into categories—frivolous, summary disposition, limited argument, and full argument.⁸³ The cases were processed accordingly, with a resultant savings in time and cost.

I. The Results—Improved Productivity

The emphasis on modern management principles, on new devices and techniques, and on increased innovation and effort

80. THIRD BRANCH, Apr. 1973, at 7.

81. Address by Warren E. Burger, *supra* note 49, at 1051.

82. *See, e.g.*, THIRD BRANCH, Sept. 1972, at 2.

83. The Chief Justice has indicated that the screening of cases needs more study and has suggested that consideration be given to other alternatives such as requiring a litigant to secure leave to appeal. *See* Address by Warren E. Burger, *supra* note 50, at 1127.

by all federal judges⁸⁴ has contributed to an increased rate of case disposition per judge,⁸⁵ even though under the range of new statutes review of cases has become more difficult and time-consuming.⁸⁶ The following table demonstrates the sharp increase in case terminations from 1968 to 1978. That period was followed by a transitional decrease which resulted from an increased vacancy rate and the appointment of many new judges with the passage of the Omnibus Judgeship Bill in 1978.⁸⁷

Table 1: *Net Productivity 1968-1980*⁸⁸

	Terminations per Judgeship	
	District Court	Court of Appeals
1968	285.4	85.2
1969	304.3	92.9
1970	285.8	110.3
1971	309.7	127.5
1972	352.8	142.6
1973	349.0	155.8
1974	347.8	158.9
1975	370.8	165.0
1976	385.5	169.3
1977	405.1	183.3
1978	409.5	182.6
1979	342.8	143.4
1980	367.8	158.2

III. INTERBRANCH COMMUNICATION AND LEGISLATION AFFECTING THE COURTS

Throughout American history congressional concern with judicial problems has been sporadic at best, with needs often remaining unremedied until they have gathered compelling momentum for action. Until recent years, the judicial branch did little to move Congress to action. Although in some instances unusually dramatic litigation aroused widespread general inter-

84. The Chief Justice has commended highly the work of senior judges: "Were it not for the continued work of these Senior Judges, the Federal Court system would have collapsed during the past five or six years." W. Burger, Year-End Report (Jan. 2, 1977) (unpublished).

85. Address by Warren E. Burger, *supra* note 24.

86. *See, e.g.*, Press Release by Warren E. Burger, *supra* note 23.

87. *See also* Letter from Warren E. Burger to Peter Rodino, (July 11, 1978) (unpublished).

88. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 43, 58 (1980).

est in reforms,⁸⁹ it was not until Chief Justice Taft's tenure that the judicial branch began to exhibit interest in changing the procedure or administration of the courts' work.⁹⁰

The occasional remark deriding the judiciary for "lobbying" overlooks the Judicial Code of 1949, which requires the Judicial Conference to comment upon pending legislation affecting the courts, but not upon police issues or substantive law. In addition, the 1949 Code authorizes the Conference to develop proposals for legislative activity.⁹¹ Little else by way of communication exists between Judicial Conference committees and the Congress. Thus, the Conference has not always had an effective voice. Meeting only twice annually and lacking permanent staff, it often seemed unable to communicate its views to the Congress at an early enough stage to have meaning or impact. In 1976, for the first time, a legislative affairs officer was added to the staff.

A. *The Problem As Seen from the Judicial Side*

Historically, Congress had not paid close attention to the needs of the courts. Proposals for needed changes tend to become bogged down even when there is no real opposition. The workload of members of Congress is so great that it is not easy for them to focus on the "mundane" problems of court administration. The Chief Justice, by using various means to bring these problems into the open, has succeeded in getting better congressional attention. But many decisions important to the judicial branch can be held hostage by political winds; when particular Supreme Court decisions are unpopular with special interest groups, they bring to bear forces that stifle changes in the judicial system. Even when Congress acts, it sometimes enacts significant legislation affecting the judiciary without adequately consulting the Judicial Conference. There are several examples of undesirable results caused by Congress' failure to pay enough attention to the needs of the judiciary.

89. See generally F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1928).

90. See generally Swindler, *Fifty-one Chief Justices*, *supra* note 3.

91. The Judicial Code of 1949 states that "[t]he Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation." 28 U.S.C. § 331 (1976 & Supp. III 1979).

1. *New legislation enlarging jurisdiction*

Congress has tended to extend federal jurisdiction without giving the courts the tools to do the job. At least ninety-four statutes conferring new jurisdiction on the federal courts have been passed by Congress since 1969, often without consultation with its committees on the judiciary.⁹² These statutes have greatly increased the overall quantity of cases, as well as their complexity, and have even intruded into the organization and management of the courts. As of 1979 some thirty statutes (and two Federal Rules of Appellate Procedure) gave priorities to classes of cases in the courts of appeals; another sixty-two did the same in the district courts.⁹³ The Speedy Trial Act of 1974,⁹⁴ with its many complex procedures, was passed without meaningful consultation with the Judicial Conference. The Railroad Reorganization Law,⁹⁵ which created a Railroad Reorganization Court and conferred upon the Chief Justice the responsibility of replacing the original panel, was passed without anyone even informing the Chief Justice that it was under consideration.

2. *New judgeships*

While the caseload of the federal courts was dramatically increasing, the creation of judgeships was lagging far behind. On this matter the perspectives of the two branches differ greatly. As many judges see it, the creation of judgeships should be dictated by the volume of filings and the projected backlogs. Members of Congress often have other considerations in mind, some of which are purely political. Congress will rarely create new judgeships in a presidential election year. Congress historically has also refused to create new judgeships when it is controlled by a party different from that of the President, who has the appointing power.

Whatever the causes, the process inevitably lags years behind the need. Every two years the Judicial Statistics Subcommittee of the Judicial Conference Committee on Court Adminis-

92. See generally Rubin, *Bureaucratization of the Federal Courts: Tension Between Justice and Efficiency*, 55 NOTRE DAME LAW. 648 (1980).

93. *Id.* at 656-58.

94. Pub. L. No. 93-619, 88 Stat. 2076 (codified at 18 U.S.C. §§ 3152-3156, 3161-3174 (1976 & Supp. III 1979)).

95. Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (codified in scattered sections of 31, 45 U.S.C.).

tration reviews the needs of the judiciary. Its report is then reviewed by the Conference, whose recommendations are forwarded to Congress. There the matter sometimes lies for six to eight years. When Congress finally authorizes judgeships, there are further delays. In the past, the process of filling judgeships has involved negotiations among the Justice Department, the Senate, the White House, and the ABA Federal Judiciary Committee. During President Carter's administration, "merit selection" commissions were also involved. When a large number of judgeships is authorized at one time, as in 1978, the challenge of integrating as many as 152 new judgeships presents additional, enormous problems for the system.

In 1976, a presidential election year, the Chief Justice pleaded for new judgeships:

It is four years since the Judicial Conference of the United States supplied statistical data accumulated by the Administrative Office of the Courts at the request of Congress in order to determine how many additional judges were needed to meet the rising caseloads. The Judicial Conference then requested sixty-five additional judges. After approximately three years, the Judiciary Committee of the Senate recommended fifty-nine new judgeships. The Senate has now approved seven appellate judgeships, and this modest action is awaiting House action. Legislation for the remaining much-needed judgeships now awaits action of both houses. In the near crisis situation that confronts us, I put to you whether any political considerations related to the impending presidential election are tolerable.⁹⁶

Burger asked President Ford to call a meeting with the congressional leadership; the Chief Justice then met with them to discuss additional judgeships and pay freezes.⁹⁷

In the summer of 1978, Burger made public a letter to the Chairmen of both congressional judiciary committees stating that "judges at every level have been pressed to the point of exhaustion."⁹⁸ He added that "[i]f the new judges are not authorized by the close of the present session, there is a real possibility

96. Address by Warren E. Burger, American Bar Association Mid-Year Meeting, *Annual Report on the State of the Judiciary* (Feb. 15, 1976), reprinted in 62 A.B.A.J. 443, 444-45 (1976). See also Interview with Warren E. Burger, *How to Break Logjam in Courts*, U.S. NEWS & WORLD REP., Dec. 19, 1977, at 21, 22.

97. Interview with Warren E. Burger, *Why Courts are in Trouble*, U.S. NEWS & WORLD REP., Mar. 31, 1975, at 28.

98. Letter from Warren E. Burger to Peter Rodino (July 11, 1978) (unpublished). See also L.A. Times, July 24, 1978, at 11, col. 1.

that trials of civil cases in some districts may stop completely.”⁹⁹ Finally, in October 1978, President Carter signed a bill authorizing 117 new district judgeships and 35 new court of appeals judgeships.¹⁰⁰ Three years elapsed before all these judgeships were filled—protracting the total process nine years, from initiation in 1972 to completion in 1981.

The Chief Justice has suggested alternatives to the present system. In 1976 he recommended that the creation of federal judgeships be automatic, based upon a formula similar to what is done in some states, with the proviso that the process would be subject to congressional veto. In 1980 he renewed this proposal, urging that Congress consider authorizing the Judicial Conference to evaluate the need for additional judgeships and, subject to congressional veto, to establish such positions when they are required.¹⁰¹ He noted that there was a forty-year-old precedent for such a mechanism in Congress’ rulemaking power.

3. *Elimination of the Supreme Court’s mandatory jurisdiction*

The undesirable results of the interplay of inertia and politics can also be seen in the congressional failure to pass a bill eliminating the present mandatory jurisdiction of the Supreme Court and providing that the review of all cases be by writ of certiorari. Such a recommendation had been made by the Study Group on the Caseload of the Supreme Court (Freund Committee) in 1972.¹⁰² The Ford Administration’s Department of Justice Committee on Revision of the Federal Judicial System (Bork Committee), and the Carter Administration’s Office for Improvements in the Administration of Justice also supported this reform. In the spring of 1978, all nine Justices of the Supreme Court signed a letter strongly endorsing the elimination of its appeal jurisdiction.¹⁰³ The Office for Improvements in the

99. Letter from Warren E. Burger to Peter Rodino, *supra* note 98. See also L.A. Times, *supra* note 98.

100. Omnibus Judgeship Act, Pub. L. No. 95-486, 92 Stat. 1629 (1978) (codified at 28 U.S.C. § 133 (Supp. III 1979)).

101. Address by Warren E. Burger, American Bar Association Mid-Year Meeting, *Annual Report on the State of Judiciary* (Feb. 3, 1980), reprinted in 66 A.B.A.J. 295 (1980). See also W. Burger, End-of-the-Year Statement 14-21 (Dec. 29, 1980) (unpublished).

102. *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573, 595-96 (1973).

103. Letter from Warren E. Burger, signed by Associate Justices Brennan, White, Stewart, Marshall, Blackmun, Powell, Rehnquist, and Stevens, to Senator DeConcini

Administration of Justice invited comment from numerous organizations and individuals on the proposal to abolish the appeal jurisdiction. No opposition was voiced then¹⁰⁴ or since. In April 1979 the Senate passed the Supreme Court Jurisdiction Act of 1979, aimed at accomplishing this goal; but a rider was attached depriving the Supreme Court and district courts of appellate jurisdiction over state cases involving voluntary prayers in public schools, and the legislation was never enacted.¹⁰⁵

4. *Speedy Trial Act*

From the judges' point of view, a most exasperating example of poor cooperation between the Congress and the judiciary in the 1970's was the Speedy Trial Act. The legislation was drafted without consultation with the judicial branch, which had already developed what appeared to be a workable solution, utilizing a new rule on an experimental basis. The new rule, subsequently issued by the Judicial Conference on April 24, 1976, as amended Rule 50(B), required that every district court develop rules to provide a trial within six months if a defendant were out on bond and within three months if a defendant were in jail. The Supreme Court called upon each district to minimize undue delays and to prepare a plan which would include new rules with time limits. The districts' plans were then to be reviewed by the Judicial Council of the Circuit.¹⁰⁶

Burger had supported the new rule and advocated evaluating other ways of speeding up the appeals process, such as re-examining the courts' dependence upon printed briefs and records. He pointed out that "[s]peedy trials—and widespread awareness of the certainty of speedy trials with reasonably predictable finality—would be one of the most forceful deterrents to criminal conduct."¹⁰⁷

The Speedy Trial Act of 1974,¹⁰⁸ to reiterate, was drafted without consultation with the judicial branch. Even while the

(June 22, 1978) (unpublished).

104. *Hearings on S. 310 Before the Subcommittee on Improvements in Judicial Machinery of Senate Committee on the Judiciary*, 95th Cong., 2d Sess. 3-12 (1978) (statement of Daniel J. Meador).

105. S. 438, 96th Cong., 1st Sess. § 1259(a), 125 CONG. REC. S1578 (1979).

106. *See* Wash. Post, Sept. 11, 1971, at A2, col. 4.

107. Interview with Warren E. Burger, *supra* note 97, at 31.

108. Pub. L. No. 93-619, 88 Stat. 2076 (codified at 18 U.S.C. §§ 3152-3156, 3161-3174 (1976 & Supp. III 1979)).

Act was pending, minimal opportunity was given for consultation because Congress was to enact the legislation as a "tribute" to retiring Senator Sam Ervin. Judges objected to the legislation because it was needlessly complicated and because it placed great and sometime impossible time demands on the judiciary. Additional employees and a computer system were required for compliance, but funds were not initially appropriated for them. For many, the Speedy Trial Act was also objectionable because it frustrated the possibility of continuing judicial experimentation directed at formulating workable solutions. "Judges overwhelmingly would have preferred to experiment with this new rule until we knew that we could make it work and until we received the additional judges necessary to do the job. Now we have no choice."¹⁰⁹

The rigidities in the Act led to unfortunate consequences, the most serious one being the delay in disposing of civil cases. Upon the urging of the Judicial Conference, Congress modified the Act in 1979, relaxing its more stringent requirements.¹¹⁰

B. *Devices for Better Communication*

A profound need has existed for better channels of communication to bridge the gap among the branches. To improve communication, Chief Justice Burger has made himself visible, attempting to develop congressional interest in the problems of the courts through speeches, magazine interviews,¹¹¹ letters, and occasional meetings with key members of Congress. Gradually, communication with the judiciary committees has improved. Burger has also worked with the executive branch through the Attorney General and has delivered speeches to influence public and bar opinion.¹¹²

109. Interview with Warren E. Burger, *supra* note 97, at 31.

110. The Speedy Trial Amendments Act of 1979, Pub. L. No. 96-43, 93 Stat. 327 (amending 18 U.S.C. §§ 3161-3174 (Supp. III 1979)).

111. In a 1975 interview, the Chief Justice stated that communication between the judiciary and Congress "qualifie[d] as an overriding problem." He emphasized that "[t]he three branches can't function in complete isolation. . . . [P]roblems can be solved only by active co-operation among the three branches." Interview with Warren E. Burger, *supra* note 97, at 29. In a 1977 interview, the Chief Justice again addressed the communication problem. He indicated, however, that "there has been a marked improvement. . . . On the whole, I think our communication with relevant committees is much better now than it was a few years ago." Interview with Warren E. Burger, *supra* note 96, at 24.

112. The Chief Justice has not indicated great enthusiasm for the idea of delivering a State of the Judiciary Address to Congress. A bill authorizing such an address, spon-

The Chief Justice has been critical of congressional inertia in providing the courts with the "tools to do the job," including provision for more judges where needed. He has also pressed Congress to make needed jurisdictional changes, such as the abolition of diversity jurisdiction and the elimination of three-judge district courts (which was largely accomplished in 1976); he has made similar efforts concerning the termination of the Supreme Court's mandatory jurisdiction and the restructuring of the circuits. Additionally, he has urged Congress to weigh the effect upon the federal courts of new legislation, proposing that "impact statements" be made by any committee that recommends legislation having a direct impact on the judiciary, so that flawed legislation, like the Speedy Trial Act, will not be thrust on the courts. He has likewise proposed a continuing tripartite commission on the judiciary to advise Congress on the needs of the courts.

1. *Impact statements*

In his 1970 State of the Judiciary Address, Burger suggested that his proposed Council on the Judiciary report to Congress on the impact of proposed legislation likely to enlarge federal jurisdiction.¹¹³ Two years later the Chief Justice stated:

You are well aware, I'm sure, that Congress now requires that whenever a public project is proposed . . . which may have an effect on the environment as a whole, the sponsoring agency must put on public record a rather elaborate "impact statement," so the public and Congress can see what the consequences will be.

Congress might well consider a requirement that the sponsoring committee of any legislation affecting the courts' work file with the judiciary committees the equivalent of an "impact

sored by Senator Howell Hefin, passed the Senate in 1980. Some observers believe that such a speech might alter separation-of-powers relationships or affect internal relationships among the Justices of the Supreme Court. Others feel that such an address would give the Chief Justice an excellent forum to dramatize his concerns and give added importance to the judicial branch. Burger has not pressed the idea but suggests as an alternative a series of joint executive sessions with the judiciary committees to explore problems in depth on an agreed agenda.

Mark Cannon, Burger's administrative assistant, has supported the idea in his "private" rather than official capacity, in congressional testimony. See *Proposed Bill to Have Chief Justice Address Joint Session of Congress: Hearing on S. 2483 Before Subcommittee on Jurisprudence and Governmental Relations*, 96th Cong., 2d Sess. 15 (1980) (statement of Mark W. Cannon).

113. Address by Warren E. Burger, *supra* note 27, at 933.

statement" to demonstrate now much that particular piece of legislation would increase the courts' work loads.¹¹⁴

Burger repeated those thoughts in a letter to House Speaker Carl Albert, noting, "This is not to suggest that Congress reject legislation simply because it would increase litigation, but only to suggest that Congress consider the needs of the courts along with the need for new legislation."¹¹⁵ Such impact statements might show that "what we sadly lack at the present time is the ability to plan rationally for the future with regard to the burdens of the courts."¹¹⁶

Congressional consciousness has heightened and some progress has been made. In 1970 the Senate Subcommittee on Judicial Machinery, under the direction of Senator Burdick, produced a kind of impact statement on proposals to abolish diversity jurisdiction.¹¹⁷ In 1973 Representative Louis Frey, Jr., with 35 cosponsors, introduced a bill which would have required that any committee reporting a bill to the floor accompany it with an estimate of the number of cases in the federal courts that might result and the number of additional personnel required to handle these cases. ABA President Robert W. Meserve endorsed the bill.¹¹⁸ The Federal Judicial Center, in conjunction with Batelle-Pacific Northwest Laboratories, began in 1973 to develop caseload forecasting models for the federal district courts.¹¹⁹

114. Interview with Warren E. Burger, *New Ways to Speed Up Justice*, U.S. NEWS & WORLD REP., Aug. 21, 1972 at 40.

115. Letter from Warren E. Burger to Carl Albert, *reprinted in* 118 CONG. REC. 36, 142 (1972).

116. Address by Warren E. Burger, *supra* note 49, at 1050. *See also* Address by Warren E. Burger, *supra* note 24, at 505-06.

117. Burdick, *Diversity Jurisdiction under the American Law Institute Proposals: Its Purpose and Its Effect on State and Federal Courts*, 48 N.D.L. REV. 1 (1971).

118. Weaver, *Court Caseload Weighed in Bill*, N.Y. TIMES, Apr. 27, 1973, at 15, col. 7.

119. FEDERAL JUDICIAL CENTER, DISTRICT COURT CASE LOAD FORECASTING, (1975). *See also* Memorandum from Michael Levitt to William Eldridge (Federal Judicial Center June 15, 1977); Goldman, Hooper & Mahaffey, *Caseload Forecasting Models for Federal District Courts*, 5 J. LEGAL STUD. 201 (1976).

California was the pioneer in this area. It now produces 40 judicial impact statements per legislative session. *See* Davis & Nejelski, *Justice Impact Statements: Determining How New Laws Will Affect the Courts*, 62 JUDICATURE 18-27 (1978). *See also* R. ANDERSON & ASSOCIATES, REPORT TO JUDICIAL COUNCIL OF CALIFORNIA, GUIDELINES FOR DETERMINING IMPACT OF LEGISLATION ON THE COURTS (1974) (submitted to the Judicial Council, State of California). *See generally* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, IMPACT STUDY: THE EFFECT OF MAJOR STATUTES AND EVENTS ON CRIMINAL AND CIVIL

At Senator Strom Thurmond's request to the Senate Committee on Veterans' Affairs, Paul Nejelski of the Office for Improvements in the Administration of Justice (Department of Justice) delivered the first formal judicial impact statement on August 31, 1977. He concluded that enactment of the measure under consideration would result in 4,600 new cases, and that eight new district judges with forty new staff members, as well as forty-six deputy clerks, twenty-one Assistant United States Attorneys, and twenty-four other persons would be required to handle the new cases.¹²⁰ This impact statement followed precisely the model advocated by the Chief Justice.

The Subcommittee on Jurisprudence and Governmental Relations of the Senate Committee on the Judiciary, chaired by Senator Howell Heflin (former Chief Justice of the Supreme Court of Alabama), has commenced a series of hearings on the subject of judicial impact statements. Editorial support for the idea has grown. For example, the *Washington Post* has editorialized:

The lesson is obvious. Congress ought to do what the Chief Justice wants. It created environmental impact statements to help all of us understand better the effect on the world around us of various federal projects. It has created its own internal budget impact statements so its members can have an idea of how much a particular proposal will cost in future years. It ought to do the same kind of thing for the courts so it can provide enough judges to handle efficiently and expeditiously the cases it wants decided.¹²¹

2. *Tripartite commissions*

The Chief Justice has attempted to develop means to improve coordination between the branches in several ways. These

CASELOAD IN THE U.S. DISTRICT COURTS DURING FISCAL YEARS 1960-75 (1976); McGowan, *Congress and the Courts*, 62 A.B.A.J. 1588 (1976).

120. See *Administrative and Judicial Review Act: Hearings on S. 364 Before Senate Committee on Veterans Affairs*, 95th Cong., 1st Sess. 390-403 (1977) (statement of Paul Nejelski). The Office for Improvements in the Administration of Justice also commissioned a study of the impact on U.S. Attorneys' offices of legislation to amend rule 23(b)(3) of the Federal Rules of Civil Procedure and sponsored a one-year research study to develop new methodologies on impact. Davis & Nejelski, *supra* note 119, at 25; *Chairman's Report: An Interview with Attorney General Bell*, BARRISTER, Summer 1977, at 2, 4, 5.

121. Wash. Post, Feb. 15, 1977, at A14, col. 1. *But see* NATIONAL ACADEMY OF SCIENCES, *FORECASTING THE IMPACT OF LEGISLATION ON COURTS* (K. Boyum & S. Krislov eds. 1980).

include the proposed Federal Judiciary Council, the Hruska Commission, and the Brookings Conference.

a. *Federal Judiciary Council.* In 1970 Burger proposed a Federal Judiciary Council:

We should urgently consider a recommendation to Congress to create a judiciary council consisting of perhaps six members, one third appointed by each of the three branches of government, to act as a coordinating body whose function it would be to report to the Congress, the President and the Judicial Conference on a wide range of matters affecting the judicial branch. This council could (a) report to Congress the impact of proposed legislation likely to enlarge federal jurisdiction; (b) analyze and report to Congress on studies made by the Judicial Conference and the Federal Judicial Center as to increase or decrease in caseloads of particular federal districts; (c) study existing jurisdiction of federal courts with special attention to proper allocation of judicial functions as between state and federal courts; (d) develop and submit to Congress a proposal for creating temporary judgeships to meet urgent needs as they arise; . . . (e) study whether there is a present need . . . for federal courts to try automobile collision cases simply because of the coincidence that one driver, for example, lives in Kansas City, Kansas and the other in Kansas City, Missouri; [and] (f) continue study and examination of the structure of the federal circuits¹²²

He returned to the idea in a *U.S. News and World Report* interview that same year.

The absence of some official who is the counterpart of the Lord Chancellor in England is very sharply in focus for me. The Lord Chancellor in England is the highest judicial officer, but he devotes only a limited time to purely judicial duties. He is also Speaker of the House of Lords and a member of the Prime Minister's Cabinet. Thus, he has access and constant communication with all three branches of government and can keep the executive and legislative branches fully informed on almost a day-to-day basis.¹²³

He discussed the idea again in a 1972 *U.S. News and World Report* interview¹²⁴ and in his 1977 Annual Address to the ABA.¹²⁵

122. Address by Warren E. Burger, *supra* note 27, at 933.

123. *Interview*, *supra* note 29, at 44.

124. *Interview* with Warren E. Burger, *supra* note 114, at 40.

125. Address by Warren E. Burger, *supra* note 24, at 509.

The proposal for a commission (or Council on the Judiciary) has been under study by the Office for Improvements in the Administration of Justice.

b. *Hruska Commission*. One example of formalized three-branch cooperation has already taken place—the Commission on Revision of the Federal Court Appellate System (the Hruska Commission). Burger raised the idea in a speech to the American Bar Association in 1970.¹²⁶ The bill setting up the Commission was signed on October 13, 1972.¹²⁷ A legislative compromise defined its mission: first, a six-month study of circuit boundaries; then, a sixteen-month study of structural and procedural changes. The Chief Justice's appointees were Circuit Judges J. Edward Lumbard and Roger Robb, former ABA President Bernard Segal, and Columbia Law Professor Herbert Wechsler. Other members included Senator Quentin N. Burdick, Representatives Emanuel Celler and Charles Wiggins, and San Francisco attorney Francis R. Kirkham. University of Pennsylvania Law School Professor A. Leo Levin was Executive Director for the Commission. (Levin is now Director of the Federal Judicial Center.)

The Hruska Commission's labors have had a practical yield. It recommended dividing the two circuits with the greatest workload—the Fifth and the Ninth.¹²⁸ Burger had urged division of those circuits into two administrative units back in 1969. By 1977, four years after the Hruska Commission reported, Burger argued that population trends and caseloads required a division of the Fifth and Ninth circuits into three divisions, at least for administrative purposes.¹²⁹ A year later in the Omnibus Judgeship Bill, Congress made this a possibility by providing the means for the circuits to accomplish their own administrative divisions:

Any court of appeals having more than 15 active judges may constitute itself into administrative units complete with such facilities and staff as may be prescribed by the Administrative

126. Address by Warren E. Burger, *supra* note 27, at 933.

127. Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807 (codified at scattered sections of 5 U.S.C.).

128. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE (1973).

129. Remarks by Warren E. Burger, American Law Institute (May 17, 1977) (unpublished).

Office of the United States Courts, and may perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals.¹³⁰

Under the new Act the Ninth Circuit divided itself into three parts for administrative purposes. The Fifth Circuit, however, continued to hold en banc hearings with twenty-six circuit judges. Many participants agreed with the Chief Justice's predictions that that system would be "unworkable," and on October 1, 1981, the Fifth Circuit was divided by Congress into two circuits: the Fifth (composed of Louisiana, Mississippi, Texas, and the Canal Zone, with fourteen judges) and the Eleventh (composed of Alabama, Florida, and Georgia, with twelve judges).¹³¹ The Ninth Circuit continues its experiment with three administrative divisions. Burger has asserted that "the entire circuit structure of the Country needs reexamination It no longer makes sense to approach these problems one Circuit at a time. The Congress should reexamine the entire structure of all the Circuits."¹³²

c. *Brookings Conferences*. Meetings among those leaders of the three branches concerned with questions of the administration of justice have been held annually since 1978,¹³³ sponsored by the Brookings Institute (which also holds seminars for freshmen Congressmen). The conferences were conceived by Mark W. Cannon, Administrative Assistant to the Chief Justice, and Warren Cikins, a senior staff member at Brookings, to provide the channel of communication Burger had complained was absent. They have made a most significant contribution to better communication between the branches.

The timing to start the series was propitious. The efforts of the Chief Justice to focus attention on problems of the administration of justice had begun to bear fruit. There was growing interest in ideas that implied interbranch cooperation, such as the Federal Justice Council, a National Institute of Justice, and impact statements. Furthermore, Griffin Bell—a former circuit

130. Omnibus Judgeship Act, Pub. L. No. 95-486, § 6, 92 Stat. 1629 (1978).

131. The Fifth Circuit Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (codified at 28 U.S.C. § 41 (Supp. III 1979)).

132. Remarks by Warren E. Burger, *supra* note 129.

133. The conferences have occurred in March 1978, March 1979, January 1980, and March 1981. For information on the Brookings Conferences, see Cannon & Cikins, *Interbranch Cooperation in Improving The Administration of Justice: A Major Innovation*, 38 WASH. & LEE L. REV. 1 (1981).

judge who was as interested in and knowledgeable about the problems of the courts as any attorney general in history—had assumed that office.¹³⁴ Burger and Bell had a long history of close cooperation in activities connected with judicial administration and had developed a warm personal relationship. Bell had fostered the creation of the Office for Improvements in the Administration of Justice, which had been established to give the Department of Justice an orderly and systematic means of dealing with all court problems.¹³⁵ Professor Daniel J. Meador of the University of Virginia Law School—a man widely respected for his knowledge in the field of judicial administration—was named by Bell as Assistant Attorney General in charge of the new office,¹³⁶ which adopted an agenda similar in many respects to the goals put forward by the Chief Justice.¹³⁷

The four Brookings Conferences to date have followed similar patterns. Attendance has been limited to preserve informal interchange among representatives of the branches, and the agenda has been carefully structured. The first meeting included members of the House Judiciary Committee and had forty-five participants. The 1979, 1980, and 1981 meetings included members of the judiciary committees of both houses. The 1981 meeting had eighty participants. Attorney General Bell attended the first two conferences, Benjamin Civiletti the third, and William French Smith the fourth. Chief Justice Burger has attended all four meetings. Twenty members of both Houses attended the 1981 conference. Among the other participants have been the

134. Bell had been Chairman of the ABA Judicial Administration Committee, Chairman of the Pound Conference Follow-Up Task Force, and a member of the Board of the Federal Judicial Center.

135. The goals of the office were to make justice more effective and accessible, improve research in judicial administration, and diminish problems related to federalism and separation of powers.

The new office replaced the Office of Policy and Planning in the Justice Department, which had largely dealt with criminal justice matters. See *New Justice Department Office Will Work to Improve Courts*, 61 JUDICATURE 91-92 (1977).

136. Maurice Rosenberg, Professor at the Columbia University School of Law, and also nationally known for his work in this field, succeeded Meador in August 1979. Here again Burger's years of activity in the field of judicial administration paid dividends. Both Meador and Rosenberg were long-time friends and collaborators. This office has since been replaced by the Office for Legal Policy, headed by Johnathan Rose.

137. The agenda included goals such as impact statements, arbitration, neighborhood justice centers, and expansion of magistrate jurisdiction. On some issues, such as diversity jurisdiction, judicial discipline, and the National Institute of Justice, the approach of the Office diverged somewhat from that of either the Judicial Conference or the Chief Justice.

Deputy Attorney General, the Solicitor General, the Assistant Attorney General for the Office for Improvements in the Administration of Justice, top staff from the judiciary committees, chairmen of Judicial Conference committees, directors of the Federal Judicial Center and the Administrative Office, the Chairman of the Conference of State Chief Justices, and the Director of the National Center for State Courts. Joint staff work for six to eight months preceding the meeting ensures special attention to high priorities.

These meetings signify a departure from the compartmentalization, inertia, and drift which have dominated the treatment of court problems at the federal level for almost two centuries. The meetings have established new channels of communication for the informal exchange of information, ideas, and differing perspectives. They have helped to break down extra-constitutional barriers between the branches, barriers arising out of misunderstanding and lack of information. After the meetings, these new lines of communication have been employed to facilitate formulation and implementation of policy.

C. *Legislation Affecting the Courts, 1969-1980*

The value of the effort to achieve closer cooperation among branches is suggested by the following table:

Table 2: *Legislation Affecting the Courts,
June 1969-December 1980*

(91st through 96th Congresses)

<u>Year</u>	<u>Law Number</u>	<u>Topic</u>
1970	Pub. L. No. 97-271	Customs Court Amendments
	Pub. L. No. 91-272	U.S. District Court Judgeship Appointments
	Pub. L. No. 91-358	District of Columbia Court Reform and Criminal Procedure Act
	Pub. L. No. 91-644	Omnibus Crime Control Act
	Pub. L. No. 91-647	Circuit Executive Act
1972	Pub. L. No. 92-238	Creation of Administrative Assistant to the Chief Justice
	Pub. L. No. 92-239	Amendments to the Federal Magistrates Act of 1968
	Pub. L. No. 92-269	Lowering minimum age of Jurors to 18
	Pub. L. No. 92-375	Temporary recall of senior commissioners, Court of Claims
	Pub. L. No. 92-397	Supreme Court Justices—Widow's Annuities

	Pub. L. No. 92-428	Magistrate's Salaries
	Pub. L. No. 92-489	Creation of Hruska Commission
1973	Pub. L. No. 93-83	Amendments to the Omnibus Crime Act of 1970
1974	Pub. L. No. 93-420	Hruska Commission Extension
	Pub. L. No. 93-512	Judicial Disqualification
	Pub. L. No. 93-595	Uniform Rules of Evidence
	Pub. L. No. 93-619	Speedy Trial Act
1975	Pub. L. No. 93-584	Eliminate direct appeal of ICC cases
	Pub. L. No. 94-64	Amendments to the Rules of Criminal Procedure
	Pub. L. No. 94-82	Salary Adjustments
1976	Pub. L. No. 94-233	Revamping of Federal parole practices
	Pub. L. No. 94-381	Elimination of three-judge courts
	Pub. L. No. 94-503	Amendments to the Omnibus Crime Act of 1970
	Pub. L. No. 94-577	U.S. Magistrates' jurisdiction
1977	Pub. L. No. 95-19	Salaries
	Pub. L. No. 95-78	Federal Rules of Criminal Procedure
1978	Pub. L. No. 95-408	District Court Reorganization Bill (1)
	Pub. L. No. 95-486	Omnibus Judgeship Act
	Pub. L. No. 95-511	Foreign Intelligence Surveillance Act
	Pub. L. No. 95-521	Financial Disclosure Act
	Pub. L. No. 95-535	Witness Fee Bill
	Pub. L. No. 95-539	Court Interpreters Act
	Pub. L. No. 95-572	Jury Reform Act
	Pub. L. No. 95-573	District Court Reorganization Bill (2)
	Pub. L. No. 95-582	Nationwide Subpoena Service
	Pub. L. No. 95-598	Bankruptcy Reform Act
1979	Pub. L. No. 96-43	Amendments to Speedy Trial Act of 1974
	Pub. L. No. 96-82	Federal Magistrates Act
	Pub. L. No. 96-86	Continuing Appropriations Act
	Pub. L. No. 96-157	Justice System Improvement Act
1980	Pub. L. No. 96-190	Dispute Resolution Act
	Pub. L. No. 96-417	Customs Court Act
	Pub. L. No. 96-452	Fifth Circuit Reorganization Act
	Pub. L. No. 96-458	Judicial Councils Reform and Judicial Conduct and Disability Act

From 1970 through 1976, few pieces of major legislation requested by the Judicial Conference became law. Those few included the not-so-essential District Court Judgeships Act of 1970, which lacked any court of appeals judgeships; the creation of circuit executive positions (1970), the position of Administrative Assistant to the Chief Justice (1972), and the Hruska Commission; and the elimination of direct appeals in Interstate Commerce Commission cases (1974) and of most three-judge district courts (1976).

The 95th Congress paid considerably more attention to the needs of the judiciary than had the previous Congresses. Judges' salaries were raised and magistrates' jurisdiction was increased in 1977. In hearings before Representative Kastenmeier's Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, witnesses representing a wide variety of groups repeatedly made the point that congressional reliance upon the federal courts to enforce a variety of substantive rights carried with it a corresponding obligation to properly maintain the court system.

Since the first Brookings Seminar in March 1978, Congress has passed an eight-year-old Omnibus Judgeship Bill, long-overdue legislative reforms in jury practices and procedures, the Federal Magistrates Act of 1979, corrective amendments to the Speedy Trial Act, the Dispute Resolution Act, the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, a law creating the Court of International Trade, and a law dividing the Fifth Circuit—a measure long advocated by the Chief Justice. Each of these laws reflects a newly won spirit of interbranch cooperation. Additionally, since 1978 one House has passed bills abolishing diversity jurisdiction, providing for massive revision of the federal criminal code, providing for the merger of the Court of Claims with the Court of Customs and Patent Appeals, creating a State Justice Institute, authorizing the State-of-the-Judiciary Address by the Chief Justice, and abolishing the mandatory Supreme Court jurisdiction.

Naturally, this burst of legislative activity cannot be attributed to one simple cause. Many individuals have been deeply involved. Both judiciary committees have been very active, led by Senators Kennedy, Thurmond, and Heflin, and by Representatives Rodino, Kastenmeier, McClory, and Railsback. The staffs of both committees have been remarkably energetic, able, and well informed on judicial problems. Another key factor has been the unremitting but low-key activity to make issues of judicial improvement visible to other leaders, the bar, and the general public. Bringing the leaders of the three branches together annually was a major step that contributed to the improvement of interbranch communication.

IV. STRENGTHENING STATE COURTS AND REDUCING FRICTION BETWEEN STATE AND FEDERAL COURTS

Chief Justice Burger has been deeply committed to

strengthening state court systems and to reducing friction between state and federal courts. He was instrumental in the founding of the National Center for State Courts and has devoted considerable effort to the Center's nurturing. Likewise, he has taken a leadership role in proposing a National Institute of Justice as a vehicle for aiding state courts. To strengthen state courts, Burger has also advocated carefully structured merit-based selection of state judges, higher compensation, and continuing training of state judges. He has been a leader in efforts to consider forms of dispute resolution other than litigation.

The Chief Justice believes that the problems of justice are indivisible: "I have felt an obligation to be concerned with problems of state courts as well as the federal courts because the problems of justice are indivisible and if we do not have strong and effective courts in both the state and federal systems, we have a failure of justice."¹³⁸ He views the state courts as important because they deal with over ninety percent of all litigation: "[The federal courts] are more visible but the state courts in all reality and candor are far more important. And so my concern is to have the state courts healthy."¹³⁹ Although state courts are able to handle the vast majority of problems they face, Burger is concerned because they remain "overburdened, understaffed, often poorly structured and administered and subject to undue political influence, particularly with respect to the process of selection and retention of judges and key court support personnel."¹⁴⁰

Aiding the state courts would in turn assist the federal courts:

In a period when we must, in my view, curtail some of the existing burdens on federal courts to make way for new impending burdens, we share an obligation to the system of justice to see to it that state courts can enlarge their capability. The problems are unitary and the solutions must embrace improved performance of all courts.¹⁴¹

138. Address by Warren E. Burger, *State of the Federal Judiciary—1971*, *supra* note 40, at 856.

139. Remarks by Warren E. Burger, Virginia Bar Association, (Feb. 10, 1976) (unpublished).

140. Draft of speech prepared by Warren E. Burger, *What Bar Associations Can Do for State Courts*, (Aug. 4, 1976) (unpublished).

141. THIRD BRANCH, Apr. 1971, at 2. See also William F. Swindler's Analysis: "The reform and modification of state judicial processes . . . is the most effective means of providing relief for the federal judicial process." Swindler, *The Court, the Constitution*,

Much of what has been done to assist state courts has been done through federal funding. Although the Chief Justice is a traditionalist in matters of federalism, he is also a pragmatist, viewing federal support as a way to strengthen state courts while taking steps to minimize the risks of federal control.¹⁴² Burger's efforts were assisted by the Omnibus Crime Control and Safe Streets Act of 1968, which created the Law Enforcement Assistance Administration (LEAA) to support law enforcement. During Burger's first four years as Chief Justice, 1969 to 1973, the LEAA funneled \$180 million into state court related programs,¹⁴³ although comparatively little went directly to the courts themselves.

A. National Center for State Courts

One of Burger's contributions likely to long survive his tenure as Chief Justice is the National Center for State Courts, which he proposed in 1971 to a National Conference on the Judiciary. The National Center is a clearinghouse, a voice for state courts, a means of communication, an information center, and a place for training. It is also the sponsor of numerous studies on state court systems, especially studies of the administrative efficacy of structure, jurisdiction, management, technologies, and procedures aimed at improving the justice system.

In 1970 Burger had first proposed a national judicial center as a state-funded research and development clearing house.¹⁴⁴ He renewed this proposal—with a more specific blueprint—on March 12, 1971, in Williamsburg at the National Conference on the Judiciary, sponsored jointly by the American Bar Association, the American Judicature Society, the LEAA, and the Institute of Justice Administration. Burger has suggested this Conference and participated in the planning with retired Justice Tom Clark. Six hundred judges and lawyers, including the chief justices of about forty states, attended.¹⁴⁵ In his keynote address, Burger emphasized that the states should pool their ideas and efforts. "The time ha[d] come," he said, "to make the initial

and *Chief Justice Burger*, 27 VAND. L. REV. 443, 472 (1974).

142. Remarks by Warren E. Burger, *supra* note 139.

143. Cohen, *Justice Report/Mixed Cases, Burger Activism Mark Supreme Court Record*, NAT'L J. REP. 1005, 1009 (1974). Swindler, *The Chief Justice and Law Reform, 1921-1971*, 1971 SUP. CT. REV. 241.

144. *Interview*, *supra* note 29, 43.

145. N.Y. Times, March 12, 1971, at 1, col. 1.

decision [to] bring into being some kind of national clearing-house or center to serve all the states and to co-operate with all the agencies seeking to improve justice at every level."¹⁴⁶ His proposal included a specific plan of action:

My suggestion, therefore, is that in shaping the national organization or center to serve all the states, that you consider calling primarily on this great association [ABA] and its fifty component state associations, along with other groups that specialize in judicial administration, . . . the American Judicature Society, the Institute of Judicial Administration, the Conference of State Trial Judges, the Appellate Judges Conference, the Council of State Governments, and the Conference of Chief Justices A steering committee can select five to ten representative leaders empowered to convene a larger group to perfect an organization.¹⁴⁷

Burger's proposals and efforts were endorsed by President Nixon in his speech to the Conference.¹⁴⁸ The proposal for the Center was unanimously endorsed at the Williamsburg Conference.

In 1978, dedicating the national headquarters building, Burger recalled that the Center came into being within months of the March 1971 proposal: "It reminds us that when there is a recognized need in our system and there is a will to meet that need, one of the unique American traits is that we move swiftly from conception to execution."¹⁴⁹ He had offered the full cooperation of the Office of the Chief Justice and the facilities of the Federal Judicial Center and the Administrative Office to achieve implementation of the resolution.¹⁵⁰ The Steering Committee met at the Federal Judicial Center on April 5, 1971. Within three months, on June 15, 1971, the National Center's articles of incorporation were signed at a luncheon given by the Chief

146. Address by Warren E. Burger, *supra* note 43, at 429.

147. *Id.* at 429-30.

148. I endorse the concept of a suggestion made by Chief Justice Burger: the establishment of a National Center for State Courts. This will make it possible for State Courts to conduct research into problems of procedure, administration and training for state and local judges and their administrative personnel. It could serve as a clearinghouse for the exchange of information about State Court problems and reforms.

Nixon, *Reforming the Administration of Justice*, 57 A.B.A.J. 421, 424 (1971).

149. Remarks by Warren E. Burger, Conference to Commemorate Dedication of National Center for State Courts (March 19, 1978) (unpublished).

150. "But bearing in mind my own concepts of federalism, I will participate only when asked to do so." Address by Warren E. Burger, *supra* note 43, at 430.

Justice at the Supreme Court. One of this Article's authors, Paul Reardon, was named Acting Director. The first Board of Directors was named on August 14, 1971. Convening for the first time on September 4, the Board elected the former acting director as its Chairman and named Judge Winslow Christian (on leave from the California Court of Appeals) as Executive Director. At that meeting Burger called for further improvements in state judicial systems. On November 6, 1971, the eighteen-member Advisory Council met for the first time.¹⁵¹

The National Center for State Courts received financial support from the LEAA and the National Science Foundation. Burger has called it the "most important single development for states' administration of justice in this century."¹⁵² He believes that the Center thus far not only has helped to improve the state court systems, but also has improved relations between the federal and state judiciaries, at least to the extent that state judges "no longer use profanity" when speaking of their federal counterparts.¹⁵³ He joined in the ground-breaking for the Center's three-million dollar building in Williamsburg and gave the Dedicatory Address during a second Williamsburg Conference in March 1978.

The purpose of the Williamsburg II Conference was to establish "a commitment for concerted action in state court improvements."¹⁵⁴ The 1978 Conference had 370 participants, including almost all state chief justices and court administrators, members of Congress, federal judges, attorneys, professors, governors, and the chief justices of England, Scotland, Canada, and Australia.

Almost a decade after the original proposal, the National Center for State Courts is a well-established and flourishing organization, although its long-range funding problems have yet to be solved. The Center's studies, publications, and technical assistance to state courts have produced marked changes. By offering continued support in his speeches, Burger has helped give the Center respectability and acceptability among state judges

151. THIRD BRANCH, Mar. 1971, at 13; THIRD BRANCH, July 1971, at 1; THIRD BRANCH, Aug. 1971, at 3; THIRD BRANCH, Nov. 1971, at 4; N.Y. Times, Sept. 5, 1971, at 21, col. 1.

152. Remarks by Warren E. Burger, Groundbreaking Ceremony at the National Center for State Courts, Williamsburg, Va. (May 8, 1979) (unpublished).

153. *Id.*

154. Fetter, *The Williamsburg II Conference: An Examination of State Courts to Achieve a Blueprint for the Future*, STATE CT. J., Summer 1978, at 3.

and the increased support of state governors and legislatures.

B. *National Institute of Justice*

Burger has supported the creation of a National Institute of Justice as another way to strengthen state courts. This concept is often considered to have been an idea of Benjamin Cardozo's, but it actually predates him.¹⁵⁵ In April 1972 Bert H. Early of the ABA launched renewed consideration of the idea in an article in the *West Virginia Law Review*.¹⁵⁶ Burger's close working relationship with the bar in the area of judicial administration was manifest in his foreword to that article.¹⁵⁷

Mr. Early has given voice to a great need—a great void—in our system. He correctly and carefully disclaims any thought of “homogenizing” the systems of justice, but rather presses for some central means to energize the valuable programs for improved justice now in being and to probe for new solutions. We spend more than two billion dollars annually through the National Institutes of Health and the country is better for it. But the social, economic and political health of the country must be fostered by a comparable facility to revitalize the faltering machinery of justice—and happily that can be done for a mere fraction of the NIH budget¹⁵⁸

The week the article was published Burger focused on the proposal in remarks to the American Law Institute. Burger emphasized that the National Institute of Justice should be a national facility, that it should not be under the exclusive control of judges and lawyers, and that it ought to have the capacity to give grants for court improvements, to do research, and to give technical assistance on a consulting basis, working with the National Center for State Courts. He emphasized that “it is very important that such a program should be one to *assist* the states to do what they lack resources to do for themselves—it should definitely not be a program to ‘federalize’ the state courts.”¹⁵⁹

During that same month of April, fellow-Minnesotan

155. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 114 (1921), noted in Early, *A National Institute of Justice—A Proposal*, 74 W. VA. L. REV. 226 (1972).

156. Early, *A National Institute of Justice—A Proposal*, 74 W. VA. L. REV. 226 (1972).

157. Burger, *Foreword to id.*

158. *Id.*

159. Address by Warren E. Burger, American Law Institute, *Has the Time Come?* (May 16, 1972) (unpublished).

Hubert Humphrey, after consultation with Burger, introduced a bill for a National Institute of Justice. ABA President Jaworski endorsed the idea and the ABA Board of Governors authorized a feasibility study. Burger then outlined the characteristics of the proposed Institute as he viewed it: an institution with substantial state representation having a limited staff of trained specialists that could lend technical assistance on state judicial problems upon the request of a state, with resources and authority similar to that of the LEAA to make grants for court improvement. The Institute would also have research and development capabilities for swiftly transmitting the best techniques of the most efficient courts in the country. Additionally, the NIJ would be able to offer assistance to state courts and the National Center for State Courts when they lacked resources to carry out programs for themselves.¹⁶⁰

In August 1972 the ABA's House of Delegates endorsed the concept of a National Institute of Justice as that concept had been outlined by its Task Force. In October the Council of the National Center for State Courts accepted the concept in principle, with Burger and former ABA President Charles Rhyne strongly supporting it over the objections of some state judges concerned about "federal domination." In December 1972 Burger keynoted an ABA Conference on the proposal in Washington and welcomed debate on it.¹⁶¹

President Carter endorsed the creation of a National Institute of Justice in April 1974.¹⁶² After the Carter Administration took office in February 1977, Burger defined his view of the NIJ's role more precisely as "essentially a grant organization, a highly specialized extension, if you will, of the concept of revenue sharing, . . . a mechanism to give to state courts the financial aid which, realistically, they are unable to secure from their own hard-pressed state legislatures I doubt it should engage in [extensive] research."¹⁶³

On July 10, 1978, a Carter reorganization team, responding to the popularity of governmental reorganization and to the unpopularity of the LEAA in some quarters, proposed to phase out the LEAA and establish a National Institute of Justice within

160. *THIRD BRANCH*, May 1972, at 2.

161. Remarks by Warren E. Burger, Conference on the National Institute of Justice (Dec. 6, 1972) (unpublished).

162. See R. Hall, *A National Institute of Justice* 3 (unpublished).

163. Address by Warren E. Burger, *supra* note 24, at 509.

the Justice Department. The proposed Institute would have had three primary components—a civil and criminal justice research body, a bureau of justice statistics, and a grant-making agency.¹⁶⁴ A variety of factors prevented the establishment of a National Institute of Justice during the Carter Administration. In 1980, however, the Senate passed a bill, sponsored by Senator Howell Heflin and supported by the Conference of (State) Chief Justices, to create a State Justice Institute. The new Institute would provide a resource center for communication between state and federal court systems and between state legislatures and Congress regarding the special problems of court management and organization.¹⁶⁵

C. *Support for Continuing Education of Judges*

The Chief Justice has attempted to strengthen the quality of justice in the state courts by supporting both the idea of continuing education for judges and those institutions providing this education. Since 1969 there has been a great expansion in the richness and variety of programs for judicial education.¹⁶⁶

Chief Justice Burger has maintained a strong interest in judicial education throughout his career on the federal bench. He has stated that education is essential in enabling persons to make the quantum leap from attorney to judge. “[W]e no longer accept the ancient folklore that every lawyer—even every good lawyer—is automatically qualified to fulfill all the functions of a judge simply because he puts on a black robe.”¹⁶⁷

After attending the first session of the Institute of Judicial Administration’s Appellate Judges’ Seminar at New York University as a student, Burger became and has since remained a member of the faculty. The NYU-IJA Seminar, which has become a model for all such programs, was initially conceived by Justice Frederick Hamley, then on the Supreme Court of the

164. THIRD BRANCH, July 1978, at 2.

165. W. Burger, End-of-the-Year Statement 12-13 (Dec. 29, 1980) (unpublished).

166. Among the milestones on the road of judicial education are the ABA’s Traffic Court Program (1942), the Institute for Judicial Administration’s Appellate Judges’ Seminar at NYU Law School (1956), the first seminars for federal trial judges (1957), and the National College of State Trial Judges (1964). See Fairbanks, *Educating Judges for Courts of the Poor*, TRIAL, Apr.-May 1970, at 43. See also R. Wheeler, Orientation Techniques for Newly-Appointed Federal District Judges, Report to the Federal Judicial Center (Mar. 1975) (unpublished).

167. Remarks by Warren E. Burger, *supra* note 33, at 12.

State of Washington and later a judge of the Ninth Circuit.¹⁶⁸

As a result of his participation in the NYU Seminars, Burger became acquainted with probably two-thirds or more of all the members of the state supreme courts. His first-name relationships with state judges such as Walter Schaefer of Illinois, Louis Burke of California, and the late Frank Kenison of New Hampshire helped achieve swift acceptance of his 1969 proposal for state-federal judicial councils. He frequently attends the Annual Conference of (State) Chief Justices. Plainly these relationships have contributed to the extension of his leadership beyond the confines of the federal judicial system.

As Chairman of the Federal Judicial Center Board, the Chief Justice has fostered the growth and expansion of the Center's programs for judicial education. For example, the number of seminars for newly appointed district court judges has expanded from 3 in 1968 to 130 in 1981. The Center also offers criminal law conferences, seminars for court of appeals judges, seminars for district court judges with five or more years' service on the bench, seminars for district court judges with more than two but less than five years' service on the bench, and workshops on a wide range of subjects.

Another significant educational entity is the National Judicial College in Nevada, the tremendous growth of which is due in part to Burger's support in speeches,¹⁶⁹ interviews,¹⁷⁰ and visits.¹⁷¹ He is Honorary Chairman of the Board, succeeding the late Justice Tom Clark in that role. By December 1980 the total attendance of judges as resident students in National Judicial College sessions over a sixteen-year period reached 11,768.¹⁷² Burger has called the National Judicial College "one of the two most significant developments affecting the administration of

168. Burger, *School for Judges*, 33 F.R.D. 139, 140-41 (1963).

169. Address by Warren E. Burger, American Bar Association Mid-Winter Meeting, *Annual Report on the State of the Judiciary* (Feb. 23, 1975), reprinted in 61 A.B.A.J. 439 (1975); Remarks by Warren E. Burger, *supra* note 149. See also Burger, *Year-End Report on the Judiciary*, 64 A.B.A.J. 211 (1978).

170. *Interview*, *supra* note 29, at 39.

171. See Remarks by Warren E. Burger, National College of the State Judiciary (July 31, 1974 & Aug. 13, 1975) (unpublished).

172. A total of 36,504 persons have been involved in the programs of the National Judicial College. From 1976 through 1980 the National Judicial College had 6,608 students in residence compared with 5,160 in the previous twelve years. Telephone interview by Helen Clark with Ronald Rose, Office of the Director of the National Judicial College (Feb. 25, 1981).

justice in this century."¹⁷³

D. The Proper Role of State and Federal Courts

Accepting the constitutional pronouncement that federal courts are courts of special and limited jurisdiction¹⁷⁴ and the corollary that state courts are the basic and primary system of justice,¹⁷⁵ Chief Justice Burger has consistently opposed uncontrolled expansion of federal jurisdiction. He has invoked traditional principles of federalism to protect the federal courts from having even greater demands placed upon them. Expressing concern over signs that state and federal dockets are becoming more and more alike, he questions whether the federal system may be evolving toward a *de facto* merger with the state court system.¹⁷⁶

Burger has emphasized that "federalism is not just a matter of pleasant historical nostalgia" but "a valid, constitutionally rooted doctrine appropriate to meet the needs of our country, now and for the future."¹⁷⁷ He has indicated his strong disapproval of the implicit disparagement of state courts that comes from the continuing expansion of federal jurisdiction.

Some few seem prepared to sacrifice our concepts of federalism for instant gratification of their own views, based on an assumption that state courts are either incapable, inadequate, or unwilling to enforce claims and rights which we would all agree were proper. This unarticulated disparagement of state jurisdiction and state courts is something I reject.¹⁷⁸

His concern about the heavy demands upon the federal court system and his sense of federalism interact. He has noted that new federal statutes and court decisions expanding federal jurisdiction have brought pressures on the courts and delays to the litigants.¹⁷⁹ Although the courts can satisfy these demands to some extent with additional judgeships, this too has a serious

173. Remarks by Warren E. Burger, *supra* note 171.

174. *State of the Judiciary and Access to the Courts: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Committee on the Judiciary, 95th Cong., 1st Sess. 6 (1977)* (letter from Warren E. Burger to Robert W. Kastenmeier) [hereinafter cited as Letter to Kastenmeier].

175. Remarks by Warren E. Burger, *supra* note 149.

176. Remarks by Warren E. Burger, American Law Institute (June 10, 1980) (unpublished).

177. Remarks by Warren E. Burger, *supra* note 149.

178. *Id.*

179. Address by Warren E. Burger, *supra* note 159.

cost: "Neither assembly-line justice, nor a rapid expansion of the size of the federal judiciary beyond anything presently contemplated, with the concomitant dilution of prestige and, I fear, quality, can be the answer."¹⁸⁰

Felix Frankfurter warned decades ago that "inflation of the number of the district judges" will "in turn . . . result, by its own Gresham's law, in a depreciation of the judicial currency and the consequent impairment of the prestige and of the efficacy of the federal courts."¹⁸¹

Burger shares Frankfurter's concern that an expanding body of federal judges could reduce the historic attraction to become one. If the federal bench is unable to attract the best lawyers, its effectiveness will ultimately be diluted. This explains why Burger, acting on behalf of the Judicial Conference, strongly—and successfully—opposed the transmutation of bankruptcy referees into federal judges. It explains why he has asked that lawyers, Congress, and the public examine carefully each demand they make on the federal court system.¹⁸² He has asked that legislation proposed to accomplish piecemeal shifts of jurisdiction away from state courts be examined carefully. He has forcefully emphasized the need to reexamine the allocation of the workload between federal and state courts, finding support in a prestigious and massive study of the American Law Institute.¹⁸³ In particular, Burger has suggested that federal diversity jurisdiction be abolished and that alternative means of dispute resolution be developed.

1. *Diversity jurisdiction*

Burger's efforts to abolish federal diversity jurisdiction are motivated by his belief in the principle that "there is no reason for federal jurisdiction where no federal question is at stake and when state courts are available to provide an adequate forum. Diversity cases, by and large, are the prime example of a contin-

180. Letter to Kastenmeier, *supra* note 174, at 9 (quoting Lumberman's Casualty Co. v. Elbert, 348 U.S. 48, 59 (1954)).

181. Lumbermen's Casualty Co. v. Elbert, 348 U.S. 48, 59 (1954) (Frankfurter, J., concurring).

182. Remarks by Warren E. Burger, *supra* note 149.

183. Interview with Warren E. Burger, *supra* note 114, at 41; AMERICAN LAW INSTITUTE, A STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969).

uing failure to adhere to that principle."¹⁸⁴ This subject has evoked some of his most pithy prose. "I repeat without any hesitation that in the original concepts of federal jurisdiction an automobile case has no more place in the federal courts than speeding on a city street."¹⁸⁵

Burger has answered a variety of objections to elimination of diversity jurisdiction. Federal question cases, he has said, will not be affected. Rarely is local bias relevant in these cases. Furthermore, Burger has suggested that upon a showing of good cause the federal courts could take jurisdiction of particular cases.¹⁸⁶ The objection that diversity cases would add a burden to unwilling and overcrowded state courts was defused by a supportive resolution passed by the Conference of (State) Chief Justices in 1977. The present diversity case load, handled by about 500 federal district and circuit court judges, would be transferred to more than 7,100 general jurisdiction state judges. In 1978 a bill curtailing a large segment of diversity jurisdiction passed the House of Representatives but was never enacted.

2. *Alternative methods of dispute resolution*

Burger would not only remove some cases from federal courts and advise caution in expanding federal jurisdiction; he would also remove some kinds of cases from all courts. He has proposed alternative methods of dispute resolution that might reduce costs to litigants and be more likely to produce satisfactory relief for the average man. It was this idea, among other factors, that generated his call for the 1976 "Pound Conference."

At the Pound Conference and on various other occasions, Burger has focused on ways to settle disputes outside of courts. He has stated that "we must probe for fundamental changes and major overhaul rather than simply 'tinkering.'"¹⁸⁷ He has noted that

[w]ith few exceptions, it is no longer economically feasible to employ lawyers and conventional litigation processes for many "minor" or small claims and what is "minor" is a subjective and variable factor. This means that there are few truly effec-

184. Letter to Kastenmeier, *supra* note 174, at 7.

185. *Interview*, *supra* note 29, at 35. See also Address by Warren E. Burger, *supra* note 50; Address by Warren E. Burger, *supra* note 33; Address by Warren E. Burger, *supra* note 22.

186. Address by Warren E. Burger, *supra* note 24, at 506-07.

187. Address by Warren E. Burger, *supra* note 22, at 32.

tive remedies for such everyday grievances as usury, shoddy merchandise, shoddy services on a TV, a washing machine, a refrigerator, or a poor roofing job on a home.¹⁸⁸

Burger believes that most people would prefer an effective, "common sense" tribunal of nonlawyers, or a mix of two nonlawyers and one lawyer, over the traditional court system for the resolution of modest but irritating claims.¹⁸⁹ Such tribunals would be informal and would hold evening sessions.¹⁹⁰

The first recommendation of the Pound Conference ABA Follow-Up Task Force, chaired by Griffin Bell, was that

[t]he American Bar Association, in cooperation with local courts and state and local bar associations, invite the development of models of Neighborhood Justice Centers, suitable for implementation as pilot projects. Such facilities would be designed to make available a variety of methods of processing disputes, including arbitration, mediation, referral to small claims courts as well as referral to courts of general jurisdiction.¹⁹¹

When Griffin Bell became Attorney General, he turned many of the Pound Conference recommendations into Department of Justice policies and projects. The Justice Department supported the operation of neighborhood justice centers in Atlanta, Kansas City, and Los Angeles. Federal funding, however, ended in 1980. Evaluations, conducted by the Institute for Social Analysis, concluded that cases were processed more quickly and efficiently than they would have been in the courts. Hearings typically occurred within one to two weeks of filing and required an average of only two hours for disposition. Three new centers were established with LEAA funding in 1980 to provide mediation for minor disputes in the metropolitan areas of Washington, D.C., Honolulu, and Houston as part of the Court Delay Reduction Program.¹⁹²

188. *Id.* at 33.

189. Remarks by Warren E. Burger, American Bar Association Minor Disputes Resolution Conference, Columbia University (May 27, 1977), reprinted in *State of the Judiciary and Access to Justice: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Committee on the Judiciary*, 95th Cong., 1st Sess., app. 1(d), at 290 (1977).

190. Address by Warren E. Burger, *supra* note 22, at 33.

191. *Report of Pound Conference Follow-Up Task Force*, in *THE POUND CONFERENCE* app. A, at 301 (A. Levin & R. Wheeler eds. 1979) [hereinafter cited as *Task Force Report*].

192. See generally W. Burger, End-of-the-Year Statement, *supra* note 101.

In 1980 the Dispute Resolution Act¹⁹³ authorized the Department of Justice to establish a resource center to serve as a national clearinghouse for the exchange of information concerning the improvement of dispute resolution mechanisms. The resource center would also provide technical assistance to state and local governments to improve existing programs.

The Chief Justice has long argued that arbitration—informal and formal—is another important area to be explored. He believes that arbitration procedures, which can be made simple and informal in comparison with traditional litigation, “have made incalculable contributions to commerce and trade and labor peace—to society as a whole.”¹⁹⁴ The Pound Conference Follow-Up Task Force recommended development of compulsory arbitration with a right of appeal for trial *de novo* in the federal courts, the widespread adoption of such programs in state courts, and the increased use of commercial arbitration.¹⁹⁵

With Burger’s support, an experiment with court-annexed arbitration in civil cases on a nonbinding basis is being tried in three federal districts by local rule—the District of Connecticut, the Eastern District of Pennsylvania, and the Northern District of California.¹⁹⁶ In those districts, certain cases (primarily contractor personal injury actions in which the relief prayed for is \$100,000 or less) are first submitted to a panel of three arbitrators chosen from the local bar. To indicate his great interest in the experiment, Burger joined Attorney General Bell and Senator DeConcini in attending and speaking at a one-day meeting held at the Federal Judicial Center in 1978. Those participating in the meeting included judges responsible for the experiment, potential evaluators from the Federal Judicial Center, and representatives from the Office for Improvements in the Administration of Justice, including Professor Meador. The experiment has been evaluated by the Federal Judicial Center. Preliminary results suggest that “more expeditious settlement has been achieved while frequent termination by acceptance of award has not.”¹⁹⁷

Burger has encouraged various other methods of noncourt

193. Dispute Resolution Act, Pub. L. No. 96-190, 94 Stat. 17 (1980).

194. Remarks by Warren E. Burger, *supra* note 189, at 291.

195. *Task Force Report*, *supra* note 191, at 302.

196. THIRD BRANCH, July 1978, at 4.

197. E. LIND & J. SHEPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS viii (Federal Judicial Center 1981).

dispute resolution such as mediation, conciliation, and even action hot-lines.¹⁹⁸ He has called as well for simplification of many of those transactions which bring the ordinary consumer to lawyers at a relatively high cost. For example, he has urged that ways be found to use computer systems to reduce the cost of land title searches and related expenses of home purchasing and financing.¹⁹⁹ He has called for simplification of probate procedures to diminish the cost of transmitting property at death.²⁰⁰ He has stated that the time has come to see if family problems such as divorce, child custody, and adoption can be better dealt with outside the formal and potentially traumatic atmosphere of the courtroom.²⁰¹

The Chief Justice believes that certain conflicts should be handled by mechanisms other than litigation, that the jurisdiction for some disputes ought to be shifted from federal to state courts, and that courts should be run efficiently. But this does not mean that he believes in second class or less liberal justice for the "little man." In his view, these proposals may well make justice far more available to those who cannot afford lawyers for certain grievances and might provide for quicker resolution of disputes in a less frustrating, less exasperating process.

3. *State-federal judicial councils*

Friction between state and federal courts has greatly diminished in the past twelve years. In 1958 the Conference of (State) Chief Justices had sharply criticized the Supreme Court for tending "to adopt the role of policy-maker without proper judicial restraint."²⁰² There are, of course, many reasons for the decline in tension between and federal and state courts, but among them are Burger's deep belief in comity between federal and

198. Remarks by Warren E. Burger, *supra* note 189, at 290.

199. Address by Warren E. Burger, *supra* note 22, at 33-34.

200. *Id.* at 34.

201. *Id.*

202. 2 W. SWINDLER, COURT AND CONSTITUTION IN THE 20TH CENTURY 231 (1970) (quoting VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, REPORT OF THE CONFERENCE OF CHIEF JUSTICES 33 (1959)). One recommendation to restrict the Supreme Court's role was made by the Committee on Federal-State Relations. The proposal adopted by the Conference of (State) Chief Justices in 1958 involved the creation of a "Court of the Union." This court, composed of the Chief Justices of the highest court in each state, would have the power to reverse any decision of the Supreme Court with a majority vote of the entire court. *Amending the Constitution to Strengthen the States in the Federal System*, 36 STATE GOV'T 10, 14 (1963).

state courts and the creation of the state-federal judicial councils in many states, a device which Burger recommended to the Conference of Chief Justices in 1969 to ease tensions and further cooperation.

In his Report on the State of the Federal Judiciary delivered in St. Louis on August 10, 1970, the Chief Justice advocated wider use of the councils:

The friction in relations between state and federal courts presents serious problems in both the review of state prisoner petitions and other cases. I strongly urge that in each state there be created a State-Federal Judicial Council to maintain continuing communication on all joint problems. Such a body could properly include a member of the highest state court, the chief judges of the larger state trial courts and the chief judges of the federal district courts. In some states such bodies have already been created on an informal basis.²⁰³

Within one year, more than half of the states created state-federal councils. Burger commented that "these councils have contributed an incalculable benefit in reducing the friction and hostility that had grown up between the two systems and producing long overdue cooperation."²⁰⁴

There are over thirty councils currently functioning. States like Maine or Idaho do not need a "council" because the senior of the two or three district judges can keep in contact and discuss problems with the chief justice of the state without resort to formal meetings or formal organizational structure. Delaware's experience exemplifies the typical value of the councils. Chief Justice Daniel L. Herrmann has stated:

One important development was the improvement of the record going to the federal court from the state court in habeas corpus proceedings. Another has been 'talking out' a situation which may have led to the unpleasantness of subpoenaing many state judges to testify before a federal judge in a habeas corpus proceeding. As from the beginning when first broached by Chief Justice Burger, I am convinced of the value of the State-Federal Judicial Council and shall endeavor to strengthen it here in the months ahead.²⁰⁵

In more than one case state and federal judges have sat si-

203. Address by Warren E. Burger, *supra* note 27, at 933.

204. Remarks by Warren E. Burger, *supra* note 33.

205. FEDERAL JUDICIAL CENTER, STATE-FEDERAL JUDICIAL COUNCIL SURVEY (1978).

multaneously to hear pretrial motions in a multiple disaster case with many claimants. For example, as a result of a fire in a night club in Louisville, over seventy-five damage cases were filed in Kentucky—forty in U.S. District Court and at least thirty-five in state court. To avoid duplication of paper work and to save the time of counsel and the courts, U.S. District Judge Carl B. Rubin (S.D. Ohio) and State Circuit Judge John A. Diskin jointly heard motions in these cases. Judge Rubin sat with Judge Diskin in Newport, Kentucky, Judge Diskin's home county, to hear motions on the subject of sovereign immunity.

Among the other areas of cooperation handled by State-Federal Judicial Councils are conflicts in calendaring, joint jury rolls, use of courthouses, diversity jurisdiction, advisory opinions, and the coordination of probation offices. Such areas of mutual interest as opinion writing, plea bargaining, settlement of cases, and court management have been discussed.

V. CAMPAIGNING FOR IMPROVEMENTS IN THE AMERICAN BAR—INFLUENCE ON LEGAL EDUCATION

Warren Burger has been active in the Chief Justice's role as titular head of the American Bar. The American Bar Association has been a potent ally in many of his efforts, such as the creation of the Institute for Court Management and the National Center for State Courts, and the convening of the Pound Conference. Burger has maintained close personal relationships with ABA Presidents and has attended the annual convention or the mid-year meeting of the organization every year. He has used its podium for his "Report on the State of the Judiciary." He has also had active support for other organizations of lawyers, a notable example being the American College of Trial Lawyers.

In his first appearance as Chief Justice at an ABA meeting in August 1969, Burger told the House of Delegates that, although they were bound to have disagreements, he would not "walk out," but would always demand "equal time."²⁰⁶ To be sure, there have been disagreements between Burger and segments of the bar as he has praised, cajoled, criticized, prodded, and preached to them about such issues as legal ethics, lawyer discipline, and the efficiency and expense of legal and court processes. He has been especially visible in expressing concerns about the inadequate training of trial lawyers and has worked

206. Authors' discussion with Warren E. Burger.

indefatigably to remedy the situation.²⁰⁷ To its credit, the organized bar has actively supported and helped put into effect many Burger initiatives.

Burger's expressions of concern about the training of lawyers go back about two decades. During the 1960's he stressed the need to begin to prepare students by practical training, especially in trial advocacy.²⁰⁸ At the same time, he has praised the modern law school for its preparation of students for appellate advocacy, which he believes is far superior to that of thirty or forty years ago.

His critique of modern legal education continued through and after 1969:

The modern law school is not fulfilling its basic duty to provide society with people-oriented counselors and advocates to meet the expanding needs of our changing world.

. . . .
The shortcoming of today's law graduate lies not in a deficient knowledge of law but that he has little, if any, training in dealing with facts or people—the stuff of which cases are really made.²⁰⁹

He argued that the consequences of this lack of adequate training are that “[t]oday, in many courtrooms, cases are being inadequately tried by poorly trained lawyers, and people suffer because lawyers are licensed, with very few exceptions, without the slightest inquiry into their capacity to perform the intensely practical functions of a counselor or advocate.”²¹⁰

ABA President Bernard Segal responded on February 21, 1970, at the ABA Mid-Year Convention in Atlanta by announcing an \$880,000 program to encourage the use of clinical training in law schools.²¹¹ The ABA Task Force on Trial Advocacy, in its 1971 report, called for a program to remedy the severe shortage of trained trial advocates.²¹² In 1972 the ABA, the American College of Trial Lawyers, and the Association of Trial Lawyers of America jointly responded to the Task Force report by spon-

207. See generally Burger, *Some Further Reflections on the Problem of Adequacy of Trial Counsel*, 49 *FORDHAM L. REV.* 1 (1980).

208. See Burger, *A Sick Profession?*, 5 *TULSA L.J.* 1 (1968).

209. Remarks by Warren E. Burger, Prayer Breakfast, American Bar Association Convention (Aug. 10, 1969) (unpublished material collected in *SPEECHES OF CHIEF JUSTICE WARREN BURGER* in Brigham Young University Law Library).

210. *Id.*

211. *N.Y. Times*, Feb. 22, 1970, at 27, col. 1.

212. *Advocacy Task Force, Report*, 96 *A.B.A. REP.* 402 (1971).

soring the creation of the National Institute for Trial Advocacy.

Accelerated forward movement can be traced directly to the Chief Justice's Sonnett Lecture at Fordham University on November 26, 1973. In that lecture he charged that from one-third to one-half of the lawyers who appear in court in serious cases are not really qualified to render fully adequate representation.²¹³ He proposed the establishment of a new set of specialized standards that any lawyer would have to meet before engaging in trial practice. He suggested that consideration be given to reducing "basic legal education" from three to two years, with specialized training thereafter for those interested in specialties practice, including trial advocacy.²¹⁴

Chief Judge Irving Kaufman of the Second Circuit moved swiftly to change the rules of that circuit to bar inexperienced attorneys from federal courts.²¹⁵ He appointed a committee, chaired by a leading New York lawyer, Robert L. Clare, to examine the problem of inadequate trial advocacy in the circuit.²¹⁶ The committee recommended that lawyers fulfill certain minimum requirements before being allowed to appear in the federal district courts of the circuit.²¹⁷ The Clare Committee rules were approved in principle by the Circuit Judicial Council in 1975²¹⁸ and were later adopted by the Northern District of New York, the District of Vermont, and the United States Court of Appeals for the Second Circuit.²¹⁹

A number of surveys have documented the seriousness of the problem of inadequate trial counsel. In March 1978 the Federal Judicial Center released the results of a survey of nearly 400 federal trial judges: 41.3% believed that the quality of advocacy in their courts was a "serious problem."²²⁰ In June 1978 the ABA published the results of a telephone survey of 599 lawyers: 60%

213. Burger, *The Special Skills of Advocacy*, 42 *FORDHAM L. REV.* 227 (1973).

214. *Id.* See also Burger Asks Curb on Trial Lawyers not Fully Trained, *N.Y. Times*, Nov. 27, 1973, at 1, col. 3.

215. *N.Y. Times*, Mar. 11, 1975, at 16, col. 1. See Kaufman, *The Court Needs a Friend in Court*, 60 *A.B.A.J.* 175 (1974).

216. *N.Y. Times*, Mar. 11, 1975, at 16, col. 1. The College of Trial Lawyers appointed a national study group to establish model rules.

217. *Qualifications for Practice Before the United States Courts in the Second Circuit*, 67 *F.R.D.* 159, 168, 170-71, 188 (1976).

218. *Id.* at 191.

219. *Just How Good (or Bad) Are Federal Trial Lawyers?*, 63 *A.B.A.J.* 1525, 1540 (1977).

220. A. PARTRIDGE & G. BERMANT, *THE QUALITY OF ADVOCACY IN THE FEDERAL COURTS* 16 (1978).

avored a specialty certification requirement for trial advocates; 42% felt that trial advocacy training in law schools should be mandatory; and another 41% thought it would be "somewhat helpful."²²¹ The Law School Admissions Council sponsored a survey of 4,000 graduates of the classes of 1955, 1965, and 1970. Of the 1600 respondents, over two-thirds said that law school training had been inadequate and had played no part in preparing them to perform such an elementary function as interviewing witnesses. Of those lawyers who said they did trial work, 55.2% indicated that their law school training had proved either not useful or only somewhat useful, and 19.6% indicated that they had received no instruction at all in trial work.²²² The American Bar Foundation released a study in 1978 based upon 1,442 responses to questionnaires sent to state and federal judges of general jurisdiction trial courts: 87% of those responding rated at least half of the lawyers who appeared before them as incompetent; 77% of those trial judges believed that law school training could be an effective agency for ensuring the competence of the trial bar; and 67% favored mandatory apprenticeships.²²³

In welcoming the American Law Institute to Washington in May 1978, Chief Justice Burger proposed a specific "trial balloon" program to have three law schools in the United States—located in large centers where courts were available—experiment with a modified program of legal education. He urged that the "three R's" of the law be given in the first two years of law school, eliminating "fringe" courses. For those aspiring to trial advocacy, the third year of legal education would be devoted exclusively to training for trial advocacy on a basis somewhat paralleling the training of barristers in the British Inns of Court. Students would be involved in every phase of the litigation process from the first interview with a client to verdict or judgment.²²⁴ The traditional three-year law course would continue for those who had interests other than litigation. The executive committee of the Association of American Law Schools ex-

221. *Burger Not All That Wrong*, 64 A.B.A.J. 832-33 (1978).

222. Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. LEGAL EDUC. 264 (1978). See also Seligman, *Everyone Who Hires a Lawyer Should Be Assured Competence*, HARTFORD COURANT, May 31, 1978, at 24; J. SELIGMAN, *THE HIGH CITADEL* chs. 8 & 10 (1978).

223. Maddi, *Trial Advocacy Competence: The Judicial Perspective*, 1978 AM. B. FOUNDATION RESEARCH J. 105.

224. Address by Warren E. Burger, American Law Institute (May 16, 1978).

pressed its willingness to entertain applications for variances from its accreditation requirement. On June 27, 1978, the Chief Justice attended a meeting (held at the Supreme Court) of law school deans, other legal educators, and officials of the LEAA. The purpose of the meeting was to further explore advocacy training.

Burger had pressed the trial advocacy issue before the ABA in February 1978 and again in August of that year. The ABA responded by creating a special task force, chaired by Dean Roger C. Cramton of Cornell Law School, under the auspices of the Section on Legal Education and Admissions to the Bar. That task force reported on August 10, 1979. Included among its recommendations were ones urging law schools to offer instruction in basic litigation skills "to all students desiring it" and to "make more extensive instructional use of experienced and able lawyers and judges especially in structural roles in which they utilize their professional knowledge and skill."²²⁵ The Cramton Report evidenced the diminishing academic resistance to the Chief Justice's proposals for more orientation to the practical aspects of legal training, which he regularly analogized to medical internship training.

Another step that helped develop views on the need for changes in legal education was the 1978 creation of a joint program between Harvard and Northeastern Law Schools. This two and one-half million dollar program is affiliated with the Legal Services Institute of Greater Boston Legal Services. Other positive signs are the establishment of an Inns of Court program at Brigham Young University Law School and at other law schools, including the Marshall-Wythe Law School, and an experience component for third-year law students in the Southern District of New York, spurred by Judge David N. Edelstein when he was Chief Judge of that district.

In 1976 the Chief Justice was authorized by the Judicial Conference to appoint a special committee to propose standards for admission to practice in the federal courts. The committee was chaired by Chief Judge Edward Devitt of the United States District Court for the District of Minnesota and was composed of ten federal trial judges, two court of appeals judges, six prac-

225. AMERICAN BAR ASSOCIATION, SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF LAW SCHOOLS 304 (1979).

ting attorneys, six law school deans, and four law student "consultants." This was the first time law students had ever participated in the work of a committee of the Judicial Conference of the United States.

The committee canvassed all federal district court judges and then held four regional public hearings. It unanimously concluded that there was a need to take positive steps to improve the quality of advocacy in the federal district courts. The committee also made these tentative recommendations in September 1978:

1. Minimum uniform standards of competency for attorneys in federal trial courts should be implemented by uniform rules providing for an examination in federal practice subjects and four trial experiences in actual or simulated trials.
2. Each district court should establish a performance review committee to review instances of inadequate trial performances.
3. A uniform district court student practice rule should be adopted.
4. Law schools should make available greater opportunity for students to take trial practice courses.
5. Continuing legal education programs on trial advocacy should be established.
6. District courts should sponsor federal practice programs.
7. The American Bar Association should consider making more specific the Code of Professional Responsibility as it relates to trial advocacy.²²⁶

Further committee hearings did not reveal a consensus within the profession on all the tentative proposals; yet there was support for greater emphasis upon trial advocacy in the law schools. The committee presented its final report to the Judicial Conference in September 1979 and proposed as a standard that "all members of the federal bar should possess knowledge of federal practice subjects [civil, criminal, evidence and local rules] and some experience in trial advocacy."²²⁷ The committee also urged the Judicial Conference to support "increased emphasis in the law schools on trial skills training, including simulated trials

226. The Judicial Conference of the United States, *Report and Tentative Recommendations of the Committee to Consider Standards for Admission to Practice in the Federal Courts*, 79 F.R.D. 187, 189 (1978).

227. The Judicial Conference of the United States, *Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts*, 83 F.R.D. 215, 231 (1979).

and instruction by experienced litigators.”²²⁸ Finally, the committee recommended “experimentation, in cooperating pilot districts, with an examination on federal practice subjects, an experience requirement and a peer review concept.”²²⁹ It urged support for post-law school seminars and continuing legal education programs on trial advocacy and federal practice subjects.²³⁰

The Judicial Conference deferred action on specific admission standards until the results were in from experiments in pilot districts. The Conference created an “Implementation Committee on Admission of Attorneys to Federal Practice” to “oversee and monitor, on a pilot basis, an examination on federal practice subjects, a trial experience requirement and a peer review procedure, in a selected number of district courts that indicate a desire to cooperate in any or all of the above programs.”²³¹ U.S. District Court Judge James Lawrence King of the Southern District of Florida is the Chairman of the committee. Fourteen district courts have undertaken pilot programs.

The Conference also recommended to the district courts that they adopt a student practice rule and support continuing legal education programs on trial advocacy and federal practice subjects. Likewise, recommendations were made that the ABA “consider amending its law school accreditation standards to require that all schools provide courses in trial advocacy . . . taught by instructors having litigation experience.”²³²

Throughout the twelve years of his tenure the Chief Justice has emphasized that the objective at this stage must be the improvement of trial advocacy, leaving for the future other possible changes in legal education relevant to the specialized training of lawyers. During this period there has been a notable change in the attitude of the American bar and legal educators towards recognizing that inadequacy in trial advocacy or in any other aspect of law practice is not tolerable and that law schools have a responsibility to improve the situation.²³³

228. *Id.*

229. *Id.*

230. *Id.*

231. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 103, 103-04 (1979).

232. *Id.* at 105.

233. On Burger's role, generally, see Manning, *Law Schools and Lawyer Schools—Two-Tier Legal Education*, 26 J. LEGAL EDUC. 379 (1974); *Burger Keeps Heat on Lawyers*, 64 A.B.A.J. 25 (1978).

VI. OTHER AREAS OF INTEREST

The results of Warren Burger's efforts "to make our system work better"²³⁴ go beyond what has been described thus far. Time, space, and the reader's patience permit but passing reference to some other areas of interest.

A. *Within the Supreme Court Building*

The Chief Justice has fostered changes affecting mechanization, institutional efficiency, the size and professionalism of the staff, employee relations, media coverage of the Court's opinions, the building's aesthetics, and public knowledge of the history and work of the judicial system. The lower Great Hall, once an elegant white marble cavern resembling a mausoleum, is now an attractive museum of the Court's past. More than 30 portraits of former Justices have been acquired and now hang in galleries with a biographical sketch attached. At one end a plaster of paris model of the Court Building is surrounded by pencil sketches made by the architect, Cass Gilbert. Alongside are the first models of the relief sculpture which adorns the building. Soon a bronze likeness of John Marshall will be added to the museum.

In 1969 only the busts of Taft, Hughes, Stone, and Vinson were seen in the Great Hall leading to the Courtroom. Today all former Chief Justices are represented by marble busts on pedestals or in niches. A sense of the Court's history pervades the public areas, where tourist attendance has doubled in a decade.

The Supreme Court Building has itself been refurbished with the aim of making visitors more welcome and the public areas more educational. The position of a full-time curator was established. Continuous exhibits of a historical nature are presented in the lower Great Hall. In addition, a small "movie theater" has been constructed within the building. A prize-winning thirty-minute film on the operations of the Supreme Court, made by the Young Lawyers Section of the Virginia Bar with the cooperation of the American Bar Association, is open to visitors during regular building hours.

Modern office equipment has been introduced into the Supreme Court, including computers that contain the clerk's records of all cases filed and word processing machines electroni-

234. *Nomination Hearings*, *supra* note 1, at 5.

cally connected to high speed printers, eliminating the "hot lead" linotype process. Two legal officers have been added as central research staff to deal with the increasing system of motions for extraordinary relief. For the first time in its history the Supreme Court has a full-time personnel officer. In order to ease some of the time difficulties faced by reporters covering the high Court, a decision was made in 1970 to attach to each Court opinion on the day of its announcement a headnote—a helpful (though not legally binding) brief analysis of each decision. These notes are written by the Court's Reporter of Decisions. The Justices have further attempted to limit the number of decisions on the merits handed down on any one day, spacing them out throughout the week, with none being issued on the Monday order list day.

Burger has been duly mindful of the need to disseminate information to the public about the courts. During his tenure these efforts have ranged from the issuing of a brief but useful tourist brochure about the Court²³⁵ and a revised edition of *Equal Justice Under Law*—a handsomely illustrated 149-page book initiated by the Federal Bar Foundation and produced by the National Geographic Society—²³⁶ to the establishment of a Supreme Court Historical Society.²³⁷ With funds appropriated by Congress for commemoration of the Bicentennial, the Judicial Conference commissioned five films on cases from the era of John Marshall. These were shown on public television and then widely disseminated to schools and even foreign countries under the sponsorship of the United States Information Service.

B. Jurisdiction of the Supreme Court

In 1971 Chief Justice Burger appointed a seven-person committee to study the problems of the Supreme Court. The committee, known as the Study Group on the Caseload of the Supreme Court (the Freund Committee), was later criticized as unrepresentative,²³⁸ although its members included such distinguished experts as Professors Paul Freund, Alexander Bickel, Charles Alan Wright, Dean Russell Niles, Robert L. Stern, Peter

235. The brochure is entitled *The Supreme Court of the United States*.

236. M. HARRELL, *EQUAL JUSTICE UNDER LAW, THE SUPREME COURT IN AMERICAN LAW* (3d ed. 1975).

237. Burger is Honorary Chairman.

238. See Gazell, *supra* note 3, at 472.

Ehrenhaft, and former ABA President Bernard Segal. Three members were former law clerks of Louis Brandeis, Felix Frankfurter, and Earl Warren. These were lawyers intimately familiar with the internal operations of the Court—people well suited to serve in the group.

On December 19, 1972, the Freund Committee submitted its report²³⁹ and made four recommendations on how to deal with the Supreme Court's growing caseload. Three were largely uncontroversial:

(1) [T]he elimination by statute of three-judge district courts and direct review of their decisions in the Supreme Court; the elimination also of direct appeals in ICC and anti-trust cases; and the substitution of certiorari for appeal in all cases where appeal is now the prescribed procedure for review in the Supreme Court.

(2) [E]stablishment by statute of a non-judicial body whose members would investigate and report on complaints of prisoners, both collateral attacks on convictions and complaints of mistreatment in prison. Recourse to this procedure would be available to prisoners before filing a petition in federal court, and to the federal judges with whom petitions were filed.

(3) Increased staff support for the Supreme Court in the Clerk's office and the Library, and improved secretarial facilities for the Justices and their law clerks.²⁴⁰

The other recommendation was controversial: the establishment by statute of a National Court of Appeals, which would screen certiorari petitions and jurisdictional statements for the Supreme Court. The new court could also decide on the merits cases of genuine conflict between circuits and cases remanded to it by the Supreme Court.²⁴¹

Burger called the report a "thoughtful analysis" that was provoking "healthy debate" and emphasized that "some adjustment to the growing caseload in the Supreme Court, as in all other courts, cannot be avoided."²⁴² He called for continuing debate and discussion.

Progress has been made on the first three Freund Commit-

239. *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573 (1973).

240. *Id.* at 611-12.

241. *Id.* at 611.

242. *THIRD BRANCH*, Jan. 1973, at 3.

tee recommendations. For example, the virtual abolition of three-judge district court jurisdiction, first advocated by Burger in 1969, was accomplished in 1976. A 1969 American Law Institute report had also recommended changes in three-judge court jurisdiction.²⁴³ Likewise, the Judicial Conference had called for its virtual abolition. When Senator Burdick, the Chairman of the Senate Subcommittee on Improvements in Judicial Machinery, introduced his bill for abolition, he termed it "a direct legislative response to one of the key recommendations of the Freund Committee."²⁴⁴ Burger kept the issue alive in bar speeches, *U.S. News and World Report* interviews, and his year-end reports:

Another means of reducing the burden on the Supreme Court is by reduction or elimination of three-judge courts. This has been recommended in varying degrees by such prestigious bodies as the American Law Institute in 1968 and the Freund Commission in 1972. It is hoped that the new Congress will follow the lead of the current Senate in taking action.²⁴⁵

On December 19, 1974, Congress passed a bill abolishing the direct appeal route from three-judge district courts to the Supreme Court in ICC cases.²⁴⁶ On August 12, 1976, President Ford signed into law the bill which abolished three-judge district courts in most cases.²⁴⁷

Progress on one of the recommendations, the creation of a National Court of Appeals, has not been so smooth. The Commission on Revision of the Federal Court Appellate System (the Hruska Commission) presented its second report to the President on June 20, 1975. In that report the Commission made a number of important recommendations concerning the internal operating procedures of the courts of appeals and recommended its version of a National Court of Appeals—one which would have jurisdiction referred to it by the Supreme Court.²⁴⁸

243. AMERICAN LAW INSTITUTE, *supra* note 183.

244. THIRD BRANCH, July 1973, at 7.

245. W. Burger, Year-End Statement (Jan. 1975) (unpublished).

246. Pub. L. No. 93-584, 88 Stat. 1917 (1975).

247. See 28 U.S.C. § 2284 (1976). Three-judge courts remain for cases in which the constitutionality of statutes apportioning federal or state legislative districts is challenged—of which there could be many following the reapportionments required by the 1980 census; or cases deriving from congressional enactments requiring these panels, such as cases arising under the Civil Rights Act of 1965 and the Voting Rights Act of 1965. *Id.*

248. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUC-

Contrary to what may have been generally assumed, Burger has never given full public support to the idea of a permanent National Court of Appeals. He gave warm praise to both the Freund and Hruska Commissions and emphasized that *something* must be done. In a letter to Senator Hruska, which was published in a Report of the Hruska Commission along with letters from the other Justices, Burger gave conditional endorsement to the proposal of the Freund Study, but emphasized that it should be considered only after all other methods for coping with the workload had been tried. "As to the proposal for an intermediate appellate court, I have no doubt that if Congress does not curtail the jurisdiction of the Supreme Court, in some way generally comparable to the 1925 Judiciary Act . . . then surely a solution must be found by creating such a court."²⁴⁹ Even then, however, he has coupled such limited endorsement with suggestions that a National Court of Appeals be tried only on a five-year experimental basis.

The proposal to create a National Court of Appeals has been extensively discussed and debated.²⁵⁰ The idea has been endorsed by a majority of the Supreme Court. The Chief Justice addressed the subject in his 1980 Year-End Report, stating:

Congress must begin serious study of profound structural changes to assist the Supreme Court in the handling of its discretionary jurisdiction. In this study, various proposals for a National Court of Appeals, as well as a variety of other ideas which have been put forward by serious observers, require further attention by Congress. I have not taken a position on such an additional court, but one thing is as sure as next year's tax bill: Congress must stop adding burdens or it must create an

TURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975).

249. Letter from Warren E. Burger to Roman C. Hruska (May 29, 1975).

250. Among the major contributions to the debate at this writing are H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 15, 47-54 (1973); Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473 (1973); Casper & Posner, *A Study of the Supreme Court's Caseload*, 3 J. LEGAL STUD. 339 (1974); Freund, *Why We Need the National Court of Appeals*, 59 A.B.A.J. 247 (1973); Freund, *A National Court of Appeals*, 25 HASTINGS L.J. 1301 (1974); Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634 (1975); Griswold, *The Supreme Court's Caseload: Civil Rights and Other Problems*, 1973 U. ILL. L.F. 625; Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335 (1975); Haynsworth, *A New Court to Improve the Administration of Justice*, 59 A.B.A.J. 841 (1973); Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change?*, 59 CORNELL L. REV. 616 (1974); Rehnquist, *Whither the Court*, 60 A.B.A.J. 787 (1974); Warren, *Let's Not Weaken the Supreme Court*, 60 A.B.A.J. 677 (1974).

additional appellate court.²⁵¹

During the 1981 Brookings Conference in Williamsburg, House and Senate members expressed considerable interest in exploring the possibility of an experimental panel drawn from existing judges—a panel which would resolve circuit conflicts referred to it by the Supreme Court, subject to certiorari review by the Supreme Court.

C. Federal Judicial Center

Chief Justice Burger has vigorously encouraged research on problems of judicial administration and has been open to insights from a variety of disciplines. As Chairman of the Board of the Federal Judicial Center during the first dozen years of its full-scale operations, he has influenced the rapid growth in the quality and stature of its work. Describing the impact of the Center, Burger has stated:

The Federal Judicial Center in 1969 was an untried fledgling with a staff of eleven. Now, with a staff of 100 and its headquarters at Lafayette Park, in Washington, it is the major center in the country for study, training and innovation in legal and judicial procedures. More than ninety percent of federal judges now in office have undergone training through the Center. Nearly half the 11,000 employees of federal courts—circuit executives, magistrates, bankruptcy judges, probation officers, court clerks, and reporters—also have had an opportunity to learn from more experienced colleagues. The Center reaches outside the world of lawyers and the law to draw upon the skills of many other areas of research and knowledge—political scientists, sociologists, psychologists, and public administrators to name a few.²⁵²

In recent years the Center has pioneered improvements in video technology and court reporting. It has not only studied the adaptation of new technology to the day-to-day operation of the courts, but has also engaged in experimentation with pilot projects which have kept court costs from escalating.²⁵³ In addition, the Center's educational program has expanded greatly. In 1979, for example, the Federal Judicial Center offered a total of 131 workshops, reaching some 5,000 participants. These pro-

251. W. Burger, End-of-the-Year Statement (Dec. 29, 1980) (unpublished).

252. W. Burger, Year-End Report (Dec. 31, 1979) (unpublished).

253. *Id.*

grams included orientation seminars for newly-appointed federal district judges. Apart from the training sessions themselves, the time together affords judges the opportunity to informally exchange ideas. Burger's efforts have contributed to the acceptance of the Center's work throughout the judiciary, as have the stature and achievements of the Center's Directors: Justice Tom Clark, Judges Alfred Murrah and Walter Hoffman, and Professor A. Leo Levin. Burger has been heavily involved in decisions concerning research projects, training programs, major changes in professional staff, and the general direction of the Center's work.²⁵⁴

D. *The Pound Conference*

Known for promoting research and being receptive to suggestions from nonlaw disciplines, Burger is open to experimentation. Believing that all progress involves risks, he prefers "that we risk some false starts rather than make no starts at all."²⁵⁵ In 1975 he proposed that the ABA and the Conference of (State) Chief Justices join with the Judicial Conference of the United States in a comprehensive reexamination of what was described as the "unfinished business" of Roscoe Pound's famed speech to the ABA in 1906 entitled *The Causes of Popular Dissatisfaction with the Administration of Justice*.²⁵⁶

The Pound Conference was held from April 7 to 9, 1976. It opened in the same legislative chamber of the Minnesota State Capitol and at the same podium where Dean Pound had made his speech seventy years before. It brought together, for the first time, leaders of the legal and judicial professions, as well as scholars from other disciplines, for a probing assessment of the forms, procedures, and flaws of the justice system and its future directions and needs. The participants concentrated on how to address dissatisfaction with the administration of justice in wholly new ways still consistent with American traditions of justice. The conference also focused upon what type of disputes belong in courts and how justice could be served with much speed-

254. For example, at the first Federal Judicial Center board meeting that Burger presided over, on November 3, 1969, he urged studies of probation, jury selection, court reporting, and circuit structure. See *THIRD BRANCH*, Dec. 1969, at 1.

255. Address by Warren E. Burger, American Bar Association, *Report on the Federal Judicial Branch* (Aug. 6, 1973), reprinted in 59 A.B.A.J. 1125, 1127 (1973).

256. Roscoe Pounds' speech, delivered Aug. 29, 1906, is reprinted in *THE POUND CONFERENCE* app. B, at 337-53 (L. Levin & R. Wheeler eds. 1979).

ier and less expensive processes.²⁵⁷ Following the conference, the ABA designated a Pound Conference Follow-Up Task Force²⁵⁸ chaired by Griffin Bell. Among the results traceable to the Pound Conference are federal support for the experiment with neighborhood justice centers and the experiment with court-annexed arbitration in the federal courts, as well as renewed interest in creation of a National Institute of Justice, and serious reconsideration of discovery practices, class actions, and methods of handling complex litigation. A "spin-off" consequence was an additional conference devoted to the subject of minor dispute resolution, held in May 1977 at Columbia University.²⁵⁹ A. Leo Levin and Russel R. Wheeler have attempted to sum up the importance of the Pound Conference:

We do not think it presumptuous, however, to state that the Pound Conference has become part of what might be called the vocabulary of the contemporary legal scene The Pound Conference helped to catalyze an interest in change and experimentation. It suggested the need to probe beyond conventional tinkering and to explore the basic assumptions on which current procedures and operations rest, while still recognizing the importance of alleviating minor problems that can be serious barriers to access to justice in any meaningful sense

Whether those who spoke in St. Paul—in 1906 or in 1976—provided the best diagnoses and prescriptions is certainly not a closed question. It is quite apparent, however, that they stimulated thought, planted new ideas, and fermented new analyses. Especially in justice administration, those are not easy accomplishments.²⁶⁰

E. Protracted Litigation

In an address to the Conference of (State) Chief Justices in August 1979, Chief Justice Burger drew attention to the special problems deriving from cases lasting a month or more—cases which may seriously disrupt the courts' calendar, overburden judges, and impose on juries.²⁶¹ That speech stimulated the state chief justices to establish a committee to study the problem.

257. For the full proceedings and conferees of the Pound Conference, see *THE POUND CONFERENCE* (L. Levin & R. Wheeler eds. 1979).

258. See *Task Force Report*, *supra* note 191.

259. Remarks by Warren E. Burger, *supra* note 189.

260. Levin & Wheeler, *Epilogue*, in *THE POUND CONFERENCE*, *supra* note 257.

261. Address by Warren E. Burger, Meeting of Conference of (State) Chief Justices (Aug. 7, 1979) (unpublished).

Burger then appointed a Judicial Conference Subcommittee, chaired by Judge Alvin Rubin of the United States Court of Appeals for the Fifth Circuit. The two groups are working together on a unique empirical survey of juries. The survey focuses on a jury's level of understanding in protracted cases and its ability to deal with them.

While the studies proceed, there has been other action. In September 1979 the Judicial Conference authorized creation of a special panel of experienced senior judges who could help in those districts where there might be a need. The Conference of Metropolitan Chief Judges is taking steps to see that these judges are requested. A committee chaired by Judge Milton Pollock of the Southern District of New York developed a film to guide judges in effectively managing protracted cases. The Chief Justice is pushing for implementation of a 1970 resolution of the Court Administration Committee which recommends that district courts adopt assignment systems. This could ensure, even though most cases are assigned randomly, that highly complex cases are assigned to an experienced rather than a new judge. The ABA has created a "Coordinating Group Re the Impact of the 'Big Case' on Litigation Costs and Delays" to explore problems relating to the "big case."²⁶²

F. Correctional Institutions and Techniques

The Chief Justice's concern with the subject of correctional institutions and techniques traces back more than two decades. In 1969 he requested the ABA to enter the field. ABA President Bernard Segal appointed a distinguished commission with former Governor (later Chief Justice) Richard Hughes of New Jersey as chairman. Dr. Karl Menninger and Dr. Norval Morris were among its members. The commission began a program to study the problems of American correctional institutions. Over a period of eight years, a wide range of improvements were introduced in American prisons under the chairmanship of Hughes and his successor, Professor Robert McKay of New York University Law School and the Aspen Institute.

A specific and graphic example of the power of a simple idea is illustrated by the following episode. In his 1973 address to the ABA the Chief Justice referred to the case of *Russell v.*

262. W. Burger, End-of-the-Year Statement 11-12 (Dec. 29, 1980) (unpublished).

Bodner,²⁶³ which was based on an allegation that a prison guard had taken seven packages of cigarettes from a prisoner as a discipline measure. The district judge dismissed the case as *de minimis*, but the court of appeals reversed, sending the case back for trial. The episode came to the Chief Justice's notice when, on remand, the district judge wrote to the chief judge of the court of appeals asking whether he could dismiss the case if he gave the prisoner seven packages of cigarettes.

Noting that the entire court of appeals reviewed the opinion, the Chief Justice stated in a speech, "What I suggest is that we use some common sense and devise procedures that give prompt attention to valid complaints [within the institution] without calling on eleven federal judges and a train of other public employees to deal with three dollars worth of cigarettes."²⁶⁴

As a result of the speech, the Director of United States Prisons, Norman Carlson, instituted a pilot program for the resolution of routine prisoner grievances in three federal prisons. The program was later expanded to all federal prisons. Consequently, a twenty-percent reduction in federal prisoner petitions to federal courts occurred between 1979 and 1980.

In his 1971 speech to the National Conference on corrections in Williamsburg, the Chief Justice emphasized the need to implement the concept of a "National Corrections Academy" as a training center for correctional staff.²⁶⁵ In 1974, with fiscal support from LEAA and the Federal Bureau of Prisons, the National Institute of Corrections was established through legislation. The original and primary purpose of the Institute, as promoted by Burger, was to train and upgrade correctional staff, particularly executive and management-level personnel. This training still accounts for forty-seven cents of every dollar spent by the organization.

CONCLUSION

At the time of his appointment, some pundits paid little attention to the role Warren Burger might perform in the admin-

263. 489 F.2d 280 (3d Cir. 1973).

264. Address by Warren E. Burger, *supra* note 50, at 1128.

265. Address by Warren E. Burger, National Conference on Corrections (Dec. 7, 1971) (unpublished material collected in SPEECHES OF CHIEF JUSTICE WARREN BURGER in Brigham Young University Law Library).

istration of justice. What they noted then were his moderate to conservative views on criminal justice and judicial restraint. Time has shown that the principal characteristic distinguishing Burger's tenure from the tenures of his predecessors has been his attempt to improve the administration of justice in the United States—"to try," as he promised during his nomination hearing, "to see that the judicial system functions more efficiently."²⁶⁶ Beyond the full load of his judicial work, Burger has also expended an extraordinary amount of time and energy on these broader duties of the Office of Chief Justice of the United States.

Burger's record for making changes in the administration of justice can be attributed to his willingness to commit his efforts and the prestige of his office to the demands of the judicial system. Because he is Chief Justice, he naturally has access to groups and podiums that others do not. Because he is Chief Justice, he has an influential audience for his annual state of the judiciary message to the ABA. Because he is Chief Justice, he can reach out to dozens of organizations.

The Chief Justice has not hesitated to avail himself of these opportunities. For example, from July through September 1971 Burger attended fourteen legal and judicial gatherings, including ABA meetings in New York and London, circuit judicial conferences, meetings of the Judicial Conference Committee on Court Administration, and meetings for the Board of Directors of the National Center for State Courts and the Federal Judicial Center Board. He usually pursued these objectives during periods after those he reserves for his strictly judicial duties. The result is a heavy work schedule. The magnitude of the work assumed by the Chief Justice evidences the depth of his commitment to the administration of justice. Of course, one of the reasons why Burger has been able to extend his activities has been the creation of the Office of Administrative Assistant to the Chief Justice. He has publicly paid tribute to Mark Cannon for his drive, zeal, and imaginative approach to judicial administration since his appointment in 1972.

Burger has indeed been a highly visible Chief Justice. He has succeeded in developing coalitions to spawn needed public awareness and in developing public support for his programs. He has sought support from lawyers' groups but has not limited

266. *Nomination Hearing*, *supra* note 1, at 5.

himself to that audience. Generally he gives three or four formal speeches per year, including a *U.S. News and World Report* interview every two or three years, and occasionally writes articles on judicial subjects.

Burger has not hesitated to establish key personal relationships. He meets with all newly appointed federal judges in Washington when they attend Federal Judicial Center seminars. His attendance at ceremonial occasions is not only a duty of his office, but also a useful way to exchange ideas.

He remains in touch—often through Mark Cannon—with numerous groups in the judicial administration field. Like his predecessors, the Chief Justice speaks annually to the American Law Institute, usually advocating a program or releasing a “trial balloon.” His working relations with the ABA have been quite salutary. He attends meetings of the Institute of Judicial Administration and the Conference of (State) Chief Justices. He visits regularly the National Center for State Courts and the National Judicial College.

Burger has continued to be an activist Chief Justice of the United States on questions of the improved administration of justice.²⁶⁷ He does not believe that judges should suffer in silence: “Someone must make these problems of the courts known to the public and Congress, if intelligent choices are to be made This is, very clearly, one of the obligations of the office I occupy.”²⁶⁸

Some have been concerned that, with this view of his role, Burger might slight his other duties, compromise his judicial independence, give the appearance of bias, become too political, or act contrary to the separation of powers.²⁶⁹ Nevertheless, both Burger’s conception of his office and his practice in that office suggest otherwise. The late Alexander M. Bickel urged the Chief Justice to embark upon just such a course:

As Chief Justice Burger takes up the task, it is not enough to hope that he will equal Taft’s success, and stand with him among the Chief Justices as a great administrative reformer The problems are worse, the needs greater. Chief Justice

267. Kohlmeier, *Chief Justice Burger is Expected to Push Administrative Reform*, Wall St. J., Oct. 28, 1971, at 1, col. 1.

268. Remarks by Warren E. Burger, Accepting the Fordham-Stein Award (Oct. 25, 1978) (unpublished).

269. See, e.g., Kurland, *supra* note 3, at 11, 28; Landever, *supra* note 3, at 533-41; Miller, *supra* note 3.

Burger will have to outdo Taft, and he will need the help of Congress and the bar.²⁷⁰

Changes in the administration of justice have historically been difficult to achieve because of the inertia of the bar and the difficulty of activating the interest of legislators in issues lacking political allure. In the federal court system there are only two officials properly positioned to give dynamic leadership—the Attorney General and the Chief Justice.²⁷¹ The modern Attorney General, with rare exceptions, is something of a “transient”²⁷² who may have given little thought to judicial administration problems prior to taking office, and who is quickly overwhelmed with other issues upon taking office. (Attorney General Griffin Bell was the first notable exception to this since Herbert Brownell.) The body designated by statute for involvement in these matters, the Judicial Conference of the United States, is not well equipped to give leadership. It is a body of twenty-seven members which meets twice a year, for two to three days each time, and lacks a permanent staff of its own. Therefore, without vigorous leadership from the Chief Justice, reform efforts will drift. As Arthur Landever has written: “[W]e must understand the need and accept the fact that the chief judge—whether of the United States Supreme Court, the federal circuit court, or the state court panel—must wear two hats. If we are to have fairness and efficiency, he must be both judge and administrator.”²⁷³

Burger has made his position clear. In October 1978 he summarized his stand:

The problems of the courts do not have high visibility. They reach the attention of other branches and the public only if they are pressed forward by someone—and often not even then. The good citizen or the busy Congressman can be excused if he is not very familiar with the need to expand United States Magistrates’ jurisdiction, for example, or to abolish diversity jurisdiction, the need for court administrators, or the need for more judges or changes in the court structure or rules of procedure. Someone must make these problems of the courts known to the public and Congress, if intelligent choices are to

270. Bickel *The Courts: the Need for Change*, N.Y. Times, Oct. 22, 1970, at 47, col. 1.

271. See generally Swindler, *supra* note 143.

272. The average tenure of the last twelve Attorneys General is just under two years.

273. Landever, *supra* note 3, at 539.

be made: Someone must make these problems real to the busy members of the Congress, overwhelmed as they are with a host of other, more visible problems

Continuing, the Chief Justice stressed:

This is, very clearly, one of the obligations of the office I occupy. The ultimate responsibility rests with the Congress—especially if questions of statutory change or rules of procedure, jurisdiction or appropriations are involved. And when Congress enacts laws, the President must sign or veto them. But given all the burdens and distractions of the political process, the Judiciary would fail dismally to perform its duty if it stood mute in this process. If a Chief Justice, as spokesman for the Judicial Conference, failed to participate in the process, he would be shirking his obligations.²⁷⁴

This article has outlined some of the major improvements in the American judicial system which have been brought about at least in part through the commitment and leadership of Warren E. Burger. Professor Everett E. Dennis summarizes these contributions as follows:

In the 10 years since the man first stormed into the American Bar Association and laid down a half-dozen specific ideas for reform, he has witnessed considerable progress. Proposals that would restructure the courts and modify their functions have been advanced; there is closer collaboration between state and federal judicial officers; a new code of judicial ethics has been adopted; scores of trained court administrators are at work where few existed before; there are formal training programs for judges at the state and federal level; federal judges report greater productivity in handling cases; experiments that will help people resolve legal conflicts, short of full trials, are underway; law schools are offering more extensive trial practice to their students and penal reformers have found a friend in the nation's highest tribunal.²⁷⁵

American Bar Association President Chesterfield Smith has made the following assessment:

In my opinion, and I am confident in the opinion of most of my professional colleagues, Chief Justice Burger has been the single-most effective, innovative, and significant figure in

274. Remarks by Warren E. Burger, *supra* note 268.

275. Dennis, *An Unheralded Toiler for Judicial Reform*, Boston Sunday Globe, Sept. 6, 1979.

this country in the area of judicial improvement in recent times. I believe that Warren Burger has carved out a place in history as a dynamic Chief Justice, who has continually pressed for modernization of our judicial structures and for reform or replacement of outmoded judicial practices and systems. The practicing bar as a whole has welcomed this magnificent leadership by the Chief Justice and, to my knowledge, it has in some way responded deliberately and constructively to every proposal made by the Chief Justice.²⁷⁶

This same sentiment has been echoed by other respected voices among the bar, the judiciary, and academia.²⁷⁷

The speeches and articles of Chief Justice Burger in the twelve years of his present office and the twenty-five years as a United States Judge do not reveal his innermost thinking, but they clearly state his objectives. He may or may not know of the account from judicial lore of a conversation between two men he admires greatly—Charles Evans Hughes and Arthur Vanderbilt. Vanderbilt once expressed a sense of despair when he spoke to Hughes of the frustrations he felt in his efforts to overcome the die-hard opposition to the use of modern methods in the judiciary. Hughes, who had experienced some of this, is reported to have said, "Arthur, when people no longer remember a single opinion either of us ever wrote, they will remember what we tried to do to make justice work better."

We think that Hughes, Vanderbilt, and Burger could spend a pleasant time reminiscing over their shared interests and common goals.

Perhaps the foregoing assessments strike some as unduly generous. Perhaps some will take issue with the conclusions we have drawn. Of course, the possibility of such a reply is inevitable given the divergence of opinions people hold concerning public officials. In response, we note that throughout we have

276. Letter from Chesterfield Smith to the N.Y. Times (Jan. 30, 1974) (unpublished).

277. Harvard Law Professor Arthur R. Miller wrote that the Chief Justice "bears primary responsibility for assuming that they [the courts] operate as efficiently as possible. Perhaps no chief justice in history has been more concerned with this supervisory role than Burger." Miller *Examining Burger's Message*, Chi. Tribune, Feb. 23, 1981, § 5, at 3, col. 6.

Senator Howell Heflin, former Chief Justice of the Supreme Court of Alabama and President of the National Center for State Courts, asserted, "In my judgment, Chief Justice Burger has done more in the areas of Court modernization and administration, and procedural reform at the federal level than anyone in this nation throughout our entire history." L.A. Daily J., Jan. 21, 1980, at 1, col. 5.

limited ourselves to the record as we have found it. For those who likewise consult and examine that record, we believe their judgment will coincide with ours. And it is just that record, we maintain, that stands as evidence of the measure of the man today addressed as the "Chief Justice of the United States."