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CHIEF JUSTICE BURGER AND THE ADMINISTRATIVE SIDE OF JUSTICE: A RETROSPECTIVE

JAMES A. GAZELL†

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INTRODUCTION

What I did not finish was an absolute imperative, and that's to experiment with this intermediate panel that is now pending before the Congress. It's a five-year experiment. It won't cost any money, and that's perhaps why it doesn't attract much attention in Washington. It literally will cost nothing, except to bring the judges from wherever they are into Washington.¹

Warren Earl Burger made this comment at a press conference on June 17, 1986. President Reagan had just announced Burger's resignation as Chief Justice of the United States and the nomination of Associate Supreme Court Justice William H. Rehnquist to succeed him. Mr. Burger's remark alluded to his advocacy of a new federal appellate tribunal. The tribunal would be attached to the United States Court of Appeals for the Federal Circuit. It would be authorized to decide all cases where two or more courts of appeals in the nation's thirteen federal judicial circuits have reached conflicting decisions on the same issues.²

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1. *President's News Conference on Resignation of Chief Justice*, N.Y. Times, June 18, 1986, at 12, col. 2 (national ed.)[hereinafter *President's News Conference*].

2. Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442, 447 (1983).

Burger's statement is a significant illustration of his strong advocacy for changes—particularly, but not exclusively, structural changes—to improve the country's administration of justice. In addition, it marked the last time that he used his official position to champion a proposal which he deemed important for helping to upgrade the quality of justice in the nation.

During his seventeen years as the nation's highest-ranking judicial officer, Chief Justice Burger often used his position as a "bully pulpit," a forum from which he espoused a melange of administrative changes in the state and federal judicial and penal systems.³ Burger's stewardship as Chief Justice is notable not because of his efforts to develop the substantive law, but because of his numerous contributions to the improvement of the administrative side of justice.⁴ His efforts, primarily structural rather than procedural, fall under two rubrics: courts and prisons. Before examining the former Chief Justice's contributions to the development of administrative structures in the judicial and correctional areas, one must first consider his background.

I. BACKGROUND

At least three preliminary matters warrant cursory attention: Burger's professional and philosophical background, salient Supreme Court decisions in which he either spoke for a majority of his colleagues or otherwise participated, and his role as Chief Justice of the United States.

A. Personal

Burger was born in St. Paul, Minnesota, on September 17, 1907. He attended the University of Minnesota for two years (1925-1927), and graduated in 1931 with an L.L.B., *magna cum laude*, from St. Paul College of Law, now William Mitchell College of Law. After admission to the Minnesota Bar, he served for the next seventeen years as a faculty member at his alma mater while also serving as a partner in a local law firm. Between 1948 and 1953, he devoted himself exclusively to pri-

3. Greenhouse, *Burger's Anti-Crime Stand Stirs Attack by ACLU*, San Diego Union, Feb. 12, 1981, at A26, col. 2.

4. The title of this article was suggested by D. MCGREGOR, *THE HUMAN SIDE OF ENTERPRISE* (1960).

vate practice and to partisan politics. In 1953, reportedly as a reward for helping Dwight Eisenhower secure the Republican presidential nomination, the new chief executive named him as an assistant attorney general of the United States. Three years later, President Eisenhower nominated him to be a judge on the Court of Appeals for the District of Columbia, where he served from 1956 to 1969.⁵

During those thirteen years, Burger achieved widespread recognition for his stand on law and order. He first publicly expressed the core of his philosophy in a speech at Ripon College in Wisconsin, on May 21, 1967.⁶ In that address, he suggested that concern for individual liberty, while necessary and desirable, had been carried too far. It had upset a delicate equilibrium between the needs of society for order, protection, and security, and an imperative for individual freedom, fairness, and justice. Further, he alleged that this imbalance was threatening to undermine the *raison d'être* for our government, operated "to foster the rights and interests of its citizens—to protect their homes and property, their persons and their lives."⁷

The future Chief Justice argued that repeated delays and appeals in the disposition of criminal cases had been thwarting society's ability to combat crime. In his view, deterrence rested on swift and certain punishment, which would end the conflict between society and convicted defendants. He contended that some criminal cases remain unresolved for five to ten years, and that a system of justice which needed several retrials of numerous criminal cases would lose popular respect. That such cases might be an exception and that most criminal matters ended with negotiated pleas of guilt did not gain his public recognition. He urged that the United States seriously consider emulation of the justice systems employed in northern European countries like Denmark, Holland, Norway, and Sweden. There, defendants stood trial before three professional judges, rather than juries of twelve, and devices like the fifth amendment did not exist to impede the search for truth

5. *Burger, Warren E(arl)*, CURRENT BIOGRAPHY 61-63 (1969); *On the Eisenhower Team*, NEWSWEEK, Mar. 2, 1953, at 31.

6. Excerpts from Burger's Ripon College address are contained in *What to do about Crime in U.S.: A Federal Judge Speaks*, U.S. NEWS & WORLD REP., Aug. 7, 1967, at 70.

7. *Id.*

regarding their guilt or innocence.⁸

Moreover, Burger asserted that imbalances in the administration of justice extended beyond an allegedly excessive preoccupation with the rights of the accused. Another disequilibrium concerned the nation's prison systems, and contained two facets. One was a tendency of the public to lose interest in defendants after determinations of guilt and subsequent incarceration. Few programs for education, rehabilitation, and vocational training operated in the American prison systems. Consequently, he charged:

In all but a few States [*sic*] we imprison this defendant in places where he will be a poorer human being when he comes out than when he went in—a person with little or no concern for law or for his fellow men and very often with a fixed hatred of all authority and order⁹

The jurist's second perceived inconsistency emanates from the first. While correctional officers sought to effect a reconciliation between prisoners and society, laws and court decisions furnished prisoners with abundant opportunities to challenge their convictions and sentences. Consequently, these countervailing impulses made the administration of justice in America neither fair nor efficacious.¹⁰

B. Supreme Court Decisions

Burger's public philosophy and his court of appeals' decisions attracted the attention of President Nixon. Mr. Nixon shared Burger's outlook, and therefore named him as the replacement for retiring Chief Justice Earl Warren. Burger and Nixon both may have expected a drastic change in the direction of the Supreme Court, particularly in the realm of criminal procedure. The scope of some cases, like the *Miranda v. Ari-*

8. Seventeen years after his Ripon College address, Burger was still pleading that "we must get away from this public attitude that we put . . . [convicted defendants] in the prison and throw the key away, because we don't throw the key away. [Most prisoners] come out. They're going to be on the street, and either they're going to be working and lawful citizens, or they're going to be on the street, and we've got to make a choice. The choice won't be easy." *Nightline: Interview with Chief Justice Warren Burger* (ABC television broadcast, June 19, 1984) (transcript at 12) [hereinafter *Nightline*].

9. *Nomination of Warren E. Burger of Virginia to be Chief Justice of the United States, Hearing Before the Committee on the Judiciary, 91st Cong., 1st Sess. 46, at 50 (1969)* [hereinafter *Nomination Hearing*].

10. *Id.* at 49.

*zona*¹¹ and the *Mapp v. Ohio*¹² decisions, were narrowed with Chief Justice Burger's approval.¹³ During the new chief justice's seventeen-year reign, however, none of the Warren Court precedents in this area were overturned.

Most of the leading decisions in which Burger spoke for the Court centered on matters not directly related to criminal procedure. His most notable opinions centered on busing,¹⁴ racial discrimination in the workplace,¹⁵ sexual discrimination in

11. 384 U.S. 436 (1966) (criminal suspects afforded greater protection from self-incrimination by augmenting procedural requirements such as the right to counsel).

12. 327 U.S. 643 (1961) (federal prohibition against using illegally obtained evidence at judicial proceedings applied to the states through the fourteenth amendment).

13. *Nomination Hearing*, *supra* note 9, at 51-53. With respect to Burger's position in *Miranda*-type cases, see, e.g., *New York v. Quarles*, 467 U.S. 649, 657 (1984) (Burger joined in the majority opinion, holding that evidence, obtained before *Miranda* warnings were given, was admissible if required to maintain public safety); *Edwards v. Arizona*, 451 U.S. 477, 487-88 (1981) (Burger, C.J., concurring) (although concurring, Burger believed test of whether resumption of interrogation was voluntary must be made on a case-by-case basis, and therefore *Miranda* does not, as the majority rules, call for a special rule on whether the defendant knowingly and intelligently waived his right to interrogation); *United States v. Henry*, 447 U.S. 264, 272-74 (1980) (opinion by Burger, ruling sixth amendment right to counsel was violated where defendant's incriminating statements were obtained via an informant placed in jail with defendant); *Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring) (Burger concurred in judgment which required *Miranda* warnings when the accused was interrogated by express questioning or its functional equivalent but he expressed concern over the subjectivity of such a rule); *Brewer v. Williams*, 430 U.S. 387, 415-29 (1977) (Burger, C.J., dissenting) (Burger argued that there was no right to counsel or *Miranda* violation where defendant spoke and acted voluntarily); *Michigan v. Tucker*, 417 U.S. 433, 445 (1974) (Burger, C.J., concurring) (exclusionary rule was condoned in situations where full procedural safeguards under *Miranda* were not given but statements made during a police interrogation were not involuntary or the result of potential legal sanctions); *Harris v. New York*, 401 U.S. 222, 226 (1971) (majority opinion by Burger, stating inadmissible *Miranda* testimony may still be used for impeachment purposes to prevent defendant's perjury).

With respect to the Chief Justice's opinions in *Mapp*-like cases, see, e.g., *United States v. Leon*, 468 U.S. 897, 924 (1984) (Burger joins majority opinion upholding a good faith exception to the exclusionary rule); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 411-27 (1971) (Burger, C.J., dissenting) (Burger stated that the majority opinion providing for damages against federal agent's violation of fourth amendment implied that *Mapp* has proved an unsuccessful deterrent to prevent law enforcement officers from violating the fourth amendment and further may imply that the Court may overrule *Mapp*).

14. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 29-32 (1971) (ruling that busing was a proper remedy to eliminate racial segregation in schools).

15. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (ruling that employment practices which are not related to successful job performance and disqualify black applicants at a substantially higher rate violate the Civil Rights Act of 1964).

the disposition of estates,¹⁶ obscenity standards,¹⁷ the Watergate-scandal tapes,¹⁸ open trials,¹⁹ the legislative veto,²⁰ and mandatory federal budget-reducing measures (the Gramm-Rudman law).²¹

Nor did the arguably most significant Supreme Court rulings of his stewardship, abortion²² and capital punishment,²³ directly pertain to criminal procedure. Moreover, his role in those cases was one of concurring participant, not that of a leader.

C. *Role as Chief*

The Chief Justice's philosophical background was manifest in his affinity for his distant predecessor, William Howard Taft. Taft was also a conservative, a law-and-order jurist, who had occupied Burger's *aerie* from 1921 to 1930, and had achieved eminence in the field of judicial administration. They were both dedicated to improving efficiency in the administration of justice. They believed that they would discourage violent crime if they could accomplish speedy but fair punishment and

16. See *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (violation of Equal Protection Clause of fourteenth amendment to give preference to males over females as administrators of estates in probate proceedings).

17. See *Miller v. California*, 413 U.S. 15, 33 (1973) (declaring standard concerning obscene material to be based on the average person, applying contemporary community standards, finding the work, taken as a whole, appealed to the purient interest).

18. See *United States v. Nixon*, 418 U.S. 683, 714-16 (1974) (ruling that presidential privilege must yield to due process of law in criminal trial and therefore presidential tapes and documents can be released to the special prosecutor).

19. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976) (ruling the barriers to prior restraint remain high and the presumption against its use continues).

20. See *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 959 (1983) (ruling as unconstitutional a one-house veto of legislatively delegated authority where article 1, § 7 requires all legislative actions to be passed by both houses and presentation to the President which insures separation of powers).

21. See *Bowsher v. Synar*, 106 S.Ct. 3181, 3194 (1986) (holding powers vested in the Comptroller General under the reporting provisions of the Balanced Budget and Emergency Deficit Control Act violated the Constitution).

22. See *Roe v. Wade*, 410 U.S. 113, 163-64 (1973) (Burger joined the majority opinion legalizing abortion when a pregnant woman's fundamental right is compelling as compared to interests in the mother's health and potentiality of human life); *Doe v. Bolton*, 410 U.S. 179, 207-08 (1973) (Burger, C.J., concurring) (declaring certain state statutory restrictions on the performance of abortions unconstitutional).

23. See *Gregg v. Georgia*, 428 U.S. 153, 220-27 (1976) (Burger, C.J. and Rehnquist, J., concurring) (state statute, properly enacted to overcome deficiencies found in *Furman v. Georgia*, 408 U.S. 238 (1972), could constitutionally impose the death penalty).

could rehabilitate convicted defendants.²⁴ Judicial congestion, delay, and overcrowded prisons negated such deterrence.²⁵ In fact, Burger's interest in administrative functions was so keen that it amounted to a second full-time job, one that kept him from devoting additional time to adjudication, especially its opinion-writing aspect.²⁶

One factor which stimulated Burger's interest in administrative justice was his place in the nation's judicial history when he succeeded Chief Justice Warren. The Warren Court had greatly altered the substance of the law in such domains as church-state relations, criminal procedure, race relations, and reapportionment.²⁷ In 1969, Burger may have suspected that, short of a wholesale philosophical change in the composition of the Supreme Court, he would be unable to lead a judicial counterrevolution. He would, for the most part, have to content himself with participating in rulings on the margins of the law, decisions that would constitute only incremental adjustments in the scope of governmental power and individual liberty. Therefore, he may have perceived the administrative field as a far more promising avenue for leaving an indelible stamp on the country.

A second consideration may have been that no Chief Justice had opted for such a direction since Charles Evans Hughes. Justice Hughes retired in 1941, after eleven years in the post. In 1939, Hughes had been instrumental in bringing about the establishment of the Administrative Office of the United States Courts, an organization which fostered the independence of the federal judiciary from the executive branch by assuming fiscal, personnel, and statistical responsibilities previously han-

24. See P. FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 19-20, 24-90 (1973); see also A. MASON, *WILLIAM HOWARD TAFT: CHIEF JUSTICE* 88-137 (1965); Burger, *The Courts on Trial: A Call for Action Against Delay*, 44 A.B.A.J. 738, 739 (1958); Taft, *The Chief Justice*, 5 CHI. B.A. REC. 8, 9-10 (Dec. 1921); Taft, *The Delays of the Law*, 18 YALE L.J. 28, 29 (1908) [hereinafter *Delays of the Law*].

25. *Nomination Hearing*, *supra* note 9, at 50. For rare, fleeting glimpses of Taft's public outlooks on penal matters, see P. FISH, *supra* note 24, at 19-90, and *Delays of the Law*, *supra* note 24, at 29.

26. *President's News Conference*, *supra* note 1, at 12, col. 5; see also Williams, *Supreme Court of the United States: The Staff that Keeps it Operating*, SMITHSONIAN, Jan. 1977, at 39, 44.

27. For a list of some important Warren Court decisions in these areas, see G. WHITE, *EARL WARREN: A PUBLIC LIFE* 371-82 (1982) (appendix with a list of Warren's opinions in various areas of the law); Gazell, *Chief Justice Warren's Neglected Accomplishments in Federal Judicial Administration*, 5 PEPPERDINE L. REV. 437, 438 n.3 (1978).

dled by the Department of Justice. Hughes, however, was probably better known as a consistent opponent of New Deal legislation and as an adversary of President Franklin D. Roosevelt's "court packing" proposals in 1937.²⁸

It was more appropriate for Burger to emulate Chief Justice Taft, whose role had been clearly that of an administrative modernizer of the federal courts and whose efforts in this respect had formed the basis of an enduring reputation. During his nine years (1921-1930) as the nation's foremost judicial officer, Taft made several notable contributions to the field of administrative justice. For instance, he vigorously lobbied Congress to establish the Conference of Senior Circuit Judges in 1922, known as the Judicial Conference of the United States since 1948, to formulate management policies for the national court system. He strongly influenced the passage of legislation in 1925 which granted the Supreme Court virtually complete control over its docket in issuing writs of certiorari. Taft also promoted the gathering of useful judicial statistics and developed the concept of temporarily reassigning available federal judges to other districts and circuits on the basis of need.²⁹

Chief Justice Burger had the opportunity to not only emulate Taft's administrative reforms, but also to expand them. While his predecessor had focused his efforts mainly on the federal judicial system, Burger enlarged his administrative role to encompass state courts as well. The extension was facilitated by the presence of modern transportation and mass communication, especially television coverage of his public addresses. Consequently, the prospect loomed for exceeding Taft's considerable reputation, thus assuring Burger a respectable niche in the nation's judicial history.

A further consideration is that Burger may have genuinely relished a strong administrative role. He certainly possessed the appearance, bearing, and demeanor of one who could serve effectively as a representative or publicist for the federal and state courts in numerous legal fora across the country. His imposing presence conveyed authority to his public statements. At the time of Burger's confirmation hearing in June 1969, Senator Everett Dirksen of Illinois noticed this potential

28. See P. FISH, *supra* note 24, at 112-24, 135-37; M. PUSEY, CHARLES EVANS HUGHES 749-65 (1951).

29. See P. FISH, *supra* note 24, at 104.

when he reportedly declared: “ ‘He looks like a Chief Justice. He sounds like a Chief Justice. He acts like a Chief Justice. He should be a Chief Justice.’ ”³⁰

All the various strands of his background converged to encourage Burger to make his administrative role the centerpiece of his stewardship as Chief Justice. He decided to use his position to mobilize components of the justice system to undertake many major reforms. As a consequence, Burger initiated such changes as annual state-of-the-judiciary addresses and year-end reports. He used a newly formed newsletter, *The Third Branch*, to convey his views. He also utilized such traditional mechanisms as speeches before the American Bar Association, the American Law Institute, and law school commencements. Burger’s administrative interests fell into two categories—courts and prisons—both of which, in his view, needed primarily structural reforms to increase their efficiency.

II. COURT REFORMS

Chief Justice Burger repeatedly advocated the development of a panoply of structures to increase judicial efficiency, resulting in faster disposition of criminal and civil cases. He believed that the country’s judicial systems were excessively decentralized, fragmented, and heterogenous. Burger felt their improvement rested, in part, on unification. He believed that particular organizations could help coordinate court reform efforts and bring about a modicum of uniformity in federal and state jurisdictions.

The earliest illustration is the widely revered Institute of Court Management, founded in 1970, only one year after Burger assumed his new position. The goals of the Institute were to expedite the flow of cases; to handle the preparation and implementation of budgets; to secure and retain qualified judicial support personnel; to bring technology and modern business methods into the courts; to utilize juries more effectively; to provide adequate space; to enhance court security; and to manage the keeping of records and the dissemination of reports.³¹

In Burger’s first address to the American Bar Association

30. Hoffman, *From Humble Roots*, UPDATE, Summer 1981, at 2.

31. INSTITUTE FOR COURT MANAGEMENT, COURSE CATALOG 2 (1986). For an enumeration and discussion of the functions of court managers, see D. SAARI, MOD-

less than two months after becoming Chief Justice, he started using his position as a "bully pulpit" to engender the establishment of such a centralizing structure. In catalytic fashion, he told his audience:

I therefore propose that we call together a dozen or more of the best informed people in this country and ask them to plan a program to train the large number of managers we need. I know this can be done and it must be done at once. It should begin in the next 60 or 90 days. We have not demonstrated great imagination or skill in this area and hence I would ask that the Planning Conference be composed of perhaps six court managers of established standing, four experts in public administration, and two in business administration, and perhaps a few progressive trial judges and experienced litigation lawyers.

* * *

I hope the American Bar Association will take the leadership and call on the Federal Bar Association, the Institute of Judicial Administration and others. They in turn can draw on the skills and experience of the best brains in public administration and in business administration. This planning should ultimately draw in Universities which have a demonstrated capacity to train public administrators.³²

Burger had cited "the lack of trained managers" as one of several reasons for widespread judicial congestion and delay.³³

The Institute quickly came into existence and began to offer several programs. Although this organization sponsors continuing education workshops and instructional seminars to fulfill the needs of particular state and local courts, its most notable effort has centered on the Court Executive Development Program, which consists of four components. The first component involves classroom education. Specifically, a student must satisfactorily complete five workshops, including a Caseflow Management and Delay Reduction seminar within three years after admission to the I.C.M. The second phase, lasting four weeks, requires the successful completion of a residential seminar which covers such topics as the functions of

ERN COURT MANAGEMENT, TRENDS IN THE ROLE OF THE COURT EXECUTIVE 4-10 (1970).

32. Burger, *Court Administrators: Where Would We Find Them?*, 5 LINCOLN L. REV. 1, 4 (1969).

33. *Id.* at 2.

courts, their internal and external environments, modern administrative theory, research for management purposes, and policy analysis. The third phase entails a thorough exploration of a particular administrative problem in a court within the trainee's home jurisdiction. This research, which culminates in a lengthy report submitted to the I.C.M. staff for its approval, spans the equivalent of sixty-five full-time days of effort over ten months. The fourth segment involves the students in reading and discussion of each other's reports over a five-day period. Those persons who successfully finish the four phases receive certificates signed by Chief Justice Burger and, in recent years, presented by him at graduation ceremonies held at the Supreme Court of the United States.³⁴

The Chief was so proud of his role in the formation of the I.C.M. that eleven years later, in 1980, he summed up its progress to the annual meeting of the American Bar Association:

Several thousand individuals have participated in the training programs of the institute. This has brought about a revolution in court administration. Today there are more than 500 trained court administrators operating in the state and federal systems compared with perhaps 20 in 1969. Without the help and support of this Association, the institute could not have been developed, and we would not have seen the creation of the new profession of court managers.³⁵

In 1980, the number of I.C.M. certificate recipients stood at 328.³⁶ At the time of Burger's resignation six years later, the number had climbed to approximately 450.³⁷

Its future was assured when, in 1984, it merged with another salient institution that the Chief Justice helped to found, the National Center for State Courts.³⁸ He first publicly urged the establishment of such an organization in 1970. He had been troubled by the difficulties that states encountered in ascertaining information about the activities of other jurisdictions which

34. INSTITUTE FOR COURT MANAGEMENT, *supra* note 31, at 4, 10, 18-20.

35. Burger, *Annual Report on the State of the Judiciary—1980*, 66 A.B.A. J. 295, 298 (1980).

36. *Id.*

37. Letter from Dawn L. Mayer, Executive Secretary, Institute for Court Management of the National Center for State Courts to James A. Gazell (June 3, 1986).

38. INSTITUTE FOR COURT MANAGEMENT, *supra* note 31, at 2; *Interview with Chief Justice Warren E. Burger*, U.S. NEWS AND WORLD REP., Dec. 14, 1970, at 43 [hereinafter *Interview with Burger*].

were revamping their judiciaries. If a particular state wanted to garner such data, it typically had to communicate with the appropriate officials, usually the court administrators, in the other forty-nine states. Such efforts, while possible, were arduous and detrimental to the easy spread of knowledge about attempted judicial reform.³⁹

Other organizations had endeavored to satisfy this purpose—namely, The Institute of Judicial Administration in New York City and the American Judicature Society in Chicago. Since 1965, the Institute of Judicial Administration had been trying to gather information about the extent of delay in the civil courts of the fifty states and the District of Columbia. It experienced such problems as no replies or incomplete responses to its inquiries, and differing methods of measuring judicial delay. Valid statistical comparisons among jurisdictions were often difficult and sometimes impossible to make.⁴⁰ The American Judicature Society, albeit interested in every facet of judicial administration, tended to stress methods for improving the process of judicial selection and tenure.⁴¹ Both organizations had chronically experienced inadequate funding and staffing. Other organizations like the Appellate Judge Conference, the Conference of State Trial Judges, and the Council of State Governments were either too specialized or too eclectic in their concerns.⁴²

In 1970, Chief Justice Burger publicly noted these troubles and strongly urged the creation of an agency which would serve as a central clearinghouse for numerous kinds of information about the courts of every state. Such an institution would facilitate the dissemination of judicial data and promote a greater degree of uniformity among state judicial systems. For example, the Chief Justice saw no compelling explanation for the vast differences from one state to another in the salaries paid to judges, nor did he perceive any powerful justification for the great disparities in the ways of choosing and retaining judges. To him, establishment of a centralizing mechanism represented one mode of redressing what he regarded as ex-

39. *Id.*

40. *Id.*

41. AMERICAN JUDICATURE SOCIETY, 1983 ANNUAL REPORT 7 (1983); AMERICAN JUDICATURE SOCIETY, 1984 ANNUAL REPORT 1 (1984).

42. Burger, *Deferred Maintenance*, 57 A.B.A. J. 425, 429-30 (1971).

cessive fragmentation of America's justice system.⁴³

Mr. Burger followed an approach similar to the one used to help effect the establishment of the I.C.M.: the invocation of aid from the nation's legal profession, including the American Bar Association. This time his method was more broad, for it included appeals to about 580 federal and state justice-system officials who had attended the National Conference on the Judiciary, held in early 1971 in Williamsburg, Virginia. He even secured an endorsement of his proposed National Center for State Courts (N.C.S.C.) from President Nixon, who had been seeking to strengthen the overall role of state governments by allowing them greater discretion in spending federal aid.⁴⁴

By the end of 1971, the National Center had become operational. After spending its first seven years in Denver, Colorado, it moved in 1978 to what is expected to be its permanent home, Williamsburg. From that base, it has evolved into a substantial organization. In addition to the Institute for Court Management, the National Center runs three regional offices: one in Williamsburg, serving the southeastern part of the nation (seventeen states); another in North Andover, Massachusetts (near Boston), assisting the northeastern section of the country (seventeen other states); and a third in San Francisco, aiding the western region of the land (the remaining sixteen states).⁴⁵

The National Center has furnished four kinds of services to state court systems. One has involved direct services to individual courts, a form of assistance that entails visits to them by representatives who offer advice to help solve specific judicially related problems. They might consult on the installation of automated dockets and records management systems, handle management reviews and studies of non-judicial personnel (such as court administrators, clerks, secretaries, librarians, and reporters), or supply aid to state organizations responsible for the implementation of a new judicial article to their constitutions. A second area has focused on education and training

43. *Interview with Burger, supra* note 38, at 43.

44. Nixon, *Reforming the Administration of Justice*, 57 A.B.A. J. 421, 424 (1971). See generally A. BOWMAN AND R. KEARNEY, *THE RESURGENCE OF THE STATES* 6-7 (1986).

45. Burger, *A Message from the Chief Justice*, THE THIRD BRANCH, Dec. 1971, at 1; NATIONAL CENTER FOR STATE COURTS, 1985 ANNUAL REPORT 6-9 (1985).

programs, most notably I.C.M.⁴⁶ A third facet has concerned research into such matters as delay prevention and reduction, efficient and fair jury administration, as well as accurate and relevant judicial statistics. In 1985, the most recent year for which compiled information is publicly available, the N.C.S.C. was embroiled in 126 such research projects. A fourth aspect of the center pertains to its extensive information services, which include its central library in Williamsburg; its variety of publications (including the *Report*, its monthly newsletter; the *State Court Journal*, its quarterly publication; the *Justice System Journal*, its thrice-yearly outlet; and its approximated 750 project reports, including fifty-nine published within the last year); and its Washington, D.C., liaison office. The liaison office attempts to keep state court officials up to date about congressional bills in order to enhance their ability to lobby with regard to such measures.

The National Center's future appears to be secure because of its diversified sources of funding.⁴⁷ Although the degree of its private support has been substantial, a majority of its money has come from each of the states, the chief beneficiaries of its services.

While the Chief Justice was using his cachet to bring about the founding of the N.C.S.C. in 1971, some of his attention still remained with the I.C.M., which had started to produce certificate recipients. Although most of its graduates received jobs at the state and local levels, openings at the federal court level, in Burger's view, were insufficient. At his urging, Congress authorized the establishment of the Circuit Executive position. Each of the then eleven circuits were allowed to hire such an official to help the chief judge and the judicial councils with their administrative responsibilities. Most circuits quickly availed themselves of this chance and hired I.C.M. graduates.⁴⁸

By 1980, Burger was so impressed with the performance reports that he began to advocate the extension of this type of office to the district court level. Wary about engendering congressional resistance, he settled for urging the formation of

46. NATIONAL CENTER FOR STATE COURTS, *supra* note 45, at 6-9, 12-13; NATIONAL CENTER FOR STATE COURTS, 1984 ANNUAL REPORT 8 (1984).

47. NATIONAL CENTER FOR STATE COURTS, *supra* note 45, at 14-15, 18-19, 22.

48. 28 U.S.C. § 332 (e)(f); Martineau, *The Federal Circuit Executives: An Initial Report*, 57 JUDICATURE 438, 440 (1974).

such staff positions in each of the fifteen largest metropolitan district courts. For the Chief Justice, however, such an expansion was only a start toward the inclusion of the Circuit Executive position in every federal trial court.⁴⁹

In 1981, Congress authorized the establishment of Circuit Executive positions on an experimental basis in five district courts.⁵⁰ Nearly two years later, the Chief Justice publicly offered a favorable assessment of this pilot program, but said nothing about the desirability of enlarging it. He simply commented, "In this area, the states have been far ahead of the federal system and the advent of the Institute for Court Management in 1969 provided a source of trained court administrators for all courts."⁵¹ Statistics confirm this assessment for, between 1970 and 1974, fifteen states created such offices. Between 1975 and 1979, an additional eight states set up such organizations. Numerous local jurisdictions also have established trial court administrator's offices.⁵²

In addition to the Institute for Court Management and the National Center for State Courts, Chief Justice Burger advocated a potpourri of other structural changes designed to enhance the efficiency of the nation's courts. These included the Federal Judiciary Council, Federal State Judicial Councils, the National Institute of Justice, and a national court of appeals.

Mr. Burger first urged Congress to authorize a Federal Judiciary Council in 1970. The members were to be appointees from each branch of the national government. He envisioned "a coordinating body whose function it would be to report to the Congress, the President and the Judicial Conference [the administrative policy-making arm of the federal court system] on a wide range of matters affecting the judicial branch."⁵³ The Council was to publish reports on the probable effects of federal jurisdiction on proposed statutes, caseload fluctuation in various district courts, division of authority between na-

49. Burger, *supra* note 35, at 298; Burger, 1984 Year End Report on the Judiciary 17 (1984) [hereinafter 1984 Year End Report]. All Year End Reports on the Judiciary are available from the Information Services, Federal Judicial Center, 1520 H Street, N.W., Washington, D.C. 20005.

50. Burger, 1982 Year End Report on the Judiciary 11 (1982) [hereinafter 1982 Year End Report].

51. *Id.*

52. Lim, *State of the Judiciary*, in 26 THE BOOK OF THE STATES 174 (1986-87 ed.).

53. Burger, *The State of the Judiciary—1970*, 56 A.B.A. J. 929, 933 (1970).

tional and state courts, temporary judgeships, three-judge district court panels in diversity-of-citizenship suits, and the restructuring of federal judicial circuit boundaries.⁵⁴

Seven years later, Burger revived the proposal. This time he called it a Commission on the Judiciary. He envisioned it as a means to relieve what he considered to be a lack of communication among the three divisions of the national government.⁵⁵ He acknowledged, however, that he needed to be more explicit about its goals. Mr. Burger failed to explain why he regarded existing institutions, such as the Judicial Conference of the United States, to be inadequate in alerting the other branches of the national government to federal court problems and possible solutions. Informal communications networks involving members of the Judiciary Committees of the House of Representatives and the Senate, the Department of Justice, and the Supreme Court had operated for decades. He did not publicly admit the possibility that the other segments of the national government did understand the condition of the federal judiciary, but disagreed on the need for a structural mechanism to correct it or for substantial judicial reforms. In 1979, when he reiterated his call for such a council,⁵⁶ the continuing vagueness of the proposal supports the implication that it was an embryonic idea that would have benefitted from further attention before being raised publicly. It is noteworthy that Burger did not further pursue the matter.

By contrast, the Federal and State Judicial Councils represent one of the Chief Justice's advocacy successes. He first voiced the suggestion in 1970. He proposed that each state form a Council composed of a jurist from the highest state court, and the chief judges of metropolitan and federal trial courts. He viewed these organizations, already functioning in some states on an informal basis, as clearinghouses. Their purpose was to eliminate conflicts between federal and state courts⁵⁷ over such matters as the need to coordinate calendars and jury calls for cases resulting from an incident like an airplane crash. Within a year, more than forty states had effectuated

54. *Id.*

55. Burger, *Chief Justice Burger's 1977 Report to the American Bar Association*, 63 A.B.A. J. 504, 509 (1977).

56. Burger, *The State of the Federal Judiciary—1979*, 65 A.B.A. J. 358, 362 (1979).

57. Burger, *supra* note 53, at 933.

ated such agencies.⁵⁸

Burger's proposed National Institute of Justice marked another catalytic achievement, although it took much longer. He first broached the idea in a speech to the American Law Institute in 1972.⁵⁹ He suggested that Congress set up an organization which would make grants to state courts for research and administrative improvements. Burger suggested that the three segments of the national government should select an equal number of members for this organization and make it broadly representative, especially of the states.⁶⁰ The proposed composition of this agency and its nebulous delineation made it reminiscent of Burger's ill-fated Federal Judiciary Council proposal.

In 1984, a variation of Burger's proposal became law as Congress opted to establish the State Justice Institute. This autonomous federal body was empowered to make discretionary grants to state courts for three general purposes: to foster judicial education, increase public access to the courts and raise the level of court efficiency. The new agency became operative on October 1, 1985, the first day of the 1985-1986 federal fiscal year. Two months later, the Institute received appropriations totaling eight million dollars, much of which will be used as grants for studies in areas such as case management, litigation alternatives, and sentencing.⁶¹

The Chief Justice's last proposed alteration in the country's judicial mosaic—a national court of appeals—has been the most controversial. Its drastic nature may have kept it from becoming Burger's foremost judicial administrative accomplishment. This recommended tribunal has proceeded through several incarnations. First, in 1971, Chief Justice Burger established a panel headed by Paul Freund to examine the growing docket of the Supreme Court and make recommendations.⁶² A year later, the panel submitted a report with a spate of proposals. The most notable proposal concerned the creation of a court between the Supreme Court and the federal

58. Burger, *The State of the Federal Judiciary—1971*, 57 A.B.A. J. 855, 856 (1971).

59. 49 A.L.I. PROC. 23, 30-32 (1972).

60. *Id.* at 30-32.

61. 1984 Year End Report, *supra* note 49, at 19; Burger, 1985 Year End Report on the Judiciary 4-5 (1985) [hereinafter 1985 Year End Report].

62. *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573 (1972) [hereinafter *Report of the Study Group*].

courts of appeal. This proposed court would screen the Supreme Court's caseload, which had more than tripled since 1950. After sifting through the petitions, the new court would certify 400 to 450 cases a year for review. It would consist of seven jurists selected on a three-year rotating basis from the membership of the federal courts of appeals.⁶³

Although Burger did not endorse the Freund panel's main conclusion, he maintained that it warranted serious consideration from the legal community.⁶⁴ The proposed national court of appeals quickly drew heavy opposition, spearheaded by Burger's immediate predecessor, retired Chief Justice Earl Warren. The opposition denied the existence of a workload crisis and viewed this proffered tribunal as an attack on the Supreme Court's status as the final arbiter of legal controversies. They contended that the screening function was integral to the role of the Court and that removing it would undermine its pre-eminence.⁶⁵

Burger was not entirely insulated from public criticism. Warren intimated that Burger was biased against the poor and powerless, and intended to limit their access to the nation's court of last resort.⁶⁶ To improve the prospects for establishing this court, he supposedly chose a panel with respected members who shared his outlook. Mr. Burger did not directly reply to the allegations, but he contended that he chose this particular panel in order to gain an extra-judicial perspective on the Supreme Court's burgeoning workload.⁶⁷

As this controversy subsided, the proposed national court of appeals assumed a second form: a reference or transfer tribunal. It was to hear cases referred to it by the Supreme Court, within broad statutory parameters. It might also decide cases transferred from the federal courts of appeal—such as inter-circuit conflicts—because of an obvious public need for an accelerated, nationally binding decision.

Proponents saw this structure as a means of expanding the

63. *Id.* at 611-13.

64. *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal*, 59 A.B.A. J. 724 (1973).

65. *Id.* at 724-30; see also Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 475-76, 482-83 (1973).

66. 59 A.B.A. J. at 725-26, 730.

67. *Id.* at 724.

appellate capacity of the federal judiciary.⁶⁸ Critics countered that the need for such a court had not been demonstrated. They questioned whether genuinely important cases would be referred, and argued that there were few unresolved, pressing intercircuit conflicts which might be transferred.⁶⁹ In this controversy, Burger again remained in the background. He observed, however, that unless Congress increased the Supreme Court's control over its docket by eliminating its mandatory jurisdiction, a national court of appeals in one form or another was unavoidable.⁷⁰

The Chief Justice entered this protean structural controversy when the proposed federal intermediate appellate tribunal took a third form: an intercircuit panel. In 1983, Burger urged the establishment of a panel within the United States Courts of Appeals for the federal circuit. The panel would decide all intercircuit conflicts (cases where two or more federal courts of appeals had issued contradictory rulings on the same legal issues). It would consist of seven or nine jurists chosen from a pool of twenty-six federal courts of appeals jurists (two from each of the thirteen circuits). It would operate on an experimental basis for five years, after which time it would go out of existence unless reauthorized by Congress. Chief Justice Burger estimated that the formation of this judicial unit would relieve the Supreme Court of approximately 35-50 cases annually.⁷¹

The Chief Justice felt the timing of this recommendation was propitious for at least three reasons. One was that the Court's caseload had climbed to a record level of 5,311 filings for the 1981-82 term. Another was that eight of the justices had publicly complained about their workload even though they disagreed about the need for structural redress.⁷² A third was

68. *Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 246-47 (1975) [hereinafter *Commission on Revision*].

69. See, e.g., Feinberg, *A National Court of Appeals?*, 42 BROOKLYN L. REV. 611, 619-25 (1976) (The Chief Justice believed that the matter of diversity jurisdiction in the federal courts is a classic example of continuing a rule of law when the reasons for it have disappeared).

70. *Commission on Revision*, *supra* note 68, at 394, 398-99; *Unless Congress Modifies Supreme Court Jurisdiction, Chief Justice Says National Court Inevitable*, THE THIRD BRANCH, June 1975, 1.

71. Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442, 447 (1983).

72. *Id.* at 442.

that this proposal was the least drastic among those which had been advanced since 1972. It fell into a tradition of setting up specialized tribunals to handle narrow but technical categories of litigation. In fact, his proposal amounted to a specialized segment of a specialized court, for it would function as an arm of a tribunal created in 1982 to decide with national effect, cases against the United States, customs claims, and alleged patent violations.⁷³

Despite the Chief's efforts, this structural recommendation, like its precursors, floundered in the legislature. Critics suggested that responsibilities for referring cases to this panel and deciding whether to hear appeals from its rulings might aggravate the Supreme Court's workload. They doubted whether there was a sufficient number of intercircuit conflicts to justify such structural alteration. Opponents charged that the Court itself bore most of the blame for its own heavy caseload for, since 1925, it had possessed discretion within broad limits to grant or to deny plenary reviews of petitions.⁷⁴ Burger began to receive public criticism for allegedly becoming repetitive and wearisome. Although he had not previously endorsed a specific plan for a new federal judicial structure, he still remained associated with the transmutations of the proposed national court of appeals despite his efforts to avoid direct involvement in the legal controversy surrounding it.⁷⁵

Nevertheless, Burger devoted sporadic attention to his proposed intercircuit panel until his resignation three years later. Since that time, however, his supreme court colleagues have reportedly been losing interest in this concept.⁷⁶ Ultimately, what may have doomed his recommendation was that it ran counter to the the *zeitgeist* in America. There was a powerful political and economic impulse in recent years to decentralize government through shifting some of its functions to lower levels, privatizing several of them, and deregulating much of

73. 28 U.S.C. § 1295 (1982).

74. See, e.g., Hellman, *Caseload, Conflicts, and Decisional Capacity: Does the Supreme Court Need Help?*, 67 JUDICATURE 28 (1983).

75. See, e.g., *Once More with Feeling*, TIME, Feb. 21, 1983, at 58; Kaus, *A Sad Violin, Please, for Warren Burger*, L.A. Herald Examiner, Jan. 18, 1985, at A19, col. 5.

76. See, e.g., Burger, 1983 Year End Report on the Judiciary 7-8 (1983) [hereinafter 1983 Year End Report]; 1984 Year End Report, *supra* note 49, at 9-10; 1985 Year End Report, *supra* note 61, at 16-18; Remarks of Warren E. Burger, American Newspaper Publishers Association Convention 3-4 (May 7, 1985); *President's News Conference*, *supra* note 1.

the economy.⁷⁷ The Reagan Administration, which had reflected this national mood, did not embrace this centralizing structural change. Without enthusiastic support, its chances for becoming law have been slim and will probably remain so.

Chief Justice Burger's proposed intercourt panel—like the Institute for Court Management, the National Center for State Courts, and the Federal Institute of Justice—represented another structural approach toward expediting the flow of cases through the nation's courts. Burger, however, recognized that these organizations would do no more than alleviate court congestion and delay. He realized that further judicial administrative efficiency also depended on the removal of some types of business from the country's federal and state trial courts. In particular, he contended that minor civil disputes would be more swiftly and justly adjudicated in community structures such as neighborhood justice centers, dispute resolution fora, and court-annexed voluntary arbitration.⁷⁸

Although the Chief Justice had long favored these complementary approaches, they did not gain momentum until 1976. At that time, the American Bar Association, Conference of Chief Justices, and Judicial Conference of the United States sponsored the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, better known as the Pound Revisited Conference. Held in St. Paul, Minnesota and attended by the Chief Justice, the Conference brought together approximately three hundred federal and state jurists, attorneys, and scholars. They examined an assortment of salient topics, the most significant of which involved the development of alternatives to litigation in settling minor cases. Increasing court costs and decreasing lengthy, judicial delay accentuated the urgency of this problem.⁷⁹

From the Conference emanated two recommendations strongly advocated by Burger. One involved the establishment of neighborhood justice centers. The centers would quickly, inexpensively, and fairly decide minor disputes such as those concerning buyers and sellers or tenants and landlords. The

77. See, e.g., J. NAISBITT, MEGATRENDS 103-41; Gazell, *If Supreme Court is Overworked, It Must Be Own Physician*, San Diego Union, Jan. 12, 1986, at C-7, cols. 1-3 (city ed.).

78. See, e.g., Burger, *Agenda for 2000 A.D.*, 49 N.Y. ST. B. J. 211, 213-14 (1978).

79. *Id.*

centers would operate in the evenings with community mediators handling the cases rather than lawyers. In 1978, the Department of Justice set up three experimental centers in Atlanta, Kansas City, and Los Angeles.⁸⁰ The success of these pilot projects prompted Congress to pass the Dispute Resolution Act two years later.⁸¹ By 1981, the number of these centers had reportedly climbed to 141, and their alter egos, mediation centers, had risen to over 170 in number. By the end of 1986, the number of centers had reportedly grown to 182 and 350, respectively.⁸²

The Chief Justice strongly embraced an expanded use of arbitration, which was a second, complementary recommendation stemming from the Pound Revisited Conference. He was enthusiastic about this idea, for it affected the removal of some civil business from the nation's trial courts. Some cases included adoptions, child custody, divorce, personal injuries, probate, and title searches.⁸³ In 1978, two years after the Conference, Burger publicly lauded federal district courts in Connecticut, Eastern Pennsylvania, and Northern California for experimenting with this mechanism.⁸⁴ By 1984, with the aid of federal money, eight other district courts had embarked on such programs.⁸⁵ By 1985, Burger noted that ten states had conducted similar projects and that eight others were considering such programs. He predicted further expansions as other jurisdictions sought alternatives to long delays and high costs of civil suits, and as the National Institute for Dispute Resolution launched a nationwide effort to provide financial aid for such undertakings. Finally, according to the latest information furnished by the Institute for Civil Justice, a subsidiary of the Rand Corporation, sixteen states and eleven federal district courts have adopted court-annexed programs.⁸⁶ The Institute also reported, however, that court officials in twenty-

80. Burger, 1978 Year End Report on the Judiciary 2 (1978) [hereinafter 1978 Year End Report].

81. 28 U.S.C. §§ 1-10 (1982). The Dispute Resolution Act offered, *inter alia*, financial aid to states that wanted to create neighborhood justice centers. *Id.* at § 8(c).

82. Burger, 1981 Year End Report on the Judiciary 11 (1981) [hereinafter 1981 Year End Report].

83. *How to Break Logjam in Courts: Exclusive Interview with Chief Justice Burger*, U.S. NEWS AND WORLD REP., Dec. 19, 1977, at 21-22.

84. 1978 Year End Report, *supra* note 80, at 3.

85. 1984 Year End Report, *supra* note 49, at 15.

86. 1985 Year End Report, *supra* note 61, at 14-15.

six states saw no present need for this program, although half of these informants anticipated a future possibility of initiating such programs.⁸⁷

III. CORRECTIONAL REFORMS

Chief Justice Burger's interest in structural alterations extended beyond the nation's justice system to its correctional (or prison) facet. The correctional system needed a spate of organizational reforms so that it could help reconcile convicted defendants with society, rehabilitate them, and prepare them with skills marketable in the world outside penal institutions. For Burger, just as the country's judiciaries had allegedly fostered an imbalance between order and liberty by what he regarded as excessive solicitude for the rights of defendants in criminal cases, the nation's incarcerative systems suffered from such serious deficiencies as inadequate public attention and correctional programs. Consequently, he used his official position to espouse the creation of several notable structures.

The first was the National Institute of Corrections (N.I.C.), formed in 1972.⁸⁸ Burger explained what he saw as its eventual paramount function:

Growing out of that conference [on corrections] a training institute has been created that is, in a sense, the counterpart of the FBI Academy which, over a period of more than 30 years, has given advanced and expert training to local and state police officers in all parts of the country. Just as the FBI Policy Academy [at Quantico, Virginia] has had an enormous impact on police work, the National Institute of Corrections will perform a comparable function in terms of training prison and correctional personnel. It has already begun work with seminars at Chicago and Long Beach. This is the kind of function which the states cannot very well perform for themselves, and it is a highly appropriate one for the federal government to perform as a service to the several states.⁸⁹

Although the Chief Justice compared the N.I.C. to the F.B.I. Academy, he would have also been correct in using an analogy to the Institute for Court Management (I.C.M.) to describe its

87. THE INSTITUTE FOR CIVIL JUSTICE, AN OVERVIEW OF THE FIRST SIX PROGRAM YEARS 44 (1986).

88. See Burger, *Our Options Are Limited?*, 18 VILL. L. REV. 165, 170-71 (1972).

89. *Id.* at 171.

chief purpose. The N.I.C. intended to certify prison employees, parole, and probation officers just as I.C.M. certified judicial executives. During its early years, however, this new agency lacked the financial resources to fulfill this aim. Instead, it concentrated on four minor kinds of assistance: information, research and evaluation, the development of correctional standards, and intermittent technical aid.⁹⁰

In 1978, Chief Justice Burger renewed his public call for a national academy of corrections to train prison employees in modern procedures and methods. Again, he envisioned that such an instructional facility would benefit thousands of these officials, just as the F.B.I. Academy had done. He suggested that judicial interventions in prison operations flowed, in part, from inadequate job skills and that, without education and training, such incursions would continue. He called on the American Bar Association (A.B.A.), as he had with respect to the Institute for Court Management and the National Center for State Courts, to work with the Federal Bureau of Prisons in devising a plan for such an academy. The A.B.A. would then submit the proposal to the Attorney General of the United States for review and, finally, send it to Congress for its approval.⁹¹

Two problems beset the Chief Justice's proposal. The first problem was Burger's apparent ambivalence toward his recommendation. On the one hand, he suggested that such an academy would upgrade the level of competence among prison officials and so end present judicial involvement and forestall future court interventions in prison administration. On the other hand, he acknowledged the difficulty of correctional work and the scarcity of knowledge to help penal officials overcome this barrier.⁹² A second problem concerned the funding of this recommended teaching facility, a matter to which he had devoted no public attention.

In 1981, Burger reassessed the situation by addressing the fiscal aspect of the proposal in his third public call for the establishment of this structure. Rather than setting up a separate facility, he suggested that this proposed organization should

90. Day, *Spotlight Interview*, 9 THE THIRD BRANCH 3 (Feb. 1977).

91. Burger, *Annual Report on the State of the Judiciary*, 49 PA. B.A. Q. 212, 221 (1978).

92. *Id.*

operate as an arm of the F.B.I. Academy and use the latter's physical facilities, particularly the dormitories and classrooms. He conjectured that the costs of this addition would be small, although he ventured no dollar estimates. Furthermore, he offered an alternative location by suggesting that the federal government purchase and adapt the facilities of a small mid-western college, which might be closing.⁹³ Either way, he expected that a national academy of corrections would supply not only education to prison personnel but also technical assistance to state and local incarcerative facilities on a continuous basis. He regarded the creation of this agency as increasingly urgent, noting that prison guards in the United States were poorly paid and trained. The turnover of such employees was high, varying from forty to seventy-five percent among the states. These statistics appeared ominous, especially when contrasted with the situation in northern European countries where a highly favorable situation reportedly prevails.⁹⁴

The Chief Justice's proposed academy drew public support. It was felt that it would be efficacious over the long haul, not only in paying for itself, but also in reducing the price of crime to the American people—such as costs to victims as well as outlays for police departments, court buildings, security systems, and insurance premiums. The embrace for this proposed reform, however, was not nearly so strong as it was for his efforts to promote vocational training for inmates.⁹⁵

In October 1981, the National Academy of Corrections (N.A.C.), which the Chief Justice had been advocating for nearly a decade, became a reality as an adjunct to the National Institute of Corrections. He reported that, in the first three months of the Academy's existence, it had trained more than 2,100 persons, largely state and local prison personnel.⁹⁶ The seemingly short period and high number of officials, coupled with Burger's previous doubts about the state of knowledge

93. W. Burger, Remarks at the Commencement Exercises of George Washington University School of Law 4 (May 24, 1981) (available from Information Services, Federal Judicial Center, 1520 H Street, N.W., Washington, D.C. 20005) [hereinafter Remarks of Warren E. Burger].

94. *Id.* at 6.

95. See, e.g., *Burger on Corrections*, St. Paul Pioneer Press, May 27, 1981, at 10, col. 1-2; *Prisoners are People*, L. A. Times, June 2, 1981, part 2, at 6, col. 1-2 (San Diego County ed.).

96. 1982 Year End Report, *supra* note 50, at 6.

about modern penal procedures, invoke skepticism about the quality and thoroughness of the education received by such personnel.

Initially, the featured instruction focused on correctional management and staff training. Burger contended that, in 1983, the number of trainees would increase to 2,500 and that the Academy's curriculum would expand to cover two new areas: population management, and prison and jail overcrowding. He asserted that all the courses had undergone evaluations, which turned out to be favorable, and attested to their high quality.⁹⁷ By 1985, the number of correctional employees attending N.A.C., located in Boulder, Colorado, had grown to 2,730. These officials then returned to their institutions to carry out their learning and to share it with their co-workers.⁹⁸ Moreover, with the emergence of the National Academy of Corrections, the Chief Justice continued to maintain a modest perspective about his role in its formation. He saw himself as a catalyst but not as a prime mover, a role which, he declared, belonged jointly to William French Smith, the Attorney General of the United States, and Allen Breed, the Director of the National Institute of Corrections.⁹⁹

Burger's structural advocacy in the field of prison administration encompassed not only the N.I.C. and N.A.C. but also two other organizations. One was the National Commission on Corrections Practices (N.C.C.P.). Its primary purpose was to devise a nationwide prison policy to cope with rapidly growing inmate populations and subsequent overcrowding. He viewed these problems as permeating federal, state, and local governmental levels and all social strata. Coordination was required among penal officials to alleviate such deficiencies. Stated another way, he perceived the nation's prisons as a single system with a pastiche of autonomous subsystems. He attributed their problems mainly to mandatory sentencing laws enacted in thirty-seven states.¹⁰⁰

The Chief Justice did not elaborate on the size, composition, and funding of this proposed agency. In his 1982 year-end report on the condition of the federal judiciary, where he first

97. *Id.*

98. 1985 Year End Report, *supra* note 61, at 8.

99. *Id.*; 1982 Year End Report, *supra* note 50, at 6.

100. 1982 Year End Report, *supra* note 50, at 7.

publicly raised this proposal, he announced that he would ask Congress to set up such a commission.¹⁰¹ This announcement garnered public support.¹⁰² In the comparable annual reports for 1983, 1984, and 1985, he made no mention of whether he had pursued this proposal and, if so, what had become of it.

The second structure was the National Center for Innovation in Corrections (N.C.I.C.), an organization created in 1984 under the joint aegis of the Brookings Institution, a venerable research institution based in Washington, D.C., and George Washington University.¹⁰³ Chief Justice Burger explained the first task facing this organization:

One immediate goal of the National Center of Innovation in Corrections is to raise inmate employment in prison industries from the current 10 percent national average to 20 percent average. The long-term goal is a full 50 percent of inmates working within the next ten years. I believe that America's corporations, foundations, and entrepreneurs will contribute leadership, funds, and technical assistance in achieving these goals.¹⁰⁴

Mr. Burger foresaw that such employment would develop skills which participating inmates could later use in the outside world. He hinted that the provenance of N.C.I.C. lay in penal systems which he regarded as progressive, especially those in Scandinavian nations. In 1983, he had taken a team of political and business representatives on a tour of prisons in those countries and asked them to observe the work environment provided for inmates. His hope was that they would be impressed enough to consider whether such a system might be adaptable to federal and state correctional systems in the United States.¹⁰⁵

The Chief Justice believed that such a group might prove instrumental in persuading Congress to repeal laws barring the transportation and sale of prison-manufactured products in interstate commerce. The Comprehensive Crime Control Act of 1984 reflected the influence of the Chief Justice and these representatives, for it exempted up to twenty pilot pro-

101. *Id.*

102. 1984 Year End Report, *supra* note 49, at 5; *see also* Lewis, *Doing Business in Prisons*, San Diego Union, Nov. 17, 1986, at B-7, col. 4-6 (city ed.).

103. 1984 Year End Report, *supra* note 49, at 5-6.

104. *Id.* at 4.

105. *Id.*; 1983 Year End Report, *supra* note 76, at 4.

grams from the ban on such commerce.¹⁰⁶ In his 1985 year-end report on the status of the federal judicial system, he announced that the National Center for Innovation in Corrections had devised twenty-one proposals for prison industry projects, all of which involved the cooperation of the business sector. In particular, he cited one recommendation to utilize inmates at Maryland State Prison in the production of prefabricated housing components, a project that he considered possibly “the most promising” because he expected it to become operational “very soon.”¹⁰⁷

This web of correctional structures—the National Institute of Corrections, the National Academy of Corrections, the National Commission on Correction Practices, and the National Center for Innovation in Corrections—was significant in at least three overlapping respects. First, this set of organizations reflected the Chief’s belief that the nation’s penal system, like its courts, had been too fragmented and that a measure of centralization within a context of continued federalism would promote efficiency, humanity, and uniformity among state and federal correctional institutions. Structural changes were the *sine qua non* for procedural reforms. Such structures could be harbingers of progress. Their broad-based membership permitted them to concentrate available expertise, if any; to develop it, if necessary; and to coordinate the implementation of recommendations.

Second, this network of institutions partly fulfilled Burger’s quest for greater public attention to what he had perceived in 1967 as one of the imbalances in the country’s penal system: a widespread proclivity toward neglecting convicted and incarcerated defendants after having erected safeguards for the fair treatment of accused persons in criminal proceedings.

Third, this panoply of institutions made possible an alleviation of the other alleged dysfunction: the development of programs to help reconcile inmates with society, which he regarded as both a moral obligation of the latter and a pursuit of its self-interest.¹⁰⁸ If the quality of prison officials was upgraded, they could educate and supply vocational training to

106. 1985 Year End Report, *supra* note 61, at 7-8; see 8 U.S.C. § 1761 (c) (1986 Cumulative Annual Pocket Part).

107. 1985 Year End Report, *supra* note 61, at 7.

108. Remarks of Warren E. Burger, *supra* note 93, at 3.

the inmates in order to enhance the prospects of the latter for receiving stable and adequate employment in the outside world.

In 1981, Chief Justice Burger delineated two kinds of instruction that trained prison personnel should offer. One was a mandatory program for inmate literacy, which in his view encompassed not only reading and writing but also arithmetic. He professed to be shocked at the high number of youthful, functionally illiterate prisoners and wondered how they could find lawful, sufficiently rewarding jobs with these educational deficiencies, aggravated by the stigma of a conviction. The second type was a greatly enlarged offering for obligatory vocational training in a variety of crafts, enabling prisoners upon release to have achieved some qualifications for employment in the construction, manufacturing and service sectors of the nation's economy.¹⁰⁹

The Chief, in his year-end report for 1982, encapsulated his overall correctional outlook by declaring:

I am bound to repeat what I have pressed for many years: **THAT EVERY CORRECTIONAL INSTITUTION MUST BE MADE A COMBINED EDUCATIONAL AND PRODUCTION INSTITUTION— A SCHOOL AND FACTORY WITH FENCES. ARCHAIC ATTITUDES AND OBSOLETE STATUTES MUST BE CHANGED** or we will continue the melancholy business of releasing inmates less fit to resume private life than before conviction. Not all, but many prison inmates can be motivated by training and by being active in productive work to help pay for the costs of incarceration.¹¹⁰

To motivate prisoners, Mr. Burger proposed what he called a "carrot and stick program."¹¹¹ The carrot was incentives for inmate cooperation such as reduced sentences. Education and vocational training would be analogous to good behavior as a rationale for lightening prison terms. He envisioned inmates learning their way out of correctional institutions. Another inducement was a restriction on total amount of time that prisoners would be required to spend on their studying and other

109. *Id.* at 6-7. In 1984, the Chief Justice told a national television audience: "People who go into prisons and then come out who are functional illiterates [*sic*], can't read, write, spell . . . simply are unemployable." See *Nightline*, *supra* note 8, at 3.

110. 1982 Year End Report, *supra* note 50, at 6-7 (emphasis in original).

111. Remarks of Warren E. Burger, *supra* note 93, at 7.

intra-institutional work. Such a limit would equal the investment of time demanded of cadets at the several military academies and students at various law schools. Although Burger did not specify the range of hours and days to be spent, his recommendation implied that inmates would spend most of each day and at least five days a week on such activities. He posited that most persons who end up in prisons had lacked discipline in learning and work, which he saw as an essential for self-esteem and a respect for others, and as a remedy favored by those knowledgeable in correctional administration. The stick was mandatory participation in such endeavors.¹¹² Moreover, the Chief Justice could have mentioned a latent institutional benefit from his approach. With prisoners occupied with educational and vocational activities, their management would be easier. Presumably, inmates would have less time, energy, and inclination to challenge authorities and to mistreat other prisoners.

Although Chief Justice Burger's program may have been preferable to doing nothing, it still posed some difficult questions. For instance, can inmates learn much in an institutional environment where the threat and practice of violence are ubiquitous? Would the educational and vocational programs suffice to make released prisoners genuinely competitive in the external job market without strong placement programs? Could educational and vocational programs spawn unintended by-products, like facilitating recidivism and encouraging the development of "jail-house lawyers"? Amateur lawyers who would file more habeas corpus petitions in federal courts, challenging various aspects of their convictions and incarceration on constitutional grounds, and thereby perpetuating rather than ending the inmate's conflict with society that Burger inveighed against? And, if inmates really perceive themselves as victims of social injustices, can such conflict be eliminated?

The Chief Justice sought to discourage habeas corpus filings in two ways. One was public protest, beginning with his first state-of-the-judiciary address in 1970, when he criticized a sharp rise in the number of such cases.¹¹³ In 1963, when the Supreme Court greatly enlarged the right of prisoners to

112. *Id.* at 6-7.

113. Burger, *supra* note 53, at 931.

habeas corpus relief in federal district courts,¹¹⁴ the incidence of such filing stood at 4,254. Seven years later, at the time of Burger's speech, it had jumped to 15,997—an increase of 376.0%.¹¹⁵ He considered the availability of adequate post-conviction relief in state courts to be the solution to this problem and the establishment of intra-prison procedures to resolve other inmate complaints. The second means was Supreme Court rulings limiting the use of this redress. For instance, he participated in a series of decisions between 1973 and 1976 which hampered the ability of prisoners to use this remedy successfully. They could not attack the validity of their convictions despite untimely challenges to the exclusion of blacks from indicting grand juries,¹¹⁶ despite failing to show cause for not having made such challenges and to demonstrate actual prejudice in state cases,¹¹⁷ despite not making a timely objection to having stood trial in prison garments,¹¹⁸ and despite the availability of fair adjudication in state courts of illegal-search-and-seizure claims.¹¹⁹ Nonetheless, the number of such petitions has continued to climb from 19,809 in 1976, the last year in this cluster of decisions, to 33,468 in 1986, the most recent year for which public information is available—all together, a 69.0% increase.¹²⁰

The Chief Justice's supportive role in these decisions represented efforts not only to end conflicts between prisoners and society, thus facilitating rehabilitation, but also to help erect a broader pattern of barriers against ready access of litigants to the federal district courts. For example, total civil filings rose from 77,193 in 1969, Burger's first year as Chief Justice, to 273,670 in 1985, the latest reporting year—an overall increase

114. See *Fay v. Noia*, 372 U.S. 391 (1963) (expanding rights of state court prisoners to seek federal habeas corpus relief).

115. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1976 ANNUAL REPORT OF THE DIRECTOR 96 (Table 25) (1976) [hereinafter 1976 ADMINISTRATIVE OFFICE REPORT].

116. *Davis v. United States*, 411 U.S. 233 (1973).

117. *Francis v. Henderson*, 425 U.S. 536, 542 (1976).

118. *Estelle v. Williams*, 425 U.S. 501, 512-13 (1976).

119. *Stone v. Powell*, 428 U.S. 465, 470 (1976). Chief Justice Burger concurred in the result, launching an attack on the exclusionary rule. *Id.* at 496-502 (Burger, C.J., concurring).

120. 1976 ADMINISTRATIVE OFFICE REPORT, *supra* note 115; ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1985 ANNUAL REPORT OF THE DIRECTOR 149 (Table 24) (1985) [hereinafter 1985 ADMINISTRATIVE OFFICE REPORT].

of 354.7%.¹²¹ Restrictions on habeas corpus filings thus joined other limitations on access, most notably class actions and standing to sue. He participated in accelerating the flow of defendants toward convictions through the sanctioning of smaller juries (six members instead of twelve), less-than-unanimous verdicts in non-capital cases, and negotiated pleas of guilt in criminal cases (better known as plea bargaining).¹²²

Chief Justice Burger's hostility, especially toward the filing of habeas corpus petitions in federal trial courts, has engendered skepticism about the depth of his concern for correctional reform because his voting record in various prison cases appears to be at odds with his public statements.¹²³ Implicit in the criticism was that, even though many inmates need education, vocational training, and discipline, they also need fairness in the handling of their claims to reconcile them with society. Otherwise, prisoners with alleged grievances might acquiesce to authority and feign rehabilitation while their underlying bitterness at unjust treatment continues to fester, culminating in recidivism.

This doubt grew with Burger's performance in other prisoner-rights cases. Two illustrations show this reservation in bold relief. In 1979, the Chief Justice joined a five-to-four Supreme Court majority which permitted authorities at a federal pre-trial jail in New York to use a variety of practices, such as the double-bunking of detainees (the confinement of two inmates to a room originally constructed for one); a prohibition against jailees receiving hardbound books not mailed directly

121. 1976 ADMINISTRATIVE OFFICE REPORT, *supra* note 115; 1985 ADMINISTRATIVE OFFICE REPORT, *supra* note 120, at 137 (Table 18).

122. Some of the most significant standing-to-sue cases in which the Chief Justice took part are: *Allen v. Wright*, 468 U.S. 737 (1984); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976); *Rizzo v. Goode*, 423 U.S. 362 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *United States v. Richardson*, 418 U.S. 166 (1974); *Sierra Club v. Morton*, 405 U.S. 727 (1972). For six-member juries, see *Williams v. Florida*, 399 U.S. 78 (1970) (Burger, C.J., concurring); *cf. Ballew v. Georgia*, 435 U.S. 223 (1978). For less-than-unanimous verdicts, see *Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972). For plea bargains, see *Santobello v. New York*, 404 U.S. 257 (1971); *North Carolina v. Alford*, 400 U.S. 25 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Brady v. United States*, 397 U.S. 742 (1970).

123. See, e.g., Meddis, *Chief Justice Pushes Jobs for Inmates*, USA Today, June 19, 1984 at 1A, col. 4, 2A, col. 1-2.

from book clubs, bookstores, or publishers; a ban on inmates receiving food packages and personal items from outside the facility; a requirement for prisoners to stay outside their cells during routine inspections, and body cavity searches of detainees following visits from persons whom they might touch. The majority ruled that none of these practices violated constitutional provisions such as the first amendment (the bar against “abridging freedom of speech”), the fourth amendment (protection “against unreasonable searches and seizures”), and the fifth amendment (a barrier against being “deprived of life, liberty or property, without due process of law”).¹²⁴

In 1981, the Chief Justice mentioned in a law school commencement address that punishments, including those inflicted in custodial settings, did not pose any constitutional difficulties unless they were “cruel and unusual” and thus in violation of the eighth amendment.¹²⁵ He was unwilling to help effect improved prison conditions through judicial policymaking, as many other federal jurists had been since 1969, when they began to issue orders regarding custodial overcrowding, cell size, inmate safety, medical services, prohibited prison guard behavior, and sanitation standards, among others.¹²⁶ This stance, however, was consistent with his general position of judicial deference toward legislative bodies even when they declined to act on politically sensitive social problems.

Shortly after that graduation speech, Chief Justice Burger joined an eight-to-one majority upholding the practice of double-celling inmates at a state prison facility in Ohio.¹²⁷ The Supreme Court found no transgression against “cruel and unusual punishments” barred by the eighth amendment even though the prisoners spent most of their time in sixty-three square-foot cells over a long term in an institution with a population thirty-eight percent above capacity.¹²⁸

These two decisions fueled accusations that Burger’s professed concern for prison reform was unsupported by his judicial behavior, that his interest in the subject was bogus, and

124. *Bell v. Wolfish*, 441 U.S. 520, 521-22 (1979).

125. Remarks of Warren E. Burger, *supra* note 93, at 3.

126. *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969). For a comprehensive list of similar cases, see J. STRAUSSMAN, *PUBLIC ADMINISTRATION* 301-05, 309-10 (1985).

127. *Rhodes v. Chapman*, 452 U.S. 337, 338 (1981).

128. *Id.* at 341.

that he used progressive penal rhetoric to mask his hostility toward inmate rights and his more general law and order orientation. His votes in these two cases also prompted criticism that, although his desire to improve prison conditions was genuine, he favored such redress through the political rather than judicial process. In short, he perceived his role as a public catalyst for legislative and executive action on such problems.¹²⁹ Prospects for remedies from these branches of federal, state, and local custodial facilities have been bleak because of the widespread political unpopularity of prison reform, which has become even more urgent with longer and mandatory sentences that have helped raise the national prison populations to a record 528,945 and to extensive overcrowding.¹³⁰ Consequently, as a practical matter, the judicial process has frequently been the only avenue left for effecting a degree of amelioration in penal institutions.

The Chief Justice recognized that the judicial doors to such reforms should not be completely closed. In 1978, he partially endorsed a Supreme Court decision upholding a federal district court judge's imposition of a thirty-day maximum period on the sentencing of Arkansas prisoners to isolation cells as a facet of an overall package to rectify constitutional violations in these custodial quarters.¹³¹ He joined in a dissent, however, from an aspect of the ruling which required the department of corrections in that state to pay the fees of the attorneys representing the inmates.¹³² The district judge had made this award after finding that the Arkansas prison officials had acted in bad faith in failing to remedy previously identified constitutional transgressions.¹³³ Furthermore, in affirming the trial court decision, the court of appeals for the fifth circuit had extended the fee payment requirement to cover appellate costs.¹³⁴

129. Meddis, *supra* note 124, at 2A, col. 1-2.

130. *Prison Population up 5% This Year*, San Diego Union, Sept. 15, 1986, at A-5, col. 1 (city ed.).

131. *Hutto v. Finney*, 437 U.S. 678, 704 (1978) (Powell, J., concurring in part and dissenting in part, with whom Burger, C.J., joined).

132. *Id.* at 704-10. Six years later, the Chief Justice reaffirmed his endorsement of occasional judicial interventions in prison operations when he told a national television audience: "Well, the courts don't run the prison systems, of course, although from time to time they've had to intervene because there were conditions that violated constitutional guarantees." See *Nightline*, *supra* note 8, at 8.

133. *Finney v. Hutto*, 410 F. Supp. 251 (E.D. Ark. 1976).

134. *Finney v. Hutto*, 548 F.2d 740 (8th Cir. 1977).

Burger's outlook was that such awards ran contrary to the eleventh amendment to the United States Constitution, which granted the states broad immunity from lawsuits. In his view, no federal enactment had authorized a waiver of this protection, although whether this amendment permits such action by statute is questionable. To him, this provision in the Constitution also barred retroactive relief involving payments from state funds. He professed his belief that this provision buttressed federalism and contended that, without an express waiver, such awards would impose new or heavy fiscal burdens on the states.¹³⁵

Burger's reasoning appeared hostile not only to fee awards in prisoner rights cases, but also to the filing of such legal actions. In addition, his rationale ignored the probability that the absence of such awards, even when state officials were found to have acted or litigated in bad faith, would discourage the filing of such cases. These cases are frequently complicated, time consuming, and thus expensive, particularly for inmates, both individually and as a class. Therefore, the overall effect of his position, if it had prevailed, would have been to leave the judicial doors to correctional reform only slightly ajar. His stance lent support to criticisms about the strength of his often stated commitment to penal reform.

CONCLUSION

This article has examined Warren Burger's seventeen years as Chief Justice of the United States and has posited that his stewardship will turn out to be memorable, not because of the Supreme Court decisions in which he participated or any sparkling opinions that he may have written, but because of the role that he selected for himself: a catalyst for reform in judicial and correctional administration at all levels. He publicized the shortcomings in both segments of the federal, state, and local justice systems because he wanted to improve the efficiency of the courts and prisons in deterring crime. Swift determinations of guilt or innocence and rehabilitation of convicted defendants were the touchstones of his professed outlooks. He saw his job principally as a high visibility platform from which he could speak, receive instant and extensive

135. See *Hutto*, 437 U.S. at 704-06.

media coverage, and exert an impact on the outlooks and decisions of judicial and correctional policy makers. He was essentially a modern William Howard Taft.

Furthermore, the nation's highest judicial executive saw the federal and, especially, the state justice systems as excessively decentralized, fragmented, and heterogeneous. To improve their efficiency, he sought to achieve at least a minimum level of uniformity and competence through a skein of voluntary national structures. Despite the country's current inclination toward deregulation and privatization of public responsibilities, his centralizing efforts generated largely favorable responses in the nation's legal and political communities, although his proposed intercourt panel crossed the line of general acceptability.

No retrospective on the administrative side of Burger's tenure would be complete without acknowledging that his structural advocacy extended beyond the immediate components of the country's justice systems. For instance, he is largely responsible for the creation of schools—American Inns of Court (better known as Amincourt)—where prospective and inexperienced trial lawyers can acquire and enhance their lawyering skills. He urged the adoption of this highly successful British experience to the United States, where law schools in five states and the District of Columbia set up such organizations following a successful pilot program at Brigham Young University.¹³⁶

Nor would such a review of the Chief Justice's administrative role be finished without at least noting his catalytic role in pressing for procedural reforms in courts and prisons. For example, he proposed the use of judicial impact statements before congressional passage of bills which would affect the federal judiciary's workload. This recommendation stemmed from the tendency of Congress to pass bills without considering the bills' impact of increasing the federal courts' caseload and, subsequently, its personnel and expenses.¹³⁷ Furthermore, he suggested several possibilities for handling prisoners' petitions: a statutory administrative process for federal custodial facilities which would have to be used before submitting cases to the district courts, delegation of inmate civil rights

136. 1985 Year End Report, *supra* note 61, at 5-6.

137. Burger, *The State of the Federal Judiciary—1972*, 58 A.B.A. J. 1049 (1972).

cases and habeas corpus filings to federal magistrates, and establishment of informal grievance processes in federal and state correctional institutions. These proposals sought to keep some of these suits out of the federal and state courts and thus conserve judicial resources (personnel, time, and money) by invoking the doctrine of exhaustion of administrative remedies.¹³⁸

These procedural recommendations merely illustrate that the scope of Burger's exhortations went considerably beyond his interest in structural reforms. Even though his attention focused mainly on the judicial and penal aspects of the justice system, he still thought that the police sector warranted at least peripheral concern. He proposed the formation of independent civilian review boards which would have broad powers to review allegations of misconduct by law enforcement officers, especially cases where the officers were accused of conducting illegal searches and seizures. He saw that this structure would be a more effective device in curbing unlawful police conduct than the judicially created policy of excluding illegally seized evidence from court proceedings.¹³⁹

Finally, from this exploration of Chief Justice Burger's continual efforts to upgrade the administrative side of justice and to thus enhance social order with much individual freedom, it is evident that he probably made the most of the "bully pulpit." He worked outside of his judicial opinions in his attempts to mobilize support from legal and political sources to improve the nation's judicial institutions.

Therefore, it was appropriate for Mr. Burger to conclude his letter of resignation, dated June 17, 1986, to President Reagan with the words:

[i]t has been an honor and privilege to hold this great office for 17 years during a stirring period in the history of the Republic and the Court. I am grateful that our system is such that this opportunity could come to me. So long as I am able, I expect, as I told the Senate Judiciary Committee [at my confirmation hearing] on June 6, 1969, to continue to devote every energy to help make our system of justice work better.¹⁴⁰

138. Burger, 1974 Year End Report on the Judiciary 2 (1974); Burger, 1976 Year End Report on the Judiciary 5 (1976).

139. Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1, 16-21 (1964).

140. *Burger's Letter to Reagan and the Reply*, N.Y. Times, June 18, 1986, at 12, col. 3.

Currently, Warren Burger devotes full time to his role as Chair of the Commission on the Bicentennial of the United States Constitution.¹⁴¹ His administrative legacy is substantial and will help distinguish him as a memorable Chief Justice of the United States.

141. Thomma, *New Job Boosts U.S. Constitution*, St. Paul Pioneer Press Dispatch, Dec. 14, 1986, at 1G, col. 1; *Critics Bicker over this Year's Constitution Bicentennial Plans*, San Diego Union, Jan. 4, 1987, at A-25, col. 1 (city ed.).