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The Burger Court, 1969-1979: Continuity and Contras

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OBSERVATIONS

THE BURGER COURT, 1969-1979: CONTINUITY AND CONTRAST*

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I. Transitions in Chief Justiceships

It is convenient to measure the time periods in the history of the Constitution and the Supreme Court by the appointment of a new Chief Justice, an event that dramatizes or personalizes the end of one era and the beginning of another. This standard of measurement and evaluation may be largely superficial, however, since there is seldom a planned transition from one Chief Justice to his successor.[1] If one nevertheless looks for continuity and contrast in the Supreme Court during the past ten years under the present Chief Justice vis-à-vis the Warren Court that preceded it, one must be certain to consider two aspects of the business of the office—the development of consistent criteria of decision making on the bench and the administrative supervision of the complete federal judicial operation.[2] The office of the modern Chief Justice as it has evolved since World War II demands a large proportion of the incumbent's time and energy in overseeing the operation of the judicial system as a whole, and the assessments of the Chief Justice's performance have tended to overlook these functions that comprise virtually one-third of his statutory responsibility.

The first decade of the Burger Court already has produced a great deal of commentary, particularly in the mass media, that focuses almost exclusively on a supposed shift in constitutional doctrine.[3] This emphasis by commentators on what they viewed as doctrinal change can be attributed to the anticipation, which arose from the announcements of President Nixon's first appointments to the bench, that the Court was going to break sharply with the judicial activism of the Warren era. Those who regarded the earlier period as the shape of the future were prepared to decry this break as an effort to turn back the clock; the prompt disposition to label the new Chief Justice's administration as "the Nixon Court," a phrase with a clearly pejorative connotation, reflected this attitude. To those who expected "the Nixon Court" to begin at once to overturn the decisions of the Warren period, it must have been a matter of considerable surprise and chagrin when, in Chief Justice

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[1] Of the twentieth century Chief Justices, Fuller, White, Stone, and Vinson died while on the bench; of the other three—Taft, Hughes, and Warren—only Hughes apparently was consulted on the matter of his successor. *See* M. Pusey, Charles Evans Hughes 787-88 (1951). *See generally* A. Mason, Harlan F. Stone: Pillar of the Law (1956). The nature of the office and the fact there are usually eight experienced Justices remaining from the antecedent administration make transition smoother than in the case of a change in the executive branch. *See* L. Henry, Presidential Transitions 4-7 (1960).

[2] *See generally* Swindler, *The Chief Justice and Law Reform*, 1971 Sup. Ct. Rev. 241, 246-47.

[3] *See, e.g.*, B. Woodward & S. Armstrong, The Brethren (1979).

Burger's first term, *Alexander v. Holmes County Board of Education*[4] appeared to follow consistently in the footsteps of Earl Warren and his associates. In the ensuing decade, a kind of "gamesmanship" has developed in the process of scanning succeeding terms and their leading constitutional decisions, resulting in a more erratic performance by the observers than by the Court.[5]

This writer believes that the record of the Burger Court, both in the areas of constitutional decision making and the administration of the nation's courts, will show more continuity than contrast with the Warren Court. In the area of judicial administration, continuity and continued activism are the dominant characteristics of the Burger Court. Both on the bench and at the Judicial Conference of the United States, transition from the Warren to the Burger administration has been a product of the nature of events; it is the result of the issues presented for adjudication and the continuing pressure for streamlining the judicial process, rather than the result of a planned transition. Moreover, the differences that can be discerned between the constitutional doctrines of the Warren and Burger Courts, as well as the differences in the two Chief Justices' approaches to the administration of the federal judicial system, reflect the temper of their respective times. For example, the last half of the 1960s was marked by the climax in the violent confrontations of the Vietnamese "police action," both domestically and internationally, and the entire decade was a period of increasing judicial activism.[6] The decade of the 1970s, the scope for this review, has been almost equally divided between the Watergate crisis and the struggle to regain social, economic, and political equilibrium, and the fundamental characteristic of the Burger Court may prove to be its search for equilibrium.

II. CONTINUITY IN CONSTITUTIONAL DOCTRINE: DEFINING THE LIMITS OF BROAD COMMITMENTS

Because the Supreme Court is composed of nine highly independent individuals, of whom the Chief Justice is only one, the emergence of a "new" Court must await a series of replacements before a philosophically different majority becomes a reality. The brouhaha over the resignation of Justice Abe Fortas, even before the new Chief Justice had assumed office, created the impression that President Nixon was going to dismantle the Warren Court in short order.[7] Arguably, the United States Senate recognized this possibility and made history, of a sort, by rejecting the first two Presidential nominations for the Fortas chair.[8] By the time the Senate had confirmed the third nominee, the Burger Court had virtually completed its first term. The next two appointments were made midway through 1972. Score-

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[4] 396 U.S. 1218 (1969) (per curiam). (The Court reversed the Fifth Circuit's grant of a delay in the implementation of the Mississippi school desegregation plan.)

[5] *See, e.g.*, Stephens, *The Burger Court: New Dimensions in Criminal Justice*, 60 GEO. L.J. 249 (1971); Kurland, *Enter the Burger Court: The Constitutional Business of the Supreme Court, O.T. 1969*, 1970 SUP. CT. REV. 1.

[6] Swindler, *The Warren Court: Completion of a Constitutional Revolution*, 23 VAND. L. REV. 205 (1970). This article traces the development of constitutional doctrine from the constitutional crisis of the Hughes Court in 1937 to the present. For a discussion of issues arising after World War II, a period in which the Warren Court served as a transitional medium, *see* A. COX, THE WARREN COURT (1968).

[7] *See* W. SWINDLER, 2 COURT AND CONSTITUTION IN THE 20TH CENTURY 340 (1970).

[8] *See* R. SHOGAN, A QUESTION OF JUDGMENT (1972); Swindler, *The Politics of "Advice and Consent,"* 56 A.B.A.J. 533 (1970).

keepers could not categorically proclaim that the Warren Court had been reduced to a minority until President Ford made an appointment in 1975.

Statistically, the Warren Court quickly disposed of its unfinished business. Among the more than four hundred orders that the Warren Court handed down in May and June of 1969, at least thirty-four orders were for reargument, probable jurisdiction, amended petitions, granting of certiorari, and the like, *i.e.,* matters carried over to the October term. The remaining orders were denials.[9] The incoming Burger Court handed down twenty-six per curiam opinions on its first "opinion day," October 27, 1969. Some of these opinions concerned continuations from the previous term and others involved petitions filed during the summer recess and settled on the briefs, without oral argument. The Court had disposed of most of the other holdovers by November 10, including *Alexander,* the school desegregation case.

The specific constitutional propositions of the Warren years should be identified in order to consider how they have fared during the 1970s. The racial equality cases are probably the most popular landmark of the Court's history between 1954 and 1969, followed by the voter equality cases,[10] which Warren himself considered his most significant contribution to American constitutional government.[11] The issue of defendants' rights comprised the arena in which students of the present Court have waged their principal and most vociferous battles.[12] The Court's treatment of first amendment issues can not of course be overlooked, although the mass media, alternately hailing favorable first amendment opinions and loudly bewailing opinions that they considered to be denials of their "rights," have focused perhaps disproportionate attention on the Warren Court's treatment of those issues and of the Bill of Rights generally.[13] The measure of change wrought during the Burger years would seem to be the degree to which the decisions since 1969 have extended or limited the major Warren Court doctrines. As a factor encouraging changes by the Burger Court, the usually broad generalizations in which the major constitutional doctrines of the Warren Court were cast made it incumbent on the successor to fill in the details, which may be a way of setting limits or defining parameters.[14] Counterbalancing this impulse, the Burger Court's commitment to the tradition of stare decisis made it inclined to accept the precedents set by the prevailing majority jurisprudence from 1937 to 1969.[15]

A. From Brown *to* Bakke *to* Weber

From racial discrimination to "reverse discrimination" was perhaps the predictable

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[9] *See* 395 U.S. 909-76 *passim* (1969).

[10] *See, e.g.,* Reynolds v. Sims, 377 U.S. 533 (1964).

[11] *See* Interview with Earl Warren, Former Chief Justice of the United States Supreme Court, in Boston (1972) (interview available on videotape cassette from WGBH/Boston television station).

[12] *See generally* H. BLACK, A CONSTITUTIONAL FAITH 43-63 (1968) [hereinafter cited as BLACK].

[13] One of the most comprehensive summaries of the application of the first amendment to the news media is the handbook, NATIONAL COLLEGE ON THE STATE JUDICIARY, COURTS AND THE NEWS MEDIA (1973).

A common trend evident in the Warren years is the majority's tendency to treat the guarantees of the fourteenth amendment as virtually self-executing. This is another way of describing the "absolutes" proclaimed by the Justice Black, particularly with regard to the first amendment and the incorporation of most of the Bill of Rights into the due process and equal protection clauses of the fourteenth amendment. *See* Interview with Justice Black, *reprinted in Justice Black and the Bill of Rights,* 9 S.W.U. L. REV. 937 (1977).

[14] *See generally* Swindler, *supra* note 6.

[15] *See generally* Swindler, *supra* note 6; A. Cox, *supra* note 6.

course of the law during the past quarter-century. After the vociferous defiance by supporters of states' rights in the decade immediately following the two *Brown* decisions,[16] the ultimate question of balancing the rights of minorities and majorities became more pressing. If the Warren Court had still been in existence, it would have had to face this issue. Since it was the Burger Court that dealt with both *University of California Regents v. Bakke*[17] and *United Steelworkers of America v. Weber*,[18] anti-Burger and pro-Warren commentators have felt free to speculate on the way in which the predecessor Court would have addressed the issues. These commentators tend to view the position of the Court under Warren as being fairly consistent with a commitment to redress the socio-political imbalance that had characterized the seventy-five years of American history prior to the *Brown* decisions,[19] even though Justice Black appeared to be searching for parameters at the end of the Warren period.[20] They have been quick to sound alarms at what they see as attempts by the Court since 1969 to limit the Warren Court's decisions.

The Burger Court undertook to describe the constitutional parameters within which it would apply Warren Court doctrine and beyond which it believed it could not go. In 1971, in an opinion of the Court, the Chief Justice concluded that there was no "constitutional command . . . that every school in every community must always reflect the racial composition of the school system as a whole."[21] The following year, the same Court by an evenly divided decision let stand a Fourth Circuit Court of Appeals holding that the federal question was settled when the trial court had admitted evidence of the elimination of state-imposed segregation.[22] In a 1972 racial discrimination case involving a private club, a six-to-three majority held that fourteenth amendment restraints were inapplicable when no persuasive evidence existed that state authority had "significantly involved itself with invidious discrimination."[23] In *Keyes v. School District*[24] the Court undertook a brief but somewhat esoteric discussion of the distinctions between de jure and de facto segregation.

By 1973, the general constitutional debate had divided into two parts. One addressed specific matters connected with implementing the established constitutional doctrine of desegregation of state provided or state licensed public facilities and services. It centered on the busing issue. The other addressed the qualification or limitation of the desegregation doctrine and focused on preferential policy. Busing, the incipient fourteenth amendment issue of the late 1960s, was considered by the last terms of the Warren Court only in preliminary fashion[25] and became the first

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[16] *See* W. SWINDLER, *supra* note 7, at 229-30.

[17] 438 U.S. 265 (1978). (Court held that quotas for minority admissions to medical school are illegal but that race may be weighed in admission decisions.)

[18] 99 S. Ct. 2721 (1979). (Court held that Title VII's prohibition against racial discrimination does not make illegal all private, voluntary, race-conscious affirmative action plans.)

[19] Brown v. Board of Educ., 347 U.S. 483 (1954); Brown v. Board of Educ., 349 U.S. 294 (1955).

[20] *See, e.g.*, Younger v. Harris, 401 U.S. 37, 50-54 (1971); *In re* Winship, 397 U.S. 358, 377 (1970) (Black, J., dissenting); Daniel v. Paul, 395 U.S. 298, 309 (1969) (Black, J., dissenting); Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 515 (1969) (Black, J., dissenting).

[21] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24 (1971).

[22] Richmond School Bd. v. State Bd. of Educ., 412 U.S. 92 (1973) (per curiam) (Powell, J., not participating).

[23] Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972).

[24] 413 U.S. 189 (1973). (According to the Court, the differentiating factor is the purpose or intent to segregate.)

[25] *See generally* Swindler, *supra* note 6, at 451.

new aspect of the desegregation doctrine of the early 1970s.[26] Once the Court had established the parameters of the doctrine itself in cases between 1969 and 1972,[27] the line of decisions to the most recent term has been generally consistent in the degree to which it places the responsibility on the state to remedy past conditions of segregation.

During the latest terms of the Burger Court, the interests of both the media and the legal profession have shifted to the second, and far more subtle, question of qualitative, subjective, or deliberate application of criteria intended to promote equality of treatment for individuals. After a period of toying with "suspect classifications" and other subjective tests,[28] the Court secured a momentary respite in the 1973 case of *DeFunis v. Odegaard*[29] by finding the question moot. It ultimately addressed the question in *Bakke* in 1978 and more recently in *Weber*. With these two cases, the final parameters of a doctrine that began in the last term of the Vinson Court and the first term of the Warren Court may be coming into view. These two cases, by balancing or qualifying each other, may be establishing a state of equilibrium, and their significance lies not so much in what was specifically adjudicated as in the values that can be inferred from the language of the opinions.

Simply put, the ultimate question in *Bakke* was how an essential social need, the selection and training of physicians, could be most equitably met. Two state courts had dealt with preferential admission of minority applicants who were selected from a pool of applicants meeting certain minimum qualifications.[30] The qualification requirement defines the paramount social interest in having competent physicians. The *Bakke* Court weighed the social interests involved and suggested that when not enough qualified candidates from a disadvantaged group are available, having qualified physicians is the stronger interest.

In *Weber* the Court put greater emphasis on economic than on social needs. In the *Weber* case, the Court was seeking parameters for the "affirmative action" criteria that had been vigorously advanced by the government during the preceding fifteen years.[31] This was the fundamental question in *Bakke*, but, as the majority opinion in *Weber* stressed, the *Weber* case did "not involve state action" and hence did "not present an alleged violation of the Equal Protection clause."[32] The agreement between Kaiser Aluminum & Chemical Corporation and the United Steelworkers of America "was an affirmative action plan voluntarily adopted by private parties to eliminate traditional patterns of racial segregation."[33] Having satisfied itself that this was the true purpose of the agreement and that the agreement was within the purposes of Title VII of the Civil Rights Act, the majority found no

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[26] *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977). (The *Dayton* Court held that finding nonhomogeneous pupil population in a school system alone is not a violation of the fourteenth amendment absent a showing that this condition resulted from intentionally segregative actions by the school board. In Columbus Bd. of Educ. v. Penick, 99 S. Ct. 2941 (1979), the Court applied the *Dayton* criteria and found a constitutional violation.)

[27] *See generally* Swindler, *supra* note 6, at 451-52.

[28] *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971). (The Court held that resident aliens are protected by the fourteenth amendment, and any state law that discriminates against them violates the equal protection clause.)

[29] 416 U.S. 312 (1974). (*DeFunis* was a "reverse discrimination" case.)

[30] Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976); DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973).

[31] 99 S. Ct. at 2727-28.

[32] *Id.* at 2726.

[33] *Id.*

compelling or paramount social interest to require preferential admission to a training program for a better qualified white candidate over a candidate from the group the agreement sought to assist.[34]

Bakke and *Weber* are representative of the positions taken by the Burger Court during the 1970s on issues arising respectively from areas of public or social concerns and private or economic interests. Preferential treatment for minorities victimized by past discrimination resulting from the desegregation doctrine established by the Warren Court lead inevitably to conflicts among the affected groups. The Burger Court was called upon to strike a balance among these groups, and *Bakke* and *Weber* were a first attempt in this direction.

B. Apportionment: A Closed Matter?

When the Warren Court broke new ground in the area of malapportionment, to the accompaniment of dire warnings about "political thickets,"[35] its first objective was to define the basis of jurisdiction under the fourteenth amendment; in its expanding examination of the matter, it never reached the stage of setting metes and bounds. By the end of its term in June 1969, the Court rejected a maximum specific ratio of population variance.[36] By 1971 the Burger Court, speaking through Justice Marshall, concluded that strict mathematical equality or uniformity was not justified, at least at the level of county government.[37] Subsequently, the Court held that proof of an intent to discriminate was a prerequisite to invoking equal protection restraints,[38] and that the initiative lay with the states to devise a "fair and effective representation" formula.[39]

Despite such departure, the position of the Burger Court throughout the 1970s has been consistent with the basic proposition enunciated by the Warren Court in 1962 in *Baker v. Carr;*[40] whatever discriminates significantly against any group of voters placed within any type of electoral unit is potentially subject to equal protection scrutiny.[41] In 1977 the Court upheld a New York referendum law and determined that the test of validity was whether a practical difference existed in interests between the groups.[42] In 1978 the Court concluded that, when an issue of voting equality was not directly involved, the equal protection test was whether the state action had "some rational relationship to a legitimate state purpose."[43]

These cases suggest an effort to define the boundaries for the undisturbed principles established in this area by the pre-1969 cases. Moreover, the steadily declining

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[34] *Id.* at 2730.

[35] *See* McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection,* 61 MICH. L. REV. 645 (1963).

[36] Kirkpatrick v. Preisler, 394 U.S. 526 (1969). (The Court held that there can be no substantial deviation from mathematical equality of population among congressional districts in the absence of a special justification.)

[37] Abate v. Mundt, 403 U.S. 182 (1971).

[38] White v. Regester, 412 U.S. 755 (1973). (The Court held that in a reapportionment plan for Texas, an average deviation of all districts from the ideal of 1.82% did not violate equal protection. Evidence of deviation alone was not sufficient to establish a prima facie case of invidious discrimination.)

[39] Gaffney v. Cummings, 412 U.S. 735 (1973). (The Court held that state reapportionment was the task of local legislatures or organs of state government and that state plans should not be invalidated on the basis of no more than minor population variations among districts.)

[40] 369 U.S. 186 (1962).

[41] *Id.* at 207-08.

[42] Town of Lockport v. Citizens for Community Action at the Local Level, 430 U.S. 259 (1977).

[43] Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 70 (1978).

number of these cases indicates that reapportionment has settled into an established and accepted principle of national life.

C. Survival and Change in Gideon, Miranda, *and Other Defendant's Rights Cases*

The third area of the Warren Court's search for constitutional equality concerned the uniform treatment of individuals in the criminal process. The trends established by the Warren Court in that area have been limited by the Burger Court[44] in ways that Justice Harlan had demanded in response to positions taken by Justices Black and Douglas.[45] These limitations affect the right-to-counsel cases,[46] the continuum of guarantees in the fourth, fifth, and sixth amendments, generally, and the extension of those holdings to the states through the fourteenth amendment.[47]

For example, in the right-to-counsel area, the Burger Court in 1972 unequivocally declared in *Argersinger v. Hamlin*[48] that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[49] In the last term, Justice Rehnquist, writing for a majority of five, held that the rule in *Argersinger* should not be extended to cases in which a defendant has been convicted of a statutory offense without imposition of penal sanctions.[50]

The *Escobedo v. Illinois*[51] and *Miranda v. Arizona*[52] decisions concerning self-incrimination, which complemented *Gideon,* represented for liberals the apogee of Warren Court jurisprudence and hence a major test of possible revisionism by the Burger Court. Critics of the Burger Court were certain that they had spotted a trend in 1971 in *Harris v. New York,*[53] in which the Chief Justice, writing for the majority, said that the constitutional privilege against self-incrimination "cannot be construed to include the right to commit perjury."[54] In the next term, however, the Court upheld the constitutionality of a federal immunity statute,[55] and in 1973 the Court rendered a similar decision concerning state immunity laws.[56] In 1977 a five-to-four majority held inadmissible self-incriminating statements elicited after a *Miranda* warning had been given but before the defendant could consult counsel.[57]

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[44] *See, e.g.,* Schneckloth v. Bustamente, 412 U.S. 218 (1973) (The Court held that the fourteenth amendment does not require the policy to forgo all questioning. The test is voluntariness.); Brady v. United States, 397 U.S. 742, 752 (1970) (The Court held that as long as the defendant was advised by competent counsel, and was made aware of the nature of the charge against him, a guilty plea under an indictment subjecting the defendant to a maximum penalty of death is valid even though the plea might have been motivated by fear of receiving a possible death sentence after a jury trial.).

[45] Miranda v. Arizona, 384 U.S. 436, 504 (1966) (Harlan, J., dissenting); Escobedo v. Illinois, 378 U.S. 478, 492 (1964) (Harlan, J., dissenting); Gideon v. Wainwright, 372 U.S. 335, 349 (1963) (Harlan, J., concurring).

[46] *See, e.g.,* Gagnon v. Scarpelli, 411 U.S. 778 (1973); Coleman v. Alabama, 399 U.S. 1 (1970) (dicta).

[47] *See generally* Swindler, *supra* note 6.

[48] 407 U.S. 25 (1972).

[49] *Id.* at 37.

[50] Scott v. Illinois, 440 U.S. 367, 369 (1979).

[51] 378 U.S. 478 (1964).

[52] 384 U.S. 436 (1966).

[53] 401 U.S. 222 (1971). *See, e.g.,* Howard, *Mr. Justice Powell and the Emerging Nixon Majority,* 70 MICH. L. REV. 445, 453 (1972).

[54] 401 U.S. at 225.

[55] Kastigar v. United States, 406 U.S. 441 (1972). (Court held that by granting immunity the federal government can compel testimony from an unwilling witness who has invoked the fifth amendment.)

[56] Lefkowitz v. Turley, 414 U.S. 70 (1973).

[57] Brewer v. Williams, 430 U.S. 387 (1977).

Many critics, however, expressed doubt whether this opinion offset a 1975 case that held to the contrary.[58]

Despite its zeal in incorporating guarantees of the Bill of Rights into the fourteenth amendment due process and equal protection clauses, the Warren Court never reached the ultimate goal of many liberals and humanitarians of defining the eighth amendment provision concerning "cruel and unusual punishment" to cover the death penalty. When the Burger Court defined the eighth amendment in this way in *Furman v. Georgia*,[59] the divided opinions of the majority confused liberals and troubled conservatives and led to qualifying decisions that did little to mollify either group.[60] State efforts to redefine death penalty statutes within the *Furman* guidelines have been upheld in some instances[61] and rejected in others,[62] with no consistent doctrine yet emerging.

As the continuing discussion in the death penalty cases demonstrates, the criminal jurisprudence of the pre-1969 Court has been limited less by a palpable effort in the 1970s to draw back from advanced positions than by a concern for more explicit standards.[63]

D. The First Amendment—Whose Right?

Although first amendment rights appeared to be unlimited under the Black-Douglas doctrines of "absolutes" and "penumbras,"[64] the Douglas "penumbras" doctrine articulated in *Griswold v. Connecticut*[65] arguably reached its zenith under the Burger Court in its abortion decision, *Roe v. Wade*.[66] With respect to freedom of speech the self-appointed guardian of unlimited communications, the communications industry, has been caught between decisions concerning first amendment

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[58] Michigan v. Mosley, 423 U.S. 96 (1975).

[59] 408 U.S. 238 (1972). (Court held that the death penalty is "unusual" if it discriminates against a defendant on grounds of race, religion, wealth, social position, or class.)

[60] *See, e.g.*, Lockett v. Ohio, 438 U.S. 586 (1978). (Court held that the Ohio death penalty statute violated the eighth and fourteenth amendments because it did not permit the sentencing judge to consider as mitigating factors the defendants character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime.)

[61] *E.g.*, Proffit v. Florida, 428 U.S. 242 (1976). (Court upheld the Florida death penalty statute, which required the sentencing judge to consider specific aggravating and mitigating factors and to set forth written findings when the death penalty was imposed, and which called for review by the Florida Supreme Court.)

[62] *E.g.*, Roberts v. Louisiana, 431 U.S. 633 (1977). (Court held that the Louisiana statute requiring a mandatory death sentence for killing a peace officer violated the eighth and fourteenth amendments because the statute did not allow for particularized mitigating factors.)

[63] *See generally* Swindler, *supra* note 2. The Court has also made a concerted effort to reduce the subjects of review by the federal courts of state criminal process. For example, in Rakas v. Illinois, 439 U.S. 1122 (1978), the Court held that the only persons entitled to challenge a search were those with a possessory interest in the automobile or in the property seized, or those with a legitimate expectation of privacy in the glove compartment or area under the seat of the vehicle in which they were passengers. Something of a paradox has resulted from its efforts because the Court, apparently seeking ways to reduce the burden of cases that come to federal courts under the sixth and eighth amendments, has found state courts competent to dispose of constitutional issues concerning nonunanimous criminal verdicts. *See* Apodaca v. Oregon, 406 U.S. 404 (1972). In Williams v. Florida, 399 U.S. 78 (1970), the Court upheld the conviction of a defendant who had been convicted by a six-person jury. This has inspired some federal courts to extend these state procedures to their own courts by local rules. For a discussion of six-man juries, *see* Address by Edward J. Devitt, Eighth Circuit Judicial Conference (Lusten, Minn., June 30, 1971), *reprinted in* 53 F.R.D. 273, 277-78 (1972).

[64] *See* BLACK, *supra* note 12, at 43-63.

[65] 381 U.S. 479, 484 (1965).

[66] 410 U.S. 113 (1973).

freedoms that it praised extravagantly, for example, the Pentagon Papers case,[67] and other first amendment decisions that it decried with equal extravagance. It may be useful to focus upon what was virtually dictum in *Gannett Co. v. DePasquale*,[68] a case that has produced a cacophony of gored oxen among the media.

Presumably the media, forever justifying their demands with the slogan, "the people's right to know," would reject at the outset Justice Stewart's statement of the basic issue in *Gannett*, namely, "whether members of the public have an independent constitutional right to insist upon access to a pretrial judicial proceeding, even though the accused, the prosecutor and the trial judge all have agreed to the closure of that proceeding in order to assure a fair trial."[69] Faced with Justice Stewart's recital of explicit sixth amendment language that "confers the right to public trial only upon a defendant and only in a criminal case"[70] and with Chief Justice Burger's concurring observation that "a hearing on a motion before trial to suppress evidence is not a *trial;* it is a *pre*trial hearing,"[71] the communications industry promptly attacked the *Gannett* decision with vehemence.

The opinion of the Court and the partial dissent were in accord with the basic proposition that either pretrial or trial proceedings may be closed at a stage in which a reasonable prospect exists that the right to a fair trial, the ultimate public right, will be prejudiced. The disposition of the communications industry to interpret these decisions as imposing a greater limitation on their first amendment freedoms than the Court intended[72] may have the danger of dulling the public's alertness to a real first amendment threat.

Regardless of the Chief Justice involved, the communications industry has tended to treat first amendment rights as property rights that the industry could enjoy, even to the point of defining on its own initiative what these property rights included. If Chief Justice Warren has become a hero to the media, it undoubtedly is the result of a convenient lapse of memory concerning Warren's criticisms of the industry's abuses. Conversely, the "Nixon Court" has suffered from industry criticism that conveniently disregards *United States v. Nixon*[73] and the Pentagon Papers case.[74] Even assuming that the dissenting part of Justice Blackmun's opinion in the *Gannett* case—that the sixth amendment guarantee is a public rather than an individual right—should eventually be accepted as controlling, it is essential to remember that it is a *public,* not an *industry,* right. This also applies to the guarantees of the first amendment.

This writer is aware of the truism that the only practical means of exercising the privileges of the Bill of Rights, generally, and of the first amendment, in particular, is through the functioning of a mass communications industry in private hands. Furthermore, the communications medium provides the only practical surveillance

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[67] New York Times v. United States, 403 U.S. 713 (1971). (Court denied the United States government an injunction against publication by newspapers of the contents of classified documents when the government failed to meet its burden of showing justification for the imposition of a prior restraint of expression.)

[68] 99 S. Ct. 2898 (1979).

[69] *Id.* at 2901.

[70] *Id.* at 2909.

[71] *Id.* at 2913.

[72] *See, e.g.,* Zurcher v. Stanford Daily, 436 U.S. 547 (1978). (Court generally inferred that the decision encouraged a disguised use of the general warrant.)

[73] 418 U.S. 683 (1974).

[74] New York Times Co. v. United States, 403 U.S. 713 (1971).

of government actions, and this surveillance is the very essence of democratic government. A private industry enjoying a public right, however, must act responsibly and intelligently. Even after a generation of discussion concerning this proposition, a substantial sense of division and ambivalence still persists.[75]

III. MANAGING THE FEDERAL JUDICIAL SYSTEM

The role of the Chief Justice as administrative head of the entire federal judicial organization acquired its modern character during the administration of Chief Justice William Howard Taft, who successfully lobbied through Congress the statute creating the Conference of Senior Circuit Judges, which is now the Judicial Conference of the United States.[76] The idea of a comprehensive oversight of the national court system developed in piecemeal fashion from Taft's day to the era of Chief Justice Earl Warren. The Administrative Office of the United States Courts was established in 1939.[77] In 1948 an amendment to the 1922 Act provided that reports of the Judicial Conference, and especially recommendations concerning pending or proposed legislation affecting the judiciary, be transmitted directly to Congress by the Chief Justice.[78] More recent enactments created the Federal Judicial Center, which opened its doors in 1967,[79] and provided for court administrators in all federal circuits.[80]

Chief Justice Warren recognized the potential of the Judicial Conference and began exploiting it during the first sessions over which he presided.[81] The Conference suggested that the United States District Courts adopt new rules for exclusion of repetitious evidence in antitrust cases, a practice that had contributed substantially to the long drawn-out trial of these cases. The meeting also recommended that Congress revise statutory provisions on habeas corpus and create a domestic relations court for the District of Columbia as a means of relieving the general trial docket of the district court in that circuit.[82] Reform of diversity jurisdiction in federal courts was placed on the Conference agenda in 1956, and in 1959 the Chief Justice requested the American Law Institute to undertake a Restatement-like study of this subject.[83] Throughout the 1960s, the Judicial Conference considered a lengthy calendar of other problems of judicial administration.

Warren also systematized the practice, more perfunctorily observed by his predecessors, of enlisting the help of the American Law Institute on specific problems of judicial administration. Chief Justice Burger has continued this practice and has extended it to an annual "state of the judiciary" address to the American Bar Association;[84] he also has taken advantage of opportunities to discuss these problems before various circuit conferences.[85] The urgency of modernization and re-

[75] *See* ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE 187 (2d ed. 1978).
[76] *See generally* Swindler, *supra* note 2.
[77] Act of Aug. 7, 1939, ch. 500, 53 Stat. 1223 (1939) (current version at 28 U.S.C. § 601 (1976)).
[78] Act of June 25, 1948, ch. 646, 62 Stat. 902 (1948) (current version at 28 U.S.C. § 332 (1976)).
[79] Act of Dec. 20, 1967, Pub. L. No. 90-219, 81 Stat. 664 (1967) (current version at 28 U.S.C. § 620 (1976)).
[80] Act of Jan. 5, 1971, Pub. L. No. 91-647, 84 Stat. 1907 (1971) (current version at 28 U.S.C. § 332(e) (1976)).
[81] 1954 JUD. CONF. REP. at 7.
[82] *Id.* at 7-8.
[83] 36 ALI PROCEEDINGS 31-34 (1959).
[84] *See* Swindler, *supra* note 2, at 241-43.
[85] *Id.* at 245-46.

form of the judicial process on both federal and state levels has led the present Chief Justice to devote substantial amounts of time to court management.[86] At a National Conference on the Judiciary in 1971, the Chief Justice promoted the establishment of a National Center for State Courts as a counterpart to the Federal Judicial Center.[87] The Chief Justice has frequently declared that improvement of the state judicial process will help alleviate the burdens on federal courts,[88] particularly if diversity jurisdiction can be further limited.

In 1972, the Chief Justice urged Congress to move more slowly in creating new statutory causes of action, perhaps proceeding only after a joint judiciary council has issued a kind of litigation impact statement.[89] Two years later he strongly encouraged the American Law Institute to consider means of streamlining probate procedures.[90] Although he supported the concept of a new National Court of Appeals between the circuit courts of appeal and the Supreme Court, three of his colleagues, Justices Brennan, Marshall, and Stewart, as well as the profession generally, opposed this idea.[91] In St. Paul, Minnesota, in 1976, on the seventieth anniversary of Roscoe Pound's speech, "Causes of Popular Dissatisfaction with the Administration of Justice," the Chief Justice recapitulated a number of his ideas for modernization and reform, including the nonjudicial disposition of minor disputes, arbitration of non-adversary or "no-fault" causes, simplification of real estate transactions, a balancing of the public interests represented in new economic development and the statutory guidelines for environmental protection, and the fashioning of methods for allocating compensation for third-party negligence without costly litigation.[92]

On February 11, 1979, the Chief Justice made a ten-year summary at the midwinter meeting of the American Bar Association and enumerated a number of major accomplishments resulting from the joint efforts of the courts and the profession: expanded and systematized information-gathering concerning the operation of the judicial system; more effective use of jurors at the trial level; significant consolidation of pretrial hearings; specific assignment of cases and greater use of the individual calendar; initiation of a modernized magistrate system; and closer judicial control over the litigation process.[93] Sharpening advocacy skills, a subject that held the attention of the media for an inordinate length of time, has given the Chief Justice an occasion to throw down a challenge to legal educators.[94]

IV. CONCLUSION

Far from departing from the activism of the pre-1969 Court, the Burger Court in this decade, in discharging its statutory duties in the administration of the judicial system, has if anything gone beyond the record of its predecessor. In the area of decision making, the Burger Court has more clearly delineated the fundamental

[86] *Id.* at 243-44.
[87] *See generally* W. SWINDLER, JUSTICE IN THE STATES (1971).
[88] *See* Swindler, *supra* note 2, at 242.
[89] *Id.* at 261.
[90] *See* Address by Warren Burger, American Law Institute Fifty-First Meeting (May 21, 1974).
[91] *See* Address by Warren Burger, American Law Institute Fiftieth Meeting (May 22, 1973).
[92] *See* Burger, *The Direction of the Administration of Justice,* 62 A.B.A.J. 727 (1976).
[93] *See* Address by Warren Burger, American Bar Association Midwinter Meeting (Feb. 11, 1979).
[94] *See* Address by Warren Burger, Fourth Circuit Judicial Conference (Jan. 29, 1979); Address by Warren Burger, American Bar Association Annual Meeting (Aug. 10, 1969).

propositions of the Warren years; despite Justice Marshall's widely publicized expressions of dissatisfaction in his circuit speeches in the spring of 1979, a dispassionate scrutiny of the fundamentals does not persuasively argue for any far reaching changes. Equality of treatment of minorities is a tenet originating in the Vinson era and continuing to the present, despite complaints that there is diminishing judicial pressure on government to exert itself beyond the public sector. Equality of electoral rights is now an all but settled principle of constitutional law, although engendering the regret in some circles that more cannot be done.[95] Furthermore, equality of criminal defendants has not been more narrowly defined by the Burger Court than it had been by Justice Black in his later years.[96]

The Court under Chief Justice Warren painted with bold strokes while its successor, the Burger Court, sharpened the detail. Rather than contrasting the accomplishments of the two Chief Justices, it would perhaps be more appropriate to view the two eras as a whole. A basis for future comparison would be, not between the Courts of Warren and Burger, but between the Warren and Burger period in the twentieth century and the Marshall and Taney era of the nineteenth.

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[95] *See Turning the Clock Back*, 38 PROGRESSIVE 11 (May, 1974).
[96] *See generally* BLACK, *supra* note 12.