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The Chief Justice of the United States: More than Just the Highest Ranking Judge

Alan B. Morrison

D. Scott Stenhouse

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The Chief Justice has always been more than first among equals. His position as chair of the Supreme Court's weekly conferences, at which tentative votes are taken on cases that have been argued, and decisions made on which cases will have full briefing and argument, is more than titular. His power to choose who will write the majority opinion, if he is on that side, can influence the course of the law, which depends at least as much on the rationale as on the result. And his symbolic function as the leader of our entire judicial system has always been important.

Such differences between his role and that of the other Justices are traditional and probably necessary. This article is about a more recent and more disturbing phenomenon: the plethora of nonjudicial responsibilities that modern Chief Justices have assumed or, more often, been assigned by Congress. Every Justice, and indeed every federal judge, has some administrative duties. But the Chief Justice has more of them, and on the whole his are more significant. Cumulatively, his responsibilities raise several serious questions.

The first is time. With increasing outside duties and an increasing caseload, is it possible for one person to continue to handle all of these tasks effectively? Or will nonjudicial activities detract from the Court's primary function?

As a result of these activities, there has also been a significant increase of the power of the Chief Justice. Some of his prerogatives are merely managerial. But many, such as the power to appoint important committees and to act as spokesman for the federal judiciary, entail significant policy-making functions. Should we be concerned about such concentrations of power in one individual? No Chief Justice has been accused of any scandalous improprieties. But scandal is not the only danger inherent

* Mr. Morrison, a Washington attorney, directs the Public Citizen Litigation Group, which he founded with Ralph Nader in 1972. The basic research for this article was done by Mr. Stenhouse, who now practices law in Atlanta, while he was a student and Mr. Morrison was a Visiting Professor at Harvard Law School.

in extra-judicial endeavors. The administrative work of every Chief Justice inevitably brings him or her into situations that could tarnish the image of the Court, to the point where it is seen as simply another participant in political disputes. If that were to occur, it might do serious damage to the confidence most Americans have in the fundamental fairness of our court of last resort.

A final reason for studying the Chief Justice's duties is to broaden our conception of the qualities that should be sought in those who are considered for the office. What does the job involve?

I. TIME COMMITMENTS

"If the burdens of the office continue to increase as they have in the past years, it may be impossible for the occupant to perform all of the duties well and survive very long." Those words were spoken by Chief Justice Burger in December, 1978.[1] Nearly ten years earlier, however, he endorsed the idea of judges serving on the boards of nonprofit groups "so long as the demands on their time and energy do not violate the absolute priority of their court duties."[2]

Are those statements consistent, and if so, where is the problem? To begin, most of the Chief Justice's nonjudicial duties have been imposed by Congress. Has this occurred too often? One standard by which to answer that question was supplied by Senator Ervin, who declared that a judge's first responsibility is to "be a full-time judge in his own court."[3] The most time-consuming obligation of the Chief Justice, apart from judging, is his role as head of the Judicial Conference of the United States, which is, in essence, the policy-making body of the federal judiciary. It is comprised of the chief judges of all federal courts of appeals and a district judge from each of the circuits (other than the new Federal Circuit).[4] The Conference is charged with supervision of the federal court system—trying to assure that cases are promptly decided, recommending rules changes, initiating or responding to legislation relating to virtually every aspect of what transpires in

1. Address to the Conference on the Role of the Judiciary in America, December 14, 1978. The speech has never been printed. The quotation is from page 19 of a transcript made from a tape recording prepared by the Institute [hereinafter cited as AEI Speech].

2. *Nonjudicial Activities of Supreme Court Justices and Other Federal Judges: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 178 (1969) (statement of Tom C. Clark, Director of the Federal Judicial Center) [hereinafter cited as *Senate Hearings*].

3. *Id.* at 156.

4. 28 U.S.C. § 331 (1976).

the federal courts, and the like.[5] When it was created by Congress in 1922, the Conference met for one day each year. Now it has two two-day meetings, and according to the Chief Justice each of these requires an additional two or three days for preparation.[6]

Besides serving as presiding officer, the Chief Justice appoints the chairmen of over twenty committees,[7] dealing with subjects like court administration, the jury system, probation, and federal magistrates. Among the most important are those which consider possible changes in procedural rules. The Conference's committees on judicial conduct advise judges about the propriety of various activities, review their reports of extra-judicial income, and assist them with their financial disclosure forms required by the Ethics in Government Act. The Chief Justice also appoints the principal staff on several of these committees. Because of the key role played by the committees, he keeps in close touch with their chairs. In 1972, Congress authorized the appointment of an Administrative Assistant to the Chief Justice, in part to relieve him of some of the liaison functions with groups such as the Judicial Conference.[8] But as Chief Justice Burger himself recognized, "there is a limit to the delegation of functions and a limit in delegating decisionmaking."[9]

A second major responsibility is his position as chair of the Board of the Federal Judicial Center.[10] Congress has directed that he, the six sitting federal judges, and the Director of the Administrative Office of the United States Courts, who comprise the Center's Board, meet quarterly to oversee its work.[11] The Center, whose primary function is to engage in research, training, and education for the judicial branch,[12] has a budget which has increased from $500,000 at its inception in 1967 to almost $8,600,000 today.[13] It engages in a wide range of research projects, offers

5. *Id.*

6. AEI Speech, *supra* note 1, at 20-21.

7. P. FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 269 (1973). 1982 REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES iv-vi lists nineteen that reported at that meeting, plus a number of subcommittees, the principal ones being those on rules of practice. Apparently, there is no published up-to-date list of the Conference's committees.

8. Pub. L. No. 92-238, 86 Stat. 406 (codified at 28 U.S.C. § 677 (1976)).

9. AEI Speech, *supra* note 1, at 25.

10. 28 U.S.C. § 621(a)(1) (1976).

11. 28 U.S.C. §§ 621, 622 (1976).

12. 28 U.S.C. § 620 (1976). The Center also issues an annual report which is helpful in understanding its functions and operations and provides the basis for the description which follows.

13. *Hearings on the Departments of Commerce, Justice, and State, The Judiciary and Related Agencies Appropriations, for 1983 Before the Subcomm. on Commerce, Justice, State,*

training sessions for judges and nonjudicial personnel in the system, and has committees on such topics as prisoners' civil rights suits, revising jury instructions, and conducting conferences for appellate judges. Like the committees of the Judicial Conference, those working under the Federal Judicial Center also require the time and attention of the Chief Justice.

A third duty concerns the Administrative Office of the United States Courts. This Office works closely with the Federal Judicial Center and the Judicial Conference in the broad area of judicial administration. It is almost impossible to assign many of the Chief Justice's duties to any one of the three because there is so much overlap. His specific responsibilities for the Administrative Office arise because its director and deputy are appointed by the Supreme Court and their work is under the direction of the Judicial Conference.[14] Since courts or conferences cannot, as a practical matter, supervise individuals, much of the responsibility falls on the Chief Justice.

A great deal of what the Administrative Office does, such as handling pay and purchasing books and other supplies,[15] is generally no burden to the Chief Justice. But the Office is also the major source of data for the Judicial Conference and the Congress about the use of the federal courts. These, in turn, are vital to the Chief because of his concerns about the increasing case load, the adequacy of judicial salaries, and the number of judges. For these reasons he has become involved, although probably to a lesser degree than in other areas of court administration, in the work of the Administrative Office.

Another major responsibility is what he has referred to somewhat facetiously as his "role of building manager of the Supreme Court building."[16] Of course, the day to day operations are handled by the marshall, clerk, librarian, reporter of decisions, and the Chief's administrative assistant.[17] They in turn are subject to the supervision of the whole Court. In some cases this is done by Court committees; in others the job has fallen to individual Justices, particularly the Chief Justice.

Chief Justice Burger has taken his duties in managing the Supreme Court building very seriously. He himself has men-

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The Judiciary of the House Comm. on Appropriations, 97th Cong., 2d Sess. 321 (1982) (statement of A. Leo Levin, Director, Federal Judicial Center).

14. 28 U.S.C. §§ 601, 604(a) (1976).

15. 28 U.S.C. § 604 (1976). The Administrative Office also publishes annual reports that set forth its functions and operations.

16. AEI Speech, *supra* note 1, at 24.

17. *See* 28 U.S.C. §§ 671-677 (1976).

tioned the time that he spends in making decisions relating to the modernization of the Court's equipment.[18] Other observers have mentioned his involvement in such details as ordering paint, planting flowers, having the reflecting pools painted blue, and installing exhibits for tourists.[19] He has also changed the lighting of the courtroom, altered the shape of the Justices' bench, moved the journalists' location, and improved the cafeteria. Indeed, he is so well versed in the Court's budget that he was able to recite down to the last dollar the overtime charges that were being run up in the print shop in trying to have all the opinions ready for Monday morning before the practice was changed in the mid-1960s.[20]

Congress has also required the Chief Justice to make various kinds of appointments. Many involve temporary or special purpose courts such as the Temporary Emergency Court of Appeals,[21] which in recent years has concentrated on energy price litigation, and the Judicial Panel on Multi-district Litigation,[22] which coordinates complex cases arising in various locations around the country.[23] He is also empowered to assign judges within the federal system to fill temporary needs—with their consent and that of their chief judge—including trips to such places as the Northern Mariana Islands, Guam, and the Virgin Islands.[24] These assignments do not comprise a significant portion of his work load, but they are one more straw on the camel's back. Equally important, they may permit the Chief to exercise extraordinary influence in certain areas of the law.

Congress has assigned to the Chief Justice many activities which are remote from judicial administration. In 1846 it made him a Regent of the Smithsonian[25] and more recently a trustee of the National Gallery of Art and the Joseph M. Hirshhorn Museum and Sculpture Garden.[26] Other outside positions, not con-

18. AEI Speech, *supra* note 1, at 24.

19. Oster, *Burger: High Court Politician,* Chicago Sun Times, Dec. 4, 1977, p. 4.

20. Interview with Carl Stern, NBC Washington Correspondent (April 11, 1979). The significance of the episode is in the fact that the Chief Justice considered such an administrative detail to be of sufficient importance to be worth his time to investigate, presumably in order to prevent similar problems from arising in the future.

21. Pub. L. No. 92-210, § 211(b)(1), 85 Stat. 743, 749 (1971) (set out as a note in 12 U.S.C. § 1904 (1976)).

22. 28 U.S.C. § 1407 (1976).

23. According to Chief Justice Burger, he and his predecessor have made more than fifty appointments under these and similar provisions. Burger, *Annual Report on the State of the Judiciary* at the midyear meeting of the American Bar Association, Feb. 6, 1983 at 11 [hereinafter cited as 1983 ABA Speech].

24. 48 U.S.C. §§ 1694(b)(2) (Supp. V 1981); 48 U.S.C. § 1614(a) (1976).

25. Act of Aug. 10, 1846, ch. 178, § 3, 9 Stat. 102, 103 (1846) (current version at 20 U.S.C. § 42 (1976)).

26. 20 U.S.C. § 72(a) (1976); 20 U.S.C. § 76cc(b) (1976).

gressionally imposed, include: Honorary Chairman of the Board of Trustees of the Supreme Court Historical Society (a group formed at his urging); Honorary Trustee of the National Geographic Society; and Honorary Chairman of the Institute on Judicial Administration and the National Judicial College.[27] Some of these are pleasant diversions, yet they can become demanding. It is worth recalling that Chief Justice William Howard Taft resigned from the Board of Yale University because he felt the ten meetings a year did not permit him to maintain his work load on the Court.[28]

There is a great deal that the Chief Justice has to do simply because he is the Chief Justice—the inevitable swearings-in, receptions, and attendance at joint sessions of Congress addressed by the president.[29] While every other Justice is assigned to one federal judicial circuit for administrative and other duties, the Chief and two other Justices are assigned an additional circuit.[30] Each year the circuit holds a conference which its Justice usually attends and often addresses. The Chief Justice also makes an annual address on the state of the judiciary to the American Bar Association, and frequently speaks before the American Law Institute, law schools, and other gatherings.

How much time does all this take? By one report, the Chief Justice has timed his own work week at seventy-seven hours, with about one-third devoted to non-case activities.[31] He has also stated that no member of the Court works less than sixty hours a week.[32] Surely, by any measure, his work load is considerable, and the burdens from his non-case activities are significant.

Some perspective can be gained by considering his extra-judicial duties in light of the Court's case load. For example, during the 1953 Term (Earl Warren's first) the Court issued sixty-five signed opinions; in the 1981-82 Term that figure was 141, or more than double the number thirty years before; in the same period, the number of cases on the Court's docket went from 1463 to 5311.[33]

Have outside activities prevented the Chief Justice from writ-

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27. WHO'S WHO IN AMERICA 453 (42d ed. 1982-83).

28. *Senate Hearings*, *supra* note 2, at 141 (statement of Alexander M. Bickel).

29. AEI Speech, *supra* note 1, at 24.

30. *See* 28 U.S.C. § 42. A listing of current assignments appears at 457 U.S. ii (1982).

31. Oster, *supra* note 19, at 4.

32. AEI Speech, *supra* note 1, at 26. *See also* 1983 ABA Speech, *supra* note 23, at 9, in which the Chief Justice stated that the Court's work load presents "a very grave problem and something must be done."

33. 1983 ABA Speech, *supra* note 23, at 1. While different measures might produce different percentage increases, and while numbers alone are not the sole measure of the

ing a reasonable share of the Court's opinions? During the five terms ending in June, 1982, he averaged the same number of majority opinions as his colleagues. Yet he wrote far fewer concurrences and dissents than any other Justice, perhaps partly because he cast relatively few dissenting votes. This may reflect a conviction that, as Chief Justice, he should try to harmonize the Court's work and that therefore concurrences and dissents should be used sparingly.[34] But there is at least some evidence that in a few cases each year there is not enough time for the Chief to add his concurring or dissenting views, and so he joins others rather than separately stating his own position.[35]

Can a Chief Justice, despite considerable nonjudicial work, devote adequate thought to judging? Charles Evans Hughes and Joseph R. Lamar, who served on presidential commissions while they were Associate Justices, were reportedly unable to maintain their full judicial work loads.[36] Indeed, Hughes acknowledged that he was so worn out by the added burdens that his work was impaired for several months even after the commission was concluded. This was during an era when the Court's case load was relatively light. Chief Justice Burger says that the Court should give full treatment to no more than 100 cases each year if it is to maintain adequate quality.[37] The current level, including full per curiam opinions, is more than fifty percent beyond this figure.

Some of a Chief's activities will inevitably reflect personal interests. The incumbent, for instance, cares intensely about judicial administration. But most of his duties are mandatory and, since his successor will probably have some favorite causes, the work load of non-case activities is not likely to decrease substantially. As Chief Justice Burger put it, just "because the Chief Justices, up to now, have somehow managed to cope, we should not assume that these glacial pressures can always be kept under control."[38]

Court's work load, no one doubts that there has been a significant increase in the demands on the Court's time.

34. In the 1981-82 Term, the Chief Justice continued to have a below average number of concurring and dissenting opinions, but his dissenting votes cast (opinions written plus those he joined) equalled the numerical average for all nine Justices.

35. Linda Greenhouse, who covers the Court for the *New York Times,* attempted to find the Chief Justice's mark on the 1981 Term, but found his role was decidedly secondary, particularly with regard to the Court's most important decisions. N.Y. Times, July 20, 1982, p. A20, col. 1. But in the most recent term he wrote the opinions in two of the most significant cases, Immigration & Naturalization Serv. v. Chada, 103 S. Ct. 2764 (1983) and Bob Jones University v. United States, 103 S. Ct. 2017 (1983).

36. *Senate Hearings, supra* note 2, at 139 (statement of Alexander M. Bickel).

37. AEI Speech, *supra* note 2, at 13; 1983 ABA Speech, *supra* note 23, at 7-8, 12.

38. AEI Speech, *supra* note 1, at 29.

II. POLITICAL POWER

It would be hard to find an educated American who does not realize that in making constitutional law the Supreme Court wields a significant kind of political power. The nonjudicial political powers of the Chief Justice are less well appreciated. Congress has assigned him a major role in three significant policy-making fields: creating rules for the federal courts, participating in the legislative process, and appointing judges to certain special courts.

The role of judges—and particular Supreme Court Justices—in fashioning or approving procedures derives from the common-sense notion that they are uniquely qualified for this task. In 1934 Congress gave the Court the job of writing federal rules of civil procedure, subject only to the right of Congress to override them by statute.[39] Since then Congress has also given the Court responsibility for the criminal, appellate, and bankruptcy rules, and—subject to a veto by either house of Congress—the rules of evidence (except those relating to the law of privilege).[40]

As every attorney knows, procedural rules sometimes determine cases. Indeed, when the Court sent over its Rules of Evidence in 1972, they created such a controversy that Congress substantially rewrote them.[41]

Two examples will give a sense of the significance of some procedural rules. The class action enables the aggregation of small claims that could not economically be brought individually. The Federal Rules of Civil Procedure require that in cases principally seeking money damages the complainant must notify each class member of the case by the best means available, so that each may decide whether to join the case or proceed separately.[42] This rule makes sense if each person has a significant sum of money at stake, say $1,000 or more. But when each claim is only fifteen dollars, and there are three million members of the class, the rule makes class actions impossible, especially since the plaintiff must

39. Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified at 28 U.S.C. § 2072 (1976)). *See generally* Burbank, *The Rules Enabling Act of 1934,* 130 U. PA. L. REV. 1015 (1982).

40. 18 U.S.C. § 3771 (1976) (criminal); 28 U.S.C. § 2072 (1976) (appellate); 28 U.S.C. § 2075 (1976) (bankruptcy); and 28 U.S.C. § 2076 (1976) (evidence). It is now clear that the veto over rules of evidence is void, Immigration & Naturalization Serv. v. Chada, 103 S. Ct. 2764 (1983), but perhaps this veto will be deemed severable from the grant of rule-making authority.

41. For a discussion of the legislative history of this congressional intervention in the rule-making process, see 1974 U.S. CODE CONG. & AD. NEWS 7051.

42. FED. R. CIV. P. 23(c)(2).

pay the cost of the individual notice.[43] The Court could easily change the rule, and thereby encourage class actions, but it has chosen not to do so.[44]

Or consider discovery. In civil cases, the discovery rules are quite liberal, which helps the claimant when the evidence is largely in the possession of the other side, as often occurs in complex antitrust and securities fraud litigation. Sometimes these rules have an opposite effect, enabling a wealthy defendant to overwhelm a small opponent with extensive and time-consuming discovery, forcing a cheap settlement. Clearly, any change in discovery rules will alter the results of some cases.

In theory, the power of the Chief Justice, as one of nine Justices who vote on all rule changes, is no greater than that of his colleagues. In fact, that is not the way the system works. Of necessity, the Justices give proposed rules only a cursory glance. This reality elevates the importance of the drafters. Rules proposals come from the Judicial Conference, headed by the Chief Justice, after passing through the Standing Committee on Rules of Practice and Procedure and the appropriate advisory committee, whose members are his appointees.[45] In addition, the staff person who does the basic research for the advisory committee (known as the reporter) is selected by the Chief Justice. Since most potential reporters are academics, their views are often readily ascertainable, making it possible to ensure that appointees concentrate on areas of importance to the Chief and rarely suggest rule changes that are inconsistent with his philosophy. While the committee system is not simply an extension of the Chief Justice's personal staff, there is a close connection between them not readily apparent from the formal structure established by Congress. At the very least it provides a substantial protection against unfriendly rule changes reaching the Supreme Court where they would have to be formally voted down to be defeated.[46]

One recent addition to the Chief Justice's powers in the rule-

43. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 176 (1974).

44. It should be noted that the 1966 amendments to the class action rules were intended to increase the availability of class actions in the federal courts. The point is not that one approach or the other is preferable, but that the Court's power to make such significant changes embodies a major policy-making component.

45. For a summary of the actual operation of the rule-making process for the federal courts, see *Hearings on Rulemaking Oversight Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary,* 98th Cong., 1st Sess. (1983) (statement of Judge Edward T. Gignoux, Chairman of the Standing Committee on Rules of Practice and Procedure).

46. The Court has notified Congress that it would "see no reason to oppose legislation to eliminate this court from the rulemaking process." Legal Times of Wash., May 22, 1983 p. 2, col. 1.

making process deserves special mention. In the Classified Information Procedures Act of 1980[47] Congress sought a solution to the problem of what to do with classified materials that become part of court proceedings, as well as the problem of "graymail"—the threat by a defendant in a criminal case to use classified information to defend himself. The job of writing the security procedures was given jointly to the Chief Justice, the Attorney General, the Director of the CIA, and the Secretary of Defense.[48] Aside from any problems that may arise if the Supreme Court ever has to decide the validity of those rules, the notion that the Chief Justice and members of the Executive Branch should jointly issue regulations of this kind contradicts the basic tenets of separation of powers. Not only is the Chief Justice's role undesirable, it is also plainly unnecessary.

Another major source of the Chief's political power is his ability to influence legislation. The formal power to propose or evaluate bills resides in the Judicial Conference, not the Court or the Chief Justice. The Federal Judicial Center and the Administrative Office of the United States Courts also play a role through their research and the statistics they provide, which are often used by the Chief Justice in his speeches to support or oppose a given recommendation. Their evidence is especially influential in congressional decisions about the number of federal judges and support personnel and, less directly, on whether new kinds of cases should be allowed in the federal courts in light of the current case load. In addition, the Judicial Center's research "often involves matters that are subjects of legislative consideration—for example, criminal code revision, the Speedy Trial Act, or proposals to restructure judges' sentencing discretion . . . ."[49]

Congress undoubtedly needs assistance when it writes legislation that affects the courts. Chief Justice Burger believes it is "absolutely necessary" for judges to provide this assistance.[50] Yet there are others who, at least collectively, are equally well qualified to do so, without tarnishing the appearance of judicial neutrality. Indeed, it is largely because judges seem to be neutral that when the Judicial Conference proposes a statute, or comments on one suggested by others, its views are treated with unusual respect.

No doubt the Conference's long-standing opposition to al-

47. 18 U.S.C. App. §§ 1-16 (Supp. V 1981).

48. 18 U.S.C. App. § 9(a) (Supp. V 1981).

49. FEDERAL JUDICIAL CENTER, 1981 ANNUAL REPORT 55 (1981).

50. The remarks were made at a speech at Fordham University several weeks after Congressional passage of the Bankruptcy Act in 1978, and are quoted in The Third Branch, Nov. 1978, p. 3, col. 2.

lowing veterans to bring suits to challenge denials of benefits[51] is partly responsible for the failure of that proposal to be adopted. Similarly, the negative views of the Conference's Ad Hoc Committee On Judicial Review Provisions In Regulatory Reform Legislation may well have been responsible for modifying proposals for greater judicial scrutiny of decisions of administrative agencies.[52]

The influence of the Chief Justice himself on legislation may in some senses be more powerful than in rule making, even though the Conference can only make recommendations. Unlike rule making, in which every Justice has a vote, none of the remaining eight has a legislative role since the views are expressed by the Judicial Conference, not the Court. Some of the Conference's legislative recommendations come from standing committees over which the Chief Justice has the considerable powers described above; in other cases special committees are formed, where the Chief's decision to create a new group may be the single most important aspect of the process.

It is impossible to assess fully the Chief Justice's impact on legislation because his influence is often subtle. Perhaps more important, his role is unclear because the meetings of the committees, as well as of the Judicial Conference itself, are conducted behind closed doors—a prerogative the Conference fought hard to maintain in 1980 when Senator Dennis DeConcini proposed to open virtually all of them to the public.[53]

Appointments are the third major source of the Chief Justice's political power. In addition to appointing committees and top staff for the Judicial Conference and the Judicial Center, he is authorized to select, from the federal judiciary, the chief judge and the members of several special courts. One of these courts—the Temporary Emergency Court of Appeals—is now responsible for appeals in all oil and gas pricing and allocation cases.[54] Obviously, his choice of these judges can have a major impact on the development of the law. While no one has suggested that the Chief Justice has unfairly balanced TECA, the possibility nonetheless exists and warrants serious thought.

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51. *See, e.g.*, 1981 REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 65-66.

52. *Id.* at 60-61. None of the proposals has yet become law.

53. *See* Letter from William E. Foley, Director of the Administrative Office of the United States Courts, to Senator Dennis DeConcini (June 18, 1980) opposing S. 2045, the Judicial Conference in the Sunshine Act. *See also* Nelson, *Secretive Judicial Conference Could Open Its Drapes,* Legal Times of Wash., March 15, 1982, p. 9, col. 1.

54. *See* text accompanying note 21 *supra*; 17 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4105 (1978 & Supp. 1982).

Another extremely important power that Congress has given the Chief Justice is the right to name the members of the trial and appellate benches of the Foreign Intelligence Surveillance Court, created by Congress to oversee the use of wiretaps by the executive branch in the foreign intelligence area.[55] Most of the original appointees were judges with reputations for upholding the government's position in criminal cases; in 1981 they lived up to their reputations by approving all 431 Justice Department requests to start or continue electronic surveillance.[56] Unlike the President's judicial appointments, these designations by the Chief Justice are not subject to Senate confirmation. While no one expected the present Chief Justice to fill the positions only with civil libertarians, it surely would be more consistent with stated congressional intentions to ensure better balance, perhaps by requiring that the assignments be approved by the Supreme Court as a whole.

In suggesting that the Chief Justice has political power, it is important not to overstate the case. He obviously does not possess non-judicial power comparable to that of, say, a leader of Congress. But he has enough influence to justify a reevaluation of this aspect of the office.

III. MAINTAINING THE APPEARANCE OF IMPARTIALITY

The Supreme Court has been called the "least dangerous branch" because it lacks the two great powers of the sword and the purse.[57] Its power ultimately rests on public support. That in turn requires a popular belief that it is an impartial tribunal.

At least some of the Chief Justice's activities are potentially damaging to this aura of impartiality. One of the themes echoed by almost every witness at the 1969 Senate hearings on non-judicial activities of federal judges was that judges ought to stay out of controversial matters.[58] As Senator Ervin said, "There seems to be widespread agreement with Chief Justices Hughes' statement that the business of judges is 'to hear appeals and not to make

55. 50 U.S.C. § 1803(a) (Supp. V. 1981).

56. *U.S. Batting a Thousand,* Nat. L.J., May 17, 1982, p. 9, col. 2.

57. *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

58. Some, but by no means all, of the support for this position may have been due to the influence of the disclosures concerning Justices Fortas and Douglas on the witnesses. It was in response to such concerns that Justice Brandeis was thought to have disentangled himself from the outside world, even to the point of refusing to accept honorary degrees so as not to be beholden to any institution. *Senate Hearings, supra* note 2, at 142. *But see* B. MURPHY, THE BRANDEIS-FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES (1980).

them.' "[59]

The witnesses were aware of the contrary history, beginning with John Jay, who served as secretary of state, ambassador to Great Britain, and candidate for governor of New York, all while he was sitting as our first Chief Justice.[60] A number of other Justices also served on non-judicial bodies, such as the postal investigation commission (Chief Justice Hughes) and the group, headed by Justice Lamar, that attempted to mediate the boundary dispute between Venezuela and British Guiana.[61] In the period around World War II Justice Reed became chairman of the Committee to Improve the Civil Service, Justice Roberts investigated Pearl Harbor, and Justice Jackson took a year's leave to serve as the American prosecutor at Nuremburg. The most famous recent example of extra-judicial service was when Chief Justice Warren chaired the committee investigating the assassination of President Kennedy.[62]

Several witnesses at the Ervin committee hearings questioned the propriety of such activities, although some admitted that there might be a few reasonable exceptions. Professor Alexander Bickel put it this way:

> The Court necessarily begets quite a sufficient amount of controversy in the discharge of its office, and scarcely needs the additional controversy that a Justice draws to himself, and hence to it, by gratuitously identifying himself with one or another side of extraneous issues. There is, in other words, a drain not only on the Justice's energies, but on his prestige, on his reservoir of public trust and goodwill. He owes both his energies and his prestige to the Court, and should not dissipate these assets elsewhere.[63]

Judge Ralph Winter, then a law professor, expressed another objection to service on presidential commissions:

> [W]hen a Justice takes such a position, he is in a sense committing a kind of fraud on the American people, in that the purpose of his appointment is to trade on the prestige of the Court and to endow the conclusions that the commission comes to with that prestige and make it seem as though there has been a real judicial process involved. . . .[64]

Whatever short-term benefit may have accrued as a result of Chief Justice Warren's service in the investigation of the Kennedy assassination seems to be outweighed by the doubts that have

59. *Senate Hearings, supra* note 2, at 32.
60. *Id.* at 31-32.
61. *Id.* at 31.
62. *Id.*
63. *Id.* at 31.
64. *Id.* at 140.

arisen about that investigation. In his memoirs Warren recalled his initial reservations about serving: it would be inconsistent with the principle of separation of powers; it would take time away from his work on the Court; it might cause him to disqualify himself from litigation arising out of the investigation. Yet he took the job, and his memoirs reflect no sense that this was an unwise decision.[65] Justice Roberts, in contrast, confessed that he had made a mistake in accepting outside appointments while on the Court.[66] In retrospect it seems that none of these assignments of sitting Justices to presidential commissions turned out well, either for the work of their commissions or for the Court.

Today no active Justice sits on an investigative commission. However, the Chief Justice has become involved in several other endeavors that raise similar questions. For example, in Congress the Judicial Conference and hence the Chief Justice speak for the federal judiciary. There are three dangers whenever a judge takes a legislative position on a controversial question: it may detract from his or her real or apparent impartiality in a subsequent case; the judge may be unable to limit himself to technical advice and thus become a special interest pleader like every other lobbyist; and, finally, it is hard to say what kinds of legislation are proper subjects of comment by the Justices.

Two examples will illustrate the impartiality problem. Chief Justice Burger, trying to reduce the judicial work load, has actively supported several different measures by which the types of cases heard in the federal courts would be reduced. He has also expressed doubt about the ability of juries to handle complex civil cases. Those issues may well come before the Court in lawsuits seeking to determine what is permitted under current law. In such cases, the party whose position is not in conformity with the Chief Justice's legislative aims may well feel that he is not receiving a fair and impartial interpretation of the law as it now stands.

Professor Bickel warned that even speeches and articles by judges endanger their basic role. His comments are even more apt in the context of judicial lobbying:

> If he goes on public record concerning issues that are likely to come before him in his judicial capacity, he thereby at least appears to close his mind, to make himself less reachable by reasoned briefs and arguments. And in some measure every man who goes on record in this fashion does in fact close his mind. Nothing is more persuasive to ourselves than our own published prose.[67]

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65. E. WARREN, THE MEMOIRS OF EARL WARREN 356-59 (1977).
66. *Senate Hearings, supra* note 2, at 205.
67. *Id.* at 142.

Judges, like the rest of us, hold views on a wide range of topics, many of which are not likely to be changed, no matter how eloquent the argument. But whatever chance exists surely becomes considerably smaller when those views are set in print. And ultimately the question of whether judges should write and speak about controversial subjects does not turn on whether they will acquire closed minds, but rather on whether some litigants might reasonably believe so.

This problem goes back at least as far as Chief Justice Taft, who engaged in many efforts to improve the judicial system through legislation.[68] More recently, in 1967-68 Congress was considering legislation to control wiretapping by government officials. The Judicial Conference, then led by Earl Warren, transmitted its views on the proposals at the same time that the Court was deliberating on some of the same issues. As one scholar observed: "Judges in their administrative capacity were speaking authoritatively on subjects which might later come before them in their judicial capacity. Although it is the judicial decision which is final, the latter may in fact determine the former, whether the subject matter relates to rules of procedure or substantial constitutional questions."[69]

Successful legislative campaigns rarely are limited to gathering information on the status of pending bills, submitting comments for the record, and offering to answer questions. To be effective, one usually must engage in less passive forms of persuasion. This means more than testifying at congressional hearings. That is undoubtedly one reason why the Chief Justice discusses his legislative agenda in speeches before bar associations and other groups; he hopes, no doubt, that the remarks will be picked up by the media.

Chief Justice Burger has twice been the center of the kind of controversy that is likely to recur when judges engage in lobbying. In one incident, he was reported to have sent Roland Kirks, then director of the Administrative Office, in the company of an influential Washington lawyer-lobbyist, to visit House Speaker Albert to campaign against some aspects of pending consumer legislation.[70] Kirks subsequently denied that the Chief Justice even knew about the lobbying trip until after it occurred, yet the Chief felt constrained to issue his own statement, which did not actually

68. *See, e.g.*, R. WHEELER & H. WHITCOMB, JUDICIAL ADMINISTRATION 30 (1977) for Chief Justice Taft's role in creating the Judicial Conference.

69. P. FISH, *supra* note 7, at 243.

70. Wash. Post, Oct. 3, 1978, p. C11, col. 6.

deny that he had sent Kirks, although he subsequently took that position.[71] It matters little who actually authorized whom to do what. What is significant is that the Chief Justice was so personally involved in the lobbying process that he had to defend his actions in the public press.

He also became very much involved with the Bankruptcy Reform Act of 1978, making extensive eleventh hour efforts to delay the bill, including telephone calls to its sponsors and to highly placed persons on the Senate Judiciary Committee.[72] One of the bill's Senate supporters received a call from the Chief Justice in which Burger reportedly "not only lobbied, but pressured and attempted to be intimidating," calling the Senator "irresponsible" for approving the bill and threatening to get the President to veto it.[73] Appeals Court Judge Ruggero Aldisert, Chairman of the Bankruptcy Committee of the Judicial Conference, defended the Chief Justice, arguing that he was merely fulfilling his statutory duty to report the adverse recommendations of the Judicial Conference.[74] Even assuming that the Chief Justice was carrying out the will of the Judicial Conference, its position could readily have been communicated with far less direct personal involvement of the Chief Justice and consequent loss of prestige to the Court.[75]

Such activities have led a popular network television news program to air a report about the Chief Justice, investigating his off-the-bench activities.[76] In October 1980 *Congressional Quarterly* ran an article debating the wisdom of lobbying by federal judges and especially Chief Justice Burger.[77] And the New York Times admonished that the duties of Chief Justice and lobbyist "sit uneasily in the same chair . . . ; the need for prudence should be evident."[78] Thus, it appears that it is news when a Supreme Court Justice engages in lobbying, and resultant media coverage is potentially damaging to the perceived neutrality of the Court.

Which legislative topics are out of bounds for judges? Chief Justice Burger has stated that he would not comment on any subject other than those relating to his "responsibilities for the admin-

71. Wash. Post, Oct. 14, 1972, p. A1, col. 7; A10, col. 1.

72. Wash. Post, Oct. 3, 1978, p. C11, col. 5.

73. Wash. Post, Oct. 7, 1978, p. C1, col. 3.

74. Aldisert, *The Judicial Conference and the New Bankruptcy Act*, 65 A.B.A. J. 229, 299 (1979).

75. *See* Kirp, *The Justices Might Find a Gag's In Order*, Wall St. J., March 23, 1983, p. 30, col. 3.

76. CBS Television's "60 Minutes," March 25, 1979.

77. *When Federal Judges Lobby, Congressmen Usually Listen*, 38 CONGRESSIONAL QUARTERLY 3167 (1980).

78. N.Y. Times, Dec. 1, 1978, p. A26, col. 2.

istration of justice."[79] Professor Bickel said that he would like the Court to comment only on jurisdictional statutes, because they are "highly technical" and, without judicial advice about them, legislatures would operate nearly blindly.[80]

Limiting comments to legislation affecting the administration of justice has a neutral and self-defining ring, but its parameters are quite amorphous. The Chief Justice has regularly expressed his dislike of proposals which would have created additional work for the federal courts. Yet in a recent interview, when asked about a bill to prevent federal courts from proceeding in controversial areas such as busing and school prayer, he declined to offer an opinion, replying "[t]hat is a subject I will have to leave to others."[81] The point is not that the Chief Justice was wrong to refuse to express his views in that instance, or that he should not have commented on other bills dealing with access to the federal courts. Rather, the two examples demonstrate that in some sense all these bills relate to "the administration of justice." Because the term is so potentially broad, it is an uncertain standard by which to decide which legislation is appropriate for judicial comment. Some topics are obviously too political, but the difficult question is, where should the line be drawn and who should draw it? One answer, of course, is to stay out of the legislative arena entirely. At most, the judiciary should answer legislative requests for its views, keeping replies as technical and objective as possible.

Whenever the Chief Justice ventures beyond his judicial role, the possibility of creating an appearance of impropriety exists. One such opportunity is provided in the numerous appointments that he makes to committees of the Judicial Conference. Students of the Conference have recognized that these committee assignments, though often arduous and always unremunerated, are coveted by judges because they are one of the few means of status differentiation within the judiciary.[82] The assignment power enables a Chief Justice to reward friends and allies. Consider this letter from Chief Justice Taft to a retired district judge, discussing legislation that would give the Chief more power regarding the assignment of judges to other locations: "[I]t may be that you and

79. *Why Courts Are In Trouble*, U.S. NEWS & WORLD REPORT, March 31, 1975, pp. 29-30.

80. *Senate Hearings*, *supra* note 2, at 150. *See also id.* at 138-39 (noting that the Judiciary Acts of 1915 and 1916, amending the Court's appellate jurisdiction, were drafted by Justices VanDevanter and McReynolds).

81. *Unclogging the Courts—Chief Justice Speaks Out*, U.S. NEWS & WORLD REPORT, February 22, 1982, pp. 36, 38.

82. P. FISH, *supra* note 7, at 273.

I can agree occasionally on your hearing cases in one of the Southern Districts in the winter time when the beauties of living in Maine are a matter of retrospect or prospect."[83] Such a tiny reward is unlikely to destroy the judiciary's moral fiber, but one wonders whether the Chief Justice should be a part of this sort of petty patronage system.

Consider also the role of Chief Justice Burger in the formation of the Supreme Court Historical Society, whose purpose is to promote the presentation of the history of the Court. Unlike the National Geographic Society, on whose board he also serves, the Chief Justice has not had to disqualify himself from any cases involving the Historical Society. Still, his participation has raised questions about his role in the Society's fund raising, which involves soliciting money from lawyers who appear before the Court and from litigants whose cases may be there.[84] Some observers believe that he unnecessarily damages the prestige of the Court by serving on the Society's board with, for example, Robert Stevens, the retired head of a textile firm that is frequently involved in extremely bitter litigation, some of which reaches the Court. The situation is further clouded by Stevens's additional gift of $8,500, beyond his $5,000 lifetime membership in the Society, which was used to commission a portrait of the Chief Justice for the National Portrait Gallery.[85] Although these kinds of activities may produce only a faint whiff of impropriety, even that minimal damage is an excessive price to pay for the Chief's participation.

Even the Chief Justice's role as chancellor of the Smithsonian Institution causes problems that may reflect on the Court and may cause him to have to recuse himself in a tax case involving the valuation of gems given to that Institution. A recent newspaper story reported that the Internal Revenue Service has cracked down on what the Service alleges are "sham" valuations of gifts to the Smithsonian for which the donors deducted five times the amount they paid for them. The Chief Justice is involved because he and the Smithsonian's Secretary hosted a black tie dinner honoring two of the four donors, a fact that appeared in the third paragraph of the article. Although there is not even a hint of wrongdoing on the part of Chief Justice Burger, the incident cannot have helped his image or the Court's and, if the tax case goes

83. *Id.* at 34.
84. Wash. Star, Nov. 1, 1977, p. A1, col. 4.
85. *Id.* at col. 2.

to the Supreme Court, it will at least cause some concern over whether the Chief Justice can hear it.

Even as seemingly innocuous a task as "building manager" has produced unwanted litigation and publicity. Two individuals carrying signs (one of which merely recited the first amendment) on a sidewalk outside the Court were threatened with arrest because a federal statute made such conduct on the Court's grounds illegal.[86] They brought suit under the first amendment against the Supreme Court marshal, who is responsible for supervising the building under the direction of the entire Court, and Chief Justice Burger, who has the statutory duty of approving regulations governing the security and decorum of the Court's property.[87] Eventually, the case went to the Court, but despite his status as a named defendant the Chief Justice did not recuse himself. The fact that eventually the Court unanimously upheld the challenge[88] did not prevent a columnist from highlighting the arguable conflict of interest in banner headlines in Sunday papers around the country: "Suing Burger in the Burger Court."[89] While some might lift an eyebrow whenever the Justices are called upon to decide a case involving protests on the Court's grounds, the problem would surely have been diminished if Congress had not made the Chief Justice responsible for the regulations, but instead had assigned the job to the General Services Administration, which manages most federal property, so that it rather than he had been named as a defendant.

A recent series of events offers further evidence that the problems created by the multiple roles of the Chief Justice are not merely theoretical. On June 28, 1982, the Supreme Court declared that the provisions of the bankruptcy law which allowed bankruptcy judges, who were not appointed for life, to decide certain kinds of cases, were unconstitutional. The Chief Justice cast one of three dissenting votes.[90] Recognizing that the entire bankruptcy system could be seriously disrupted, the Justices agreed to suspend the effect of their ruling until October 4, 1982, to enable Congress to remedy the matter.

At that point, exit the Chief Justice as adjudicator, and enter the Chief Justice as lobbyist and administrator. One solution to this problem would be to make all bankruptcy judges lifetime federal judges. The Judicial Conference apparently saw the addition

86. 40 U.S.C. § 13k (1976).
87. 40 U.S.C. § 131 (1976).
88. United States v. Grace, 103 S. Ct. 1702 (1983).
89. Anderson, Wash. Post, Nov. 7, 1982, p. B7, col. 1.
90. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858 (1982).

of 227 bankruptcy judges as a diminution of the prestige of the current district judges and spoke out against it.[91] At one point the Chief Justice even considered appearing on television to express his opposition to the proposal.[92]

Meanwhile, as the October 4 deadline approached, it became apparent that Congress was unlikely to act. In early September the Conference, charged by Congress with overall responsibility for the smooth operation of the federal courts, decided to do something if Congress did not act.[93] With no opportunity for public comment, it issued rules, which it recommended to all federal courts, on how to handle the problem if Congress continued to procrastinate.

Whether because of doubts about the rules' legality or for some other reason, the Justice Department asked the Court to give Congress more time—until December 24, 1982, when the lame-duck session was expected to be over. The Court agreed, and the problem was avoided for another two and a half months. But once again Congress could not agree on a solution, once again the Conference's interim solution was sent out, and once again the Department of Justice asked for more time. This time the Court, with the concurrence of the Chief Justice, said no. That left the federal courts with only the interim rules suggested by the Conference, with the Chief Justice's blessing.

It is unclear whether the interim rules are valid. Even if Congress eventually acts, the saga is not likely to end since some of those who lost cases under the interim rules will seek reversals on the ground that the Conference had no authority to issue them.

If such a case goes to the Court, the Chief Justice will be hard put to maintain a semblance of judicial detachment. Indeed, he is not likely to be the only one with a predilection on the issue. He may well have talked to his colleagues when the second request for more time was denied in December and told them that doom would not truly result from the denial of the stay because the Judicial Conference rules would prevent chaos. Hence anyone challenging the rules could hardly be accused of being cynical if he felt that the judicial deck was stacked against him.[94]

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91. 1982 REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE 68-69 (1982).

92. N.Y. Times, December 12, 1982, p. 45, col. 1.

93. This chronology is set forth in H.R. REP. NO. 9, 98th Cong., 1st Sess. 1-3 (1983), which accompanies H.R. 3, The Bankruptcy Court Act of 1983. H.R. 3 would resolve the problem by giving article III status to all bankruptcy judges.

94. *See* Lempert, *Judges Run Into Ethical Problems in Lobbying Fight,* Legal Times of Wash., April 4, 1983, p. 11, col. 1.

The point is not that anyone did anything wrong or assumed roles not specifically authorized by Congress in trying to cope with this genuine problem. The difficulty arose because Congress had assigned nonjudicial functions to the Chief Justice which are plainly inconsistent with his judicial role.

IV. WHAT CAN BE DONE?

No single additional duty of the Chief Justice takes enough time away from deciding cases so that it can be described as interfering with his judicial responsibilities. Nor will any single foray into the rule-making or legislative arena destroy the impartial image of the Court. But cumulatively the accretion of duties in the office of the Chief Justice is an alarming phenomenon.

The first remedy should be a moratorium on new duties for the Court or the Chief Justice. A recent proposal illustrates just how urgently we need this moratorium. However painful it may be for members of Congress to set their own salaries and decide how much of their expenses of living in Washington should be deductible on their federal tax returns, it surely turns the notion of separation of powers upside down to propose, as did the Senate majority and assistant majority leaders, that the job be turned over to the Supreme Court.[95] Unless Congress stops looking to the Court to solve every difficult problem, the rest of the effort to reduce the power of the Chief Justice will almost certainly fail.

We also should recognize that all of the Chief Justice's added duties do not cause equally severe problems of time commitment, political influence, and apparent prejudice. Unfortunately, the easier solutions don't often match the more serious problems. For instance, a retired Justice could replace the Chief on the boards of various institutes and societies, but this would have scarcely any effect on the Chief's work week or on his influence over important policy matters. The Chief Justice also could abandon his role as ultimate supervisor of the Court's print shop, physical plant and support staff, with no great loss to the Court, but also no great gain.

Finding a replacement for the Chief Justice as the head of the federal judiciary is much harder, partly because the position has so many components. One idea, proceeding from the opposite direction, is to reduce the Court's work load, perhaps by establishing a new court to handle some of the cases that now go to the

95. S.J. Res. 164, 97th Cong., 2d Sess., 128 CONG. REC. S2022-23 (1982) (daily ed.).

Supreme Court.[96] Even if there were sufficient support for such a change, it would address only one aspect of the problem of nonjudicial activities.

Developing an earlier suggestion of Chief Justice Burger, Professor Daniel Meador[97] urged that the administrative functions of overseeing the work of the committees of the Judicial Conference, supervising the Administrative Office, and heading the Federal Judicial Center be assigned to a newly created post called "Chancellor of the United States Courts."[98] Creating that job, which might well be filled by a sitting federal judge who would assume the duties on a full-time, but temporary basis, would relieve the Chief Justice of most of his administrative duties pertaining to the federal judicial system. As Meador recognizes, the basic idea has several possible variants, each with its own advantages and disadvantages, but with none likely to replace all of the Chief Justice's obligations. Yet the concept deserves further study.

If one of our concerns is the amount of power possessed by Chief Justices, then one way to attack the problem would be to limit the time that any person may serve as Chief Justice. The Constitution gives all federal judges life tenure; it does not require that the Justice who is also designated as Chief must remain in that position as long as he or she remains on the Court. Since 1958, the chief judges of the district and circuit courts have been required to step down at the age of seventy, although they may remain active judges.[99] In 1982 Congress further reduced the period that any person may serve as chief judge to seven years or the age of seventy, whichever comes first.[100] The same approach makes even more sense for the Chief Justice of the United States. Not only does he have more nonjudicial duties than do most lower court judges, but his influence is far greater than the leader of any circuit or district court. A fixed term, whether determined by age or years of service in the job, would militate against the

96. While not yet ready to take a position on the means by which the Supreme Court's work load should be reduced permanently, Chief Justice Burger endorsed as an interim measure, to last for five years, a temporary panel consisting of courts of appeals judges, which would resolve intercircuit conflicts. 1983 ABA Speech, *supra* note 23, at 11. Legislation to achieve that end is now pending in the Senate. S. 645, 98 Cong., 1st Sess. § 604 (1983).

97. Meador, *The Federal Judiciary and Its Future Administration*, 65 VA. L. REV. 1031 (1979).

98. *Id.* at 1049-53.

99. Pub. L. No. 85-593, §§ 1, 2, 72 Stat. 497 ((codified at 28 U.S.C. § 45 (1976)).

100. Pub. L. No. 97-164, §§ 201, 202, 96 Stat. 52 ((codified at 28 U.S.C. §§ 45(a)(3), 136(a)(3) (West Supp. 1983)).

possibility that any Chief Justice would wield too much power or become out of touch with the political mood of the country. And to the extent that nonjudicial obligations drain the Chief's energy, relieving him of his special duties as Chief will help in the later years when even the most vigorous tend to slow down.

In the meantime, we need to acknowledge that the job of being Chief Justice is not simply that of the highest judge in the land. It seems unlikely that any Chief Justice could greatly reduce his nonjudicial activities merely by eliminating the relatively few tasks that Congress has not imposed. It should be apparent that the position calls not only for a superior lawyer, but also an able administrator, an extraordinarily energetic individual with a broad view of our system of justice and a commitment to exercise the powers of the office in an even-handed manner.

The full scope of the Chief Justice's duties is of more than academic concern, since Chief Justice Burger has recently celebrated his seventy-fifth birthday. When the search for his successor is undertaken, it should be done with a greater appreciation than in the past of the power and scope of the Chief Justice's duties. For if the search is not premised on an accurate assessment of the position, we will never find a person who can perform its functions adequately. If our Chief Justices are going to do much more than decide cases, we need to be sure that they are qualified for their whole job.