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Warren Burger and the Administration of Justice

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Essay

WARREN BURGER AND THE ADMINISTRATION OF JUSTICE

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

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

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

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1. Linda Greenhouse, *Warren E. Burger Is Dead at 87: Was Chief Justice for 17 Years*, N.Y. TIMES, June 26, 1995, at A1 (stating that nomination made Chief Justice Burger "a lightening rod for those who welcomed as well as those who feared the end of an era of judicial activism"); A.E. Dick Howard, *He Was Not What They Expected*, NAT'L L.J., July 10, 1995, at A20 (recalling President Nixon's promise to put "political conservatives" and "strict constructionists" on bench); Henry J. Reske, *The Diverse Legacy of Warren Burger: Law-and-Order Chief Justice Joined in Activist Opinions That Shaped Social Policy*, A.B.A. J., Aug. 1995, at 36 (asserting that President Nixon had campaigned in part against activist record of Warren Court).

2. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 721-27 (1986) (emphasizing separation of powers between Legislative, Executive and Judicial Branches); INS v. Chadha, 462 U.S. 919, 951 (1983) (same); Roe v. Wade, 410 U.S. 113, 152-66 (1973) (declaring abortion rights for women); Reed v. Reed, 404 U.S. 71, 75-77 (1971) (declaring women's rights); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)

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

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

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

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

3. *See* United States v. Nixon, 418 U.S. 683, 713 (1974) (ordering President Nixon to divulge material based on principle that President's generalized interest in confidentiality must yield to specific need for evidence in pending criminal trial). *See generally* Joan Biskupic, *Ex-Chief Justice Warren Burger Dead at Age 87; Court Helped Define Major Social Changes*, WASH. POST, June 26, 1995, at A1 (reporting *Nixon* decision "was arguably the Burger [C]ourt's most dramatic moment"); Reske, *supra* note 1, at 36 (stating President Nixon appointed Burger as law-and-order Justice).

4. Biskupic, *supra* note 3, at A1. *See generally* Daniel A. Farber, *Two Cheers For Warren Burger*, 4 CONST. COMM. 1, 1 (1987) (describing response to Chief Justice Burger's judicial opinions as unenthusiastic); Stuart Taylor, Jr., *Lessons Learned From Warren Burger*, CONN. L. TRIB., July 10, 1995, at 27 (stating "conservative true believers come to think of Burger as an undependable compromiser more attuned to conventional wisdom and public opinion than to conservative principle").

5. *See, e.g.*, THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T, *supra* note 2, at xii (presenting series of commentaries by 12 close students of Burger Court's work); THE BURGER YEARS, *supra* note 2, at vii (compiling analyses by scholars and experts of Burger Court's rulings from both practical and theoretical perspectives); Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1437-41 (1987) (detailing Burger Court's "inconstant performance" and its "reluctance or inability to chart a clear course"); Abram Chayes, *The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 7-8 (1982) (describing Burger Court's decisions as "something less than hospitable" to procedures and elements of public law litigation).

cant. This feature is Warren Burger's enormous contribution to improving the administration of justice in the United States. The Chief Justice won justly-deserved credit, realized some of his greatest successes, and probably left the most lasting legacy in this unglamorous, thankless, and yet critical, area.

Warren Burger was fond of observing that he took seriously the title of Chief Justice of the United States, not merely the Supreme Court, and considered himself the steward of the whole judicial system, state and federal.[6] It is quite ironic that the jurist whom Richard Nixon hoped would end an era of judicial activism employed judicial activism in the service of the administration of justice.

The plethora of institutions dedicated to enhancing the administration of justice established during Warren Burger's tenure testifies to his leadership. These entities include the Institute for Court Management, the National Institute of Corrections, the National College of the Judiciary, the National Center for State Courts, the State Justice Institute, the American Inns of Court and the Supreme Court Historical Society.[7]

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

6. Greenhouse, *supra* note 1, at A1; *see* Dennis J. Hutchinson, *A Transitional Chief Justice With a Contradictory Record*, NAT'L L.J., July 10, 1995, at A20 (describing Chief Justice Burger as "the transitional figure between the presiding justice of old and the modern judicial administrator"); Thomas J. Moyer, *Federalism's Champion*, NAT'L L.J., July 17, 1995, at A22 (remembering Justice Burger as Chief Justice who made great contributions to state court system); *Retired Chief Justice Warren Burger Reflects on Developments in the Judiciary During His Tenure*, 20 THE THIRD BRANCH (Fed. Judicial Ctr., Wash., D.C.), Sept. 1988, at 1, 5-7 [hereinafter *Reflections*] (discussing Chief Justice Burger's involvement with administrative aspect of judicial system).

7. *See* Warren Cikins, *Unexpected Enlightenment: Warren Burger's Law-and-Order Legacy Includes a Lesser Known Commitment to Prison Reform*, THE RECORDER, July 11, 1995, at 8 (attributing establishment of National Institute of Corrections, National College of the Judiciary, and State Justice Institute to Chief Justice Burger); William H. Rehnquist, *A Tribute to Chief Justice Warren E. Burger*, 100 HARV. L. REV. 969, 970 (1987) (stating that existence of aforementioned judicial entities is "testimony to Warren Burger's constant concern for health and welfare of state courts"); Reske, *supra* note 1, at 37 (recognizing Chief Justice Burger's influence in creating Institute for Court Management, National Center for State Courts, American Inns of Courts and Supreme Court Historical Society); *Warren Burger Leaves Imprint on the Judiciary*, 27 THE THIRD BRANCH (Fed. Judicial Ctr., Wash., D.C.), July 1995, at 1, 4 [hereinafter *Imprint*] (crediting Chief Justice Burger with creating number of entities dedicated to improvement of justice). *See generally* Mark W. Cannon, *Innovation in the Administration of Justice, 1969-1981: An Overview*, *in* THE POLITICS OF JUDICIAL REFORM 35, 39-42 (Philip L. Dubois ed., 1982) (chronicling Chief Justice Burger's early efforts to facilitate judicial reform).

already existed when he became Chief Justice. Warren Burger presided over thirty-four meetings of the Judicial Conference of the United States, the principal policymaking arm of the federal courts.[8] He correspondingly assumed major responsibility for converting the nascent, rather obscure Federal Judicial Center, whose board the Chief Justice chairs by statute, into an influential entity for research and writing on the Third Branch.[9]

Warren Burger's perceptive appreciation of the need to encourage, increase and institutionalize dialogue between federal and state judges concomitantly led him to promote the creation of State-Federal Judicial Councils.[10] Practically every one of the above organizations was established to improve the performance of all individuals—including judicial officers, as well as clerks of court, probation officials and marshals—who deliver federal and state civil and criminal justice.[11]

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8. *See* 28 U.S.C. § 331 (1994) (explaining Judicial Conference of the United States and Chief Justice's leading role); *Imprint*, *supra* note 7, at 4 (stating that Judicial Conference adopted resolution to formally honor Chief Justice Burger). For a further discussion of the Judicial Conference resolution, see *infra* note 52 and accompanying text. For a further discussion of the Judicial Conference, see generally RUSSELL R. WHEELER & GORDON BERMANT, FEDERAL COURT GOVERNANCE: WHY CONGRESS SHOULD—AND WHY CONGRESS SHOULD NOT—CREATE A FULL-TIME EXECUTIVE JUDGE, ABOLISH THE JUDICIAL CONFERENCE, AND REMOVE CIRCUIT JUDGES FROM DISTRICT COURT GOVERNANCE 13-15 (1994).

9. *See* 28 U.S.C. § 621(a)(1) (1994) ("[T]he Chief Justice of the United States . . . shall be the permanent Chairman of the Board"); Greenhouse, *supra* note 1, at A1 (stating that Chief Justice Burger contributed much effort to organizations whose purpose was to improve judicial process); *see also Imprint*, *supra* note 7, at 4 (suggesting Chief Justice Burger was strong supporter of Administrative Office of the United States (AO)). *See generally* William W Schwarzer, *The Federal Judicial Center and the Administration of Justice in the Federal Courts*, 28 U.C. DAVIS L. REV. 1129, 1130 (1995) (stating that Federal Judicial Center has greatly contributed to improved judicial administration); Russell R. Wheeler, *Empirical Research and the Politics of Judicial Administration: Creating the Federal Judicial Center*, LAW & CONTEMP. PROBS., Summer 1988, at 31 (discussing evolution of judicial administration).

10. *See* Warren E. Burger, The Annual Report on the State of Justice, Address Before ABA, St. Louis, Mo. (Aug. 10, 1970), *in* WARREN E. BURGER, DELIVERY OF JUSTICE 44 (1990) (urging creation of State-Federal Judicial Council to maintain "continuing communication on all joint problems"); *Imprint*, *supra* note 7, at 4 (recalling Justice Burger's commitment to strengthen relationship between state and federal judges). For a further discussion of State-Federal Judicial Councils, see *Reflections*, *supra* note 6, at 5. For a general discussion of state and federal judicial relationships, see generally *National Conference on State-Federal Judicial Relationships*, 78 VA. L. REV. 1655, 1655 (1992) (reproducing papers and commentary from National Conference on State-Federal Judicial Relationships held in April 1992); Moyer, *supra* note 6, at A22 (stating that Chief Justice Burger "did more to elevate the status of the state courts in our system of federalism than did anyone before him").

11. *See Imprint*, *supra* note 7, at 1, 4 (remarking that Chief Justice Burger's impact was felt by courts at all levels); Greenhouse, *supra* note 1, at A1 ("[Chief Justice Burger] believed that judges could be helped to be more efficient if profes-

The creation of the many entities that I have examined and the legislative receptivity to numerous additional initiatives that the Chief Justice supported, attest to his facility in working with Congress. For instance, Warren Burger was an avid proponent of court administrators, and he successfully advocated for the establishment of the office of circuit executive.[12] Moreover, when the Chief Justice perceived that district courts were encountering growing docket pressures, he convinced Senators and Representatives to expand the jurisdiction of magistrate judges.[13] Warren Burger correspondingly persuaded Congress to create the United States Court of Appeals for the Federal Circuit to capitalize on the efficiencies that specialized courts can yield and to reduce somewhat the workloads of judges on the regional appellate courts.[14]

The Chief Justice also convinced Senators and Representatives that they must devote additional resources to the Third Branch. For example, between the time of his 1969 appointment and 1980, Congress doubled the number of active federal judges and appropriated a five-fold increase in the federal courts' budget.[15] Warren

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sional management techniques were imported to the courts, from clerk's offices to judges' chambers.").

12. *See* Act of Jan. 5, 1971, Pub. L. No. 91-647, 84 Stat. 1907 (codified as amended at 28 U.S.C. § 332(f) (1994)) (providing for appointment of circuit executive for each judicial circuit); Rehnquist, *supra* note 7, at 970 (referring to Justice Burger as one of "principal architects of the idea of circuit executives"). *See generally* BURGER, DELIVERY OF JUSTICE, *supra* note 10, at 32-35 (reproducing speech titled "Court Administrators: Where Would We Find Them?," ABA, Dallas, Tex., Aug. 12, 1969). For a further discussion of circuit executives, see JOHN T. MCDERMOTT & STEVEN FLANDERS, THE IMPACT OF THE CIRCUIT EXECUTIVE ACT 7-31 (1979); JOHN W. MACY, JR., THE FIRST DECADE OF THE CIRCUIT EXECUTIVE ACT: AN EVALUATION (1985); *Reflections, supra* note 6, at 1, 5.

13. *See* Act of Oct. 21, 1976, Pub. L. 94-577, 90 Stat. 2729 (codified as amended at 28 U.S.C. § 636(b) (1994)) (stating purpose is to "improve judicial machinery by further defining the jurisdiction of United States magistrates"); *see also* James A. Gazell, *Chief Justice Burger's Quest for Judicial Administrative Efficiency*, 1977 DET. C.L. REV. 456, 465 (detailing rising caseloads and Chief Justice Burger's efforts to treat them at all levels of federal court system). For a further discussion of federal magistrates, see generally CARROLL SERON, THE ROLES OF MAGISTRATES IN FEDERAL DISTRICT COURTS (1983).

14. *See* Act of Apr. 2, 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified as amended at 28 U.S.C. § 41 (1994)) (establishing United States Court of Appeals for the Federal Circuit). *See generally* Rochelle C. Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989) (arguing that Court of Appeals for Federal Circuit has been unable to attain fully efficient objectives that specialization can accomplish); *United States Court of Appeals for the Federal Circuit Tenth Anniversary Commemorative Issue*, 41 AM. U. L. REV. 559-1074 (1992). For a further discussion of Chief Justice Burger's efforts to reduce workload on federal circuit courts, see *infra* notes 27-31, 44-45 and accompanying text.

15. *See* Warren E. Burger, *How Can We Cope? The Constitution After 200 Years*, 65 A.B.A. J. 203, 206 (1979) (asserting that judiciary doubled in size); *see also* Act of Oct. 20, 1978, Pub. L. No. 95-486, § 1(a), 92 Stat. 1629 (authorizing additional

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

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

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judgeships). *Compare* JUDICIAL CONF. OF THE UNITED STATES ANN. REP. 82 (1970) (providing $155,621,000 estimated annual budget figure) *with* JUDICIAL CONF. OF THE UNITED STATES ANN. REP. (1980) (providing $668,000,000 annual budget figure). *See generally* Biskupic, *supra* note 3, at 1 (reporting Chief Justice Burger's efforts to raise judges' pay).

16. *See* Act of Mar. 1, 1972, Pub. L. No. 92-238, § 1, 86 Stat. 46 (codified as amended at 28 U.S.C. § 677 (1994)) (authorizing Chief Justice to appoint Administrative Assistant). *See generally* Gazell, *supra* note 13, at 466-67 (listing managerial duties of Administrative Assistant to Chief Justice); Philip B. Kurland, *Mr. Chief Justice Burger on the State of the Judiciary - 1981*, 15 SUFFOLK U. L. REV. 1105, 1109 (1981) (reporting recent creation of office of Administrative Assistant). Warren Burger's concern about ethics led him to support passage of the Judicial Conduct and Disability Act. *See* Act of Oct. 15, 1980, Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. § 372(c) (1994)) (establishing procedure for processing complaints against federal judges). For additional discussion of Warren Burger's work with Congress, see Cikins, *supra* note 7, at 8; Leon Friedman, *The Community's Protector*, 72 A.B.A. J. 14, 14 (1986); Hutchinson, *supra* note 6, at A20.

17. *See* RUSSELL R. WHEELER & HOWARD R. WHITCOMB, JUDICIAL ADMINISTRATION: TEXT AND READINGS at xiv (1977) (stating that idea for book on judicial administration was developed during authors' participation in Judicial Fellows program created by Chief Justice Burger); *Imprint*, *supra* note 7, at 4 (explaining that Chief Justice Burger supported creation of Judicial Fellows program on recommendation of his assistant, Mark W. Cannon). *See generally* Gazell, *supra* note 13, at 467 (reciting Justice Burger's hope that Judicial Fellows would later make further contributions to development of judicial administration).

18. *See Imprint*, *supra* note 7, at 1 (relating Chief Justice Burger's efforts to increase court efficiency through improved technology and streamlined docketing); Mark W. Cannon, *Creative Administrator*, NAT'L L.J., July 17, 1995, at A22 (suggesting that Chief Justice Burger contributed more than did any of his predecessors in modernizing administration of justice); Reske, *supra* note 1, at 37 (stating that Chief Justice Burger modernized not only Supreme Court and federal courts, but state courts as well). *See generally* Cannon, *supra* note 7, at 40-41 (describing Chief Justice Burger's efforts to modernize both federal and state courts). For a further discussion of Chief Justice Burger's efforts to modernize the judiciary, see *Reflections*, *supra* note 6, at 1, 5.

Warren Burger's indefatigable efforts to enhance the quality of courts' operations led him to encourage a broad spectrum of studies relating to the courts. One prominent example was the Chief Justice's orchestration of the Pound Conference, a 1976 conclave which intensively evaluated perceived problems of the civil justice system, such as the litigation explosion and abuse of the discovery process.[19]

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

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

19. *See* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 5-6 (A. Leo Levin & Russell Wheeler eds., 1979) (documenting proceedings of National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, jointly sponsored by Judicial Conference of United States, Conference of Chief Justices and American Bar Association).

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

21. *See* Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 712 (1993) (suggesting new rules proposed and adopted during past decade reflect efforts of Chief Justice Burger); Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155, 1156-59 (1993) (detailing concerns raised at Pound Conference). For a further discussion of examples of the continuing national conversation regarding civil justice, see *infra* notes 37-45 and accompanying text. *See generally* Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 288 & n.122 (1989) (discussing differing sides of debate on implications of increase in civil litigation).

22. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 910 (1987) (stating that 1938 Federal Rules of Civil Procedure were heralded as phenomenal success and worked effectively for three decades); Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1591-93 (1994) (stating that drafters sought to enhance uniformity by requiring that all federal district courts apply same procedures); Jack B. Weinstein, *After Fifty Years of the Federal Rules*

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

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

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of Civil Procedure: Are the Barriers to Justice Being Raised?, 137 U. PA. L. REV. 1901, 1906 (1989) (describing authors of Federal Rules as seeking "horizontal national uniformity, broader judicial discretion, and the fusion of law and equity" by promulgating Federal Rules). *See generally* Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 783 (1993) (describing Rules as "revolutionary" in nature).

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

24. For analysis of managerial judging, see generally STEVEN FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS (1977); Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770, 770 (1981) (suggesting that more effective use by judges of pretrial management procedures led to rise in judicial efficiency); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 377 (1982) (observing that, as result of rise in managerial judging, judges play critical role in shaping litigation and influencing results). For analysis of local procedural proliferation, see COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES ON CIVIL PRACTICE (1989) (examining local rules of various districts); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2018 (1989) (including as reasons for local rule proliferation: increase in number and complexity of federal cases, explosion in discovery and documentation, and desire by federal judges to manage their dockets and routinize operations); Tobias, *supra* note 22, at 1595-98 (discussing problems associated with local procedural proliferation). "Judges often pursued managerial judging, especially prior to the 1983 Federal Rules amendments, by issuing local procedures." Tobias, *supra* note 22, at 1595.

25. *See* Amendments to Federal Rules of Civil Procedure, 461 U.S. 1095 (1983) (amending Rules 7, 11, 16, 26, 52, 53, 67, 72, 73, 74, 75 and 76). *See generally* ARTHUR R. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 10-11 (1984) (attempting to alter pretrial process by increasing lawyer responsibility, improving judicial oversight, changing rules of discovery and imposing sanctions). The 1983 amendments legitimated and codified numerous

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

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

Congress implemented the Commission's recommendation that the former Fifth Circuit be divided in 1980,[29] while the Com-

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practices that district judges pursued under the rubric of managerial judging. *See* Tobias, *supra* note 22, at 1594-95 (arguing that amendments compromised idea of uniform national procedure code).

26. *See* Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended at 28 U.S.C. §§ 471-482 (1994)) (identifying, developing and implementing solutions to problems of cost and delay in civil litigation). The Civil Justice Reform Act of 1990 (CJRA) implicitly encouraged all 94 federal districts to experiment with expense and delay reduction procedures which conflicted with applicable Federal Rules. Numerous districts accepted that invitation. *See* Tobias, *supra* note 22, at 1601-04, 1617-27 (discussing implementation of CJRA). For a discussion of the effects of implementing the CJRA, see *infra* notes 39-40 and accompanying text. *See generally* Patrick Johnston, *Civil Justice Reform: Juggling Between Politics and Perfection*, 62 FORDHAM L. REV. 833, 833 (1994) (analyzing CJRA and its requirement that every district court direct substantial resources towards reducing expense and delay in courts).

27. *See* Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change*, *reprinted in* 62 F.R.D. 223, 229 (1973) [hereinafter Hruska Commission] (proposing realignment of Fifth and Ninth Circuits).

28. *See* Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807 (creating Commission on Revision of Federal Court Appellate System); *see also* THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL 31-51 (1994) [hereinafter BAKER, RATIONING JUSTICE] (discussing crisis of volume); Thomas E. Baker, *On Redrawing Circuit Boundaries—Why the Proposal to Divide the United States Court of Appeals for the Ninth Circuit is Not Such a Good Idea*, 22 ARIZ. ST. L.J. 917, 925 (1990) [hereinafter Baker, *Redrawing Circuit Boundaries*] (examining Commission's creation and suggesting Warren Burger's role in creation). *See generally* Arthur D. Hellman, *Legal Problems of Dividing a State Between Federal Judicial Circuits*, 122 U. Pa. L. Rev. 1188, 1191 (1974) (examining legal consequences of Commission's recommendations).

29. *See* Act of Oct. 14, 1980, Pub. L. No. 96-452, 94 Stat. 1994 (codified as amended at 28 U.S.C. § 41 (1994)) (dividing Fifth Circuit into two separate circuits); *see also* Hruska Commission, *supra* note 27, 62 F.R.D. at 230-34 (arguing for realignment of geographical boundaries of Fifth Circuit which, in 1973, had largest volume of judicial business of any court of appeals). *See generally* H.R. REP. No. 96-1390, at 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4236, 4236 (enacting legislation dividing Fifth Circuit into two circuits); DEBORAH J. BARROW & THOMAS G. WALKER, A COURT DIVIDED—THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM 1 (1988) (detailing division of Fifth Circuit, composed of

mission's suggestion that the Ninth Circuit be split underlies perennial calls for bifurcation, one as recently as May 1995.[30] Over the last twenty years, the Commission's efforts have framed much debate regarding the problems which expanding caseloads cause and the best means of treating those dockets.[31]

Warren Burger, in his unremitting pursuit of workable reforms that would facilitate the administration of justice, willingly confronted and even actively engaged controversy. Perhaps the preeminent illustration was his fervent and frequent advocacy of an intermediate appellate court to relieve the Supreme Court's workload.[32] The Chief Justice vigorously and persistently espoused the idea, although Congress never created the tribunal. During 1988, former Chief Justice Burger observed: "Apathy and inertia seem to surround proposals for improving the administration of justice unless there's a driving force behind them."[33]

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

30. *See* Hruska Commission, *supra* note 27, 62 F.R.D. at 234-42 (advocating division of Ninth Circuit which, in 1973, handled more cases than any circuit except "the beleaguered Fifth"); S. 956, 104th Cong. (1995) (establishing commission to study possible effects of Ninth Circuit division); S. 948, 101st Cong. (1989) (proposing division of Ninth Circuit). For a general discussion of splitting the Ninth Circuit, see RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS (Arthur D. Hellman ed., 1990); Kurland, *supra* note 16, at 1113; Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 44 EMORY L.J. 1357 (1995).

31. *See, e.g., Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong. (1990) (considering revision of title 28 of United States Code to divide Ninth Circuit into two circuits); Baker, *Redrawing Circuit Boundaries*, *supra* note 28, at 924-28 (same). *See generally* Tobias, *supra* note 30, at 1357 (same).

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

33. *Reflections*, *supra* note 6, at 7. Warren Burger also actively participated in prison reform and supported numerous other initiatives that improved the administration of justice. *See* Cikins, *supra* note 7, at 8 (highlighting Chief Justice Burger's determination to strengthen criminal justice system and ensure punishment of wrongdoers, while also providing offenders opportunity to reform); Friedman,

Some observers asserted that Warren Burger's imperious demeanor complicated his efforts to build consensus on the Supreme Court.[34] However, the Chief Justice apparently never forgot his Midwestern origins. Warren Burger was one of seven children who secured his first job at the age of ten delivering newspapers. He later attended night classes in undergraduate and law school while selling life insurance during the day.[35] The Chief Justice similarly worked assiduously to guarantee that all of the courts functioned efficiently, thereby enhancing the quality of justice and protecting taxpayers. In 1973, he stated: "By making the judicial system more productive, we are making the federal courts accessible to all Americans at less personal financial expense and less emotional expense—all in addition to saving citizens' taxes."[36]

The present appears to be an especially troubled time for the increasingly beleaguered federal courts. Many district courts experience greater difficulties in resolving a steadily growing, more complex, civil docket[37] and a substantial, albeit relatively static, criminal caseload, a situation that the 1994 crime legislation promises to exacerbate.[38] Numerous federal judges considered the Civil Justice Reform Act of 1990 to be a congressional attempt at micro-managing the courts' internal operations and, therefore, an unwarranted

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supra note 16, at 14 (stating that Congress has passed number of needed administrative reforms suggested or endorsed by Chief Justice Burger).

34. *See, e.g.*, Matthew Brelis, *Court Improvements, Not Ideology, Called Burger's Main Legacy*, BOSTON GLOBE, June 26, 1995, at 1; Hutchison, *supra* note 6, at A20.

35. Hutchinson, *supra* note 6, at A20 (describing Chief Justice Burger as "a rags-to-riches story" who won scholarship to Princeton but stayed home to help family and save money); *see also* Reske, *supra* note 1, at 37 (detailing Chief Justice Burger's educational and career background).

36. *Imprint*, *supra* note 7, at 4.

37. *See* 1994 ANNUAL REPORT OF THE DIRECTOR, JUDICIAL BUSINESS OF THE U.S. COURTS, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, app. 1, at 51-53 (1994) [hereinafter AO ANNUAL REPORT]. *See generally* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 495 (1986) (recognizing claim that federal courts are in "crisis"); Tobias, *supra* note 30, at 1404 (discussing various proposals to increase in workloads).

38. *See* AO ANNUAL REPORT, *supra* note 37, app. 1, at 42-44; *see also* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified at 42 U.S.C. §§ 13701-14223 (1994)) (creating new legislation to combat crime). *But see* Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (purportedly stopping abuse of federal collateral remedies by limiting applications for habeas corpus). The second and fourth tenets of the CONTRACT WITH AMERICA promised to expand federal criminal jurisdiction. *See* CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION (Ed Gillespie & Bob Schellhas eds., 1994). *See generally* William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719, 720 (1995) (voicing concerns over recent enactment of federal crime legislation); Tobias, *supra* note 30, at 1404.

intrusion by a coordinate branch of government.[39] The statute's implementation has further fragmented the already balkanized system of federal civil procedure.[40]

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

39. *See* Tobias, *supra* note 22, at 1601 (detailing controversy surrounding implementation of CJRA). *See generally* Johnston, *supra* note 26, at 843 (stating most significant restriction on judicial discretion is requirement that courts contemplate adoption of judicial management methods set forth in CJRA). *But see* Joseph R. Biden, Jr., *Congress and the Courts: Our Mutual Obligation*, 46 STAN. L. REV. 1285, 1285-87 (1994) (describing crucial role of CJRA in enabling Congress to help control federal caseload).

40. *See, e.g.*, Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1447 (1994) (cautioning that goal of uniformity underlying Federal Rules should not be compromised lightly); Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1393 (1992) (arguing that thirty-four federal courts' implementation of CJRA threatens continued viability of uniform, simple system of procedure). *See generally* Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 380-81 (1992) (stating that "[t]he Civil Justice Reform Act is at war with the concept of uniform procedural rules"). For a further discussion of the fragmentation of federal civil procedure, see *supra* note 24 and accompanying text.

41. *See, e.g.*, Lauren K. Robel, *Mandatory Disclosure and Local Abrogation: In Search of a Theory for Optional Rules*, 14 REV. LITIG. 49, 49 (1994) (finding "startling the explicit rejection of the uniformity principle in the text of a civil rule regulating lawyers' work"); Tobias, *supra* note 22, at 1611-17 (noting that "conflicting procedures complicate[] federal civil litigation for lawyers and litigants, especially for goverment and public interest attorneys who litigate in multiple districts, and it tested judges' and practitioners' tolerance for inconsistency"). *See also* FED. R. CIV. P. 26(a) (requiring mandatory disclosure, "[e]xcept, to the extent otherwise stipulated or directed by order or local rule"), *reprinted in* 146 F.R.D. 401, 431-32 (1993). For a discussion of the original Federal Rules of Civil Procedure, see *supra* note 22 and accompanying text. *See generally* Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1393 (1994) (concluding that reform of civil discovery has created balkanization and confusion in civil justice system); Carl Tobias, *The Transmittal Letter Translated*, 46 FLA. L. REV. 127, 129 (1994) (describing 1983 revision of Rule 11 as "most controversial revision of the civil rules ever promulgated").

42. *See, e.g.*, Robel, *supra* note 41, at 51, 61 (suggesting Advisory Committee lacks commitment to fundamental aims of procedural system); Carl Tobias, Death Knell for National Rule Revision: Hearings on H.R. 988 (1995) (unpublished manuscript, on file with author). *See generally* Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 795 (1991) (suggesting that adoption of disclosure amendment signals decline of

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

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

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

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Advisory Committee's role as procedural rule-drafting body); Charles Alan Wright, *Foreword: The Malaise of Federal Rulemaking*, 14 REV. LITIG. 1, 8 (1994) (describing deterioration of national rulemaking process).

43. *See* CONTRACT WITH AMERICA, *supra* note 38; H.R. 988, 104th Cong. (1995) (proposing to amend Federal Rule of Civil Procedure 11); Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699, 723-24, 734-37 (1995) [hereinafter Tobias, *Common Sense*] ("Passage of the legislation would . . . extend the unwise, disruptive practice of Congressional intervention in the rule revision process."). *See generally* Carl Tobias, *The 1993 Revision of Federal Rule* 11, 70 IND. L.J. 171, 171 (1994) (examining process of revising Federal Rule 11). For a further discussion of the erosion of the Advisory Committee's rulemaking authority, see *supra* note 42 and accompanying text.

44. *See* BAKER, RATIONING JUSTICE, *supra* note 28, at 33 (describing sense of crisis in federal appellate courts); *Report of Subcommittee on Administration, Management, and Structure*, 2 FEDERAL COURTS STUDY COMMITTEE 109 (1990) (stating that yearly caseload of average court of appeals judge has nearly tripled in past three decades); *see also* AO ANNUAL REPORT, *supra* note 37, app. 1, at 2 (showing that filings in regional courts of appeals declined slightly in 1994 for first time since 1978). *See generally* Tobias, *supra* note 30, at 1395 (assessing growing caseload in federal courts).

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

46. This constitutes a constant refrain in the annual end of the year reports on the state of the federal judiciary compiled by Chief Justice William H. Rehnquist. *See, e.g.*, William H. Rehnquist, *1995 Year-End Report on the Federal Judiciary* (1995) (predicting that fiscal austerity will demand closer attention to how efficiently judicial machinery operates), *reprinted in* 19 AM. J. TRIAL ADVOC. 491, 495-501 (1996); William H. Rehnquist, *1994 Year-End Report on the Federal Judiciary* (1994) (recognizing "need to allocate resources rationally in the face of fiscal austerity and rising caseloads"), *reprinted in* 27 THE THIRD BRANCH (Fed. Judicial Ctr., Wash., D.C.), Jan. 1995, at 1; *see also President Signs FY 94 Appropriation Bill For Judiciary*, 25 THE THIRD BRANCH (Fed. Judicial Ctr., Wash., D.C.), Nov. 1993, at 1 (stating

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

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

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

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

48. *See* Letter from J. Clifford Wallace, Chief Judge, U.S. Court of Appeals for the Ninth Circuit, to Chief Justice William H. Rehnquist, Attorney General Janet Reno, then-Senate Judiciary Committee Chair Joseph Biden, and then-House Judiciary Committee Chair Jack Brooks (Mar. 29, 1993) (suggesting three-branch conference to study federalization), *reprinted in* Marshall, *supra* note 38, at 738-45 [hereinafter Wallace Letter]; *see also* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978) (discussing polycentricity).

49. *See* Wallace Letter, *supra* note 48, at 742 (advocating convocation as opportunity to address problem of federal court docket control triggered by unchecked federalization). There have recently been several convocations.

relatively specific, practical illustration would be the imposition of a moratorium on federal civil rule revision, pending the conclusion of Civil Justice Reform Act experimentation, its thorough, expert evaluation and congressional resolution of the legislation's future.[50]

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

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

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

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

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