

CIVIL PROCEDURE IN THE CHIEF JUSTICE’S YEAR-END REPORT ON THE FEDERAL JUDICIARY

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I. INTRODUCTION

On New Year’s Eve 2015, the Supreme Court released the 2015 Year-End Report on the Federal Judiciary.¹ This was Chief Justice John Roberts’ eleventh Report, the fifty-first in history, and the thirty-eighth circulated on the afternoon of New Year’s Eve.²

The Year-End Report originated with Warren Burger’s August 1970 speech at the Annual Meeting of the American Bar Association (ABA).³ The focus of that Report, as well as Burger’s first several, was the need to modernize the federal judiciary, which he described as operating with “cracker barrel corner grocer methods and equipment—vintage 1900” in a “supermarket age.”⁴

Forty-five years later, procedure remained on the agenda, with Roberts arguing for more efficient civil litigation and civil dispute

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1. JOHN G. ROBERTS, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2015) [hereinafter 2015 REPORT], *reprinted in* STATE OF THE FEDERAL JUDICIARY: ANNUAL REPORTS OF THE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES (Shelley L. Dowling ed., 2006) [hereinafter STATE OF THE FEDERAL JUDICIARY].

2. JOHN G. ROBERTS, 2020 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2020), <https://www.supremecourt.gov/publicinfo/year-end/2020year-endreport.pdf> [hereinafter 2020 REPORT]; JOHN G. ROBERTS, 2019 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2019), <https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf> [hereinafter 2019 REPORT]; John G. Roberts, 2018 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2018), <https://www.supremecourt.gov/publicinfo/year-end/2018year-endreport.pdf>; STATE OF THE FEDERAL JUDICIARY, *supra* note 1.

3. Warren E. Burger, Chief Justice, U.S. Sup. Ct., Remarks of Warren E. Burger to the American Bar Association (Aug. 10, 1970) [hereinafter 1970 Remarks], *reprinted in* STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at v.

4. 1970 Remarks, *supra* note 3, at 1; *see also* Warren E. Burger, Chief Justice, U.S. Sup. Ct., Remarks of Warren E. Burger to the American Bar Association (Aug. 14, 1972) [hereinafter 1972 Remarks], *reprinted in* STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at 1; Warren E. Burger, Chief Justice, U.S. Sup. Ct., State of the Federal Judiciary (Jul. 5, 1971) [hereinafter 1971 Remarks], *reprinted in* STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at 3.

resolution. Following his signature introductory historical exegesis, this time on the history of dueling, Roberts segued into the importance of amendments to the discovery provisions of the Federal Rules of Civil Procedure, which had taken effect earlier that month. He praised them as a “major stride toward a better federal court system” and a “step up to the challenge of making real change.”⁵

The 2015 Report attracted an unusual amount of public attention and sparked criticism along several fronts.⁶ Routine, relatively anodyne administrative documents do not often draw public focus. But that unique moment provides a starting point to consider the history and evolution of the Year-End Report and the special place of civil litigation and civil procedure in its origins, present, and future. This exploration of civil procedure in the Year-End Report provides a worthy cap to a volume devoted to the elevated place of civil procedure on the Roberts Court.⁷

II. HISTORY OF THE YEAR-END REPORT

A. Origins and Evolution

Burger spoke at August 1970 to the ABA Annual Meeting following his first full Term as Chief, then published the text.⁸ He returned to the meeting and published his remarks for the next three years.⁹ Political events in Washington in August 1974 presumably kept him from attending that annual meeting, so he delivered the 1974 Report in a

5. 2015 REPORT, *supra* note 1, at 9.

6. Adam M. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1 (2016); Michael C. Dorf, *Chief Justice Roberts Takes a Fourth Bite at the Apple*, DORFONLAW (Jan. 4, 2016), <http://www.dorfonlaw.org/2016/01/chief-justice-roberts-takes-fourth-bite.html>.

7. Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 314–15 (2012); *see also, e.g.*, Scott Dodson, *Personal Jurisdiction, Comparativism, and Ford*, 51 STETSON L. REV. 187 (2022); Richard D. Freer, *The Roberts Court and Class Litigation: Revolution, Evolution, and Work to Be Done*, 51 STETSON L. REV. 285 (2022); Lumen N. Mulligan, *28 U.S.C. § 1331 Jurisdiction in the Roberts Court: A Rights Inclusive Approach*, 51 STETSON L. REV. 201 (2022); Jeffrey A. Parness, *The Roberts Court and Lost ESI*, 51 STETSON L. REV. 335 (2022); Charles W. “Rocky” Rhodes, *The Robert’s Court’s Jurisdictional Revolution within Ford’s Frame*, 51 STETSON L. REV. 157 (2022).

8. 1970 Remarks, *supra* note 3, at 2; *Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx (last visited Dec. 13, 2021).

9. Warren E. Burger, Chief Justice, U.S. Sup. Ct., Report on the Federal Judicial Branch: Remarks of Warren E. Burger, Chief Justice of the United States, to the American Bar Association (Aug. 6, 1973) [hereinafter 1973 Remarks], *reprinted in* STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at 1; 1972 Remarks, *supra* note 4; 1971 Remarks, *supra* note 4.

speech to the Mid-Year Meeting in February 1975.¹⁰ In 1976, Burger disconnected the Report from the ABA meeting or from any public speech, issuing a written statement from the Court.¹¹ In 1978, he introduced the current practice of releasing the Report at the end of the workday on New Year's Eve.¹²

Burger's successors took office acknowledging the history of the Report, their newness to the job of Chief Justice, and their uncertainty in how they would proceed in the role. William Rehnquist wrote in 1986:

Whatever form these reports may take in the future, it is appropriate to continue the practice this year if only to pay tribute to Chief Justice Burger's tenure as the nation's chief judicial officer during a period of unprecedented growth in the federal courts' workload and workforce.¹³

Roberts' first Report in 2005 began:

I am pleased to carry on the tradition launched by Chief Justice Burger, and continued for the past 19 years by Chief Justice Rehnquist, of issuing on New Year's Day a report on the state of the federal courts. I recognize that it is a bit presumptuous for me to issue this Report at this time, barely three months after taking the oath as Chief Justice. It remains for me very much a time for listening rather than speaking. But I do not intend to start the New Year by breaking with a 30-year-old tradition. . . .¹⁴

Each continued the practice while placing his unique stamp on it. In 1995, Chief Justice Rehnquist restructured it; rather than writing a laundry list of issues and items, he identified and expounded on one theme (he called it a "leitmotif").¹⁵ Roberts has elevated it to an art form. A one-time, would-be historian, he opens each Report with a historical ditty, illustrating an annual theme or topic. Besides dueling, Roberts has

10. Warren E. Burger, Chief Justice, U.S. Sup. Ct., Annual Report on the State of the Judiciary (Feb. 23, 1975), *reprinted in* STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at 1 [hereinafter 1974 Report].

11. WARREN E. BURGER, YEAR-END REPORT ON THE FEDERAL JUDICIARY (1977), *reprinted in* STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at 1 [hereinafter 1976 REPORT]. The 1976 report was published on January 2, 1977.

12. WARREN E. BURGER, YEAR-END REPORT (1978), *reprinted in* STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at 1 [hereinafter 1978 REPORT].

13. WILLIAM H. REHNQUIST, 1986 YEAR-END STATEMENT, *reprinted in* STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at 3.

14. JOHN G. ROBERTS, 2005 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2006), *reprinted in* STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at 1.

15. WILLIAM H. REHNQUIST, 1995 YEAR-END REPORT ON THE FEDERAL JUDICIARY (1996) [hereinafter 1995 REPORT], *reprinted in* STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at 1.

discussed John Jay writing only five Federalist Papers and not getting a Broadway musical;¹⁶ the Great Hurricane of 1790;¹⁷ the Black Sox Scandal;¹⁸ and pneumatic tubes as an innovative technology for circulating documents.¹⁹

B. The Judiciary and Civil Litigation

Adam Feldman argues that choices of words and themes reflect the ethos of the authoring Chief Justice. For Roberts, that ethos is trust and faith in judges and the judiciary, an idea echoed in his opinions.²⁰

But trust and faith in the judiciary was a long time coming. Burger's early Reports hammered his belief that the judicial system was broken and needed fundamental reform. Recalling Roscoe Pound's 1906 ABA speech, Burger's inaugural Report lamented that "[i]n the supermarket age we are trying to operate courts with cracker barrel corner grocer methods and equipment—vintage 1900."²¹ In 1972 he complained of a "crisis of confidence in the judicial system"²² and in 1973 that courts were "still clinging, far too much, to practices [and] procedures" that were outdated when Pound called for change almost seventy-five years earlier.²³

Rehnquist offered a more optimistic take. In 1999, he discussed survey data showing "strong support for the justice system," with eighty percent of Americans holding a "great deal" or "fair" amount of trust in the federal judiciary, more than other branches. Another eighty percent agreed that "in spite of its problems, the American justice system is still the best in the world."²⁴

16. 2019 REPORT, *supra* note 2, at 1–2.

17. JOHN G. ROBERTS, 2017 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2017) [hereinafter 2017 REPORT], *reprinted in* STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at 1–2.

18. JOHN G. ROBERTS, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2011), *reprinted in* STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at 1–2.

19. JOHN G. ROBERTS, 2014 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2014), *reprinted in* STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at 1–3.

20. Adam Feldman, *Empirical SCOTUS: How Chief Justice Roberts Articulates His Ethos Through His Year End Reports*, SCOTUSBLOG, (Jan. 8, 2020, 10:23 AM), <https://www.scotusblog.com/2020/01/empirical-scotus-how-chief-justice-roberts-articulates-his-ethos-through-his-year-end-reports/>.

21. 1970 Remarks, *supra* note 3, at 1.

22. 1972 Remarks, *supra* note 4, at 1.

23. 1973 Remarks, *supra* note 9, at 1.

24. WILLIAM H. REHNQUIST, 1999 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2000), *reprinted in* STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at 2.

C. Historical Context

Rehnquist and Roberts have offered historical context by considering how major national and world events affect the judiciary in a given year. Burger never did this. For example, he did not mention Watergate in either 1974 or 1975,²⁵ despite its legal and political significance and the Court's central role in resolving that crisis.²⁶

Rehnquist's 2001 Report discussed how 9/11 affected the federal judiciary. He began with that morning's Judicial Conference meeting at the Supreme Court building, which was cancelled when the building was evacuated upon news of the first plane hitting the Towers. He recounted a second evacuation two months later, when traces of Anthrax were found in the off-site mailroom; the Court moved arguments from the building, recalling its relocation following the British burning of the Capitol in 1814.²⁷

Roberts has addressed historical moments in several reports, whether because he has served as Chief during more major historical events or because his historical interests prompt him to consider broader context. In 2020, he discussed the COVID-19 pandemic; after recounting the 1790 Yellow Fever epidemic, he explored courts' creativity in responding to the global outbreak.²⁸ In 2017, following a busy hurricane season affecting Puerto Rico, the Virgin Islands, Florida, and Texas, as well as wildfires in California, he began with the Great Hurricane of 1780, then discussed trial courts' developing plans to continue operating in the wake of natural disasters.²⁹ Roberts declined to write during the height of the Great Recession in 2009, "when so many of our fellow citizens have been touched by hardship."³⁰ He limited his statement to "what is essential: The courts are operating soundly, and the nation's dedicated federal judges are conscientiously discharging their duties."³¹

25. See WARREN E. BURGER, YEAR-END REPORT: THE CONDITION OF THE JUDICIARY (1976) [hereinafter 1975 REPORT], reprinted in STATE OF THE FEDERAL JUDICIARY, *supra* note 1:1974 Report, *supra* note 10.

26. Cf. *United States v. Nixon*, 418 U.S. 683 (1974).

27. WILLIAM H. REHNQUIST, 2001 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2002), reprinted in STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at 1.

28. 2020 REPORT, *supra* note 2, at 1–4.

29. 2017 REPORT, *supra* note 17, at 1–5.

30. JOHN G. ROBERTS, 2009 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2009), reprinted in STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at 1.

31. *Id.*

III. CIVIL PROCEDURE AND THE YEAR-END REPORTS

A discussion of the Year-End Report fits this volume's exploration of civil procedure in the Roberts Court because civil procedure has been a major and recurring theme in these Reports since their inception, up to, through, and beyond Roberts' scrutinized 2015 take on discovery. Four topics central to the study of federal civil procedure have appeared in multiple Reports, spanning years and Chief Justices.

A. Diversity Jurisdiction

Burger and Rehnquist made diversity jurisdiction³² a recurring theme. Burger discussed it in nine of his sixteen reports (all within his final fourteen) and Rehnquist in six of his nineteen (all within his first fourteen), making diversity jurisdiction a subject in fifteen Reports in less than thirty years.³³ This focus matched the judicial politics of the moment.³⁴

Diversity jurisdiction purports to provide a federal forum to protect a non-local party from the disadvantages of state-court bias in favor of a local adverse party.³⁵ Whatever the logic of that policy concern in 1789, Burger and Rehnquist insisted that conditions had changed in two centuries.³⁶ Burger's 1973 Report insisted that "there is no rational basis to put an automobile accident case in a federal court simply because the

32. 28 U.S.C. § 1332.

33. WILLIAM H. REHNQUIST, 1998 YEAR-END REPORT OF THE FEDERAL JUDICIARY (1999) [hereinafter 1998 REPORT], reprinted in STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at 7; WILLIAM H. REHNQUIST, 1997 YEAR-END REPORT ON THE FEDERAL JUDICIARY (1998), reprinted in STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at 6; WILLIAM H. REHNQUIST, 1991 YEAR-END REPORT ON THE FEDERAL JUDICIARY (1992) [hereinafter 1991 REPORT], reprinted in STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at 4; WILLIAM H. REHNQUIST, 1990 YEAR-END REPORT ON THE FEDERAL JUDICIARY (1990), reprinted in STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at 8; WILLIAM H. REHNQUIST, 1988 YEAR-END REPORT ON THE FEDERAL JUDICIARY [hereinafter 1988 REPORT], reprinted in STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at 2 n. 3; WILLIAM H. REHNQUIST, 1987 YEAR-END REPORT ON THE JUDICIARY [hereinafter 1987 REPORT], reprinted in STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at 7; WARREN E. BURGER, 1984 YEAR-END REPORT ON THE JUDICIARY [hereinafter 1984 REPORT], reprinted in STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at 11–12; WARREN E. BURGER, 1983 YEAR-END REPORT ON THE JUDICIARY, reprinted in STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at 6–7; WARREN E. BURGER, 1982 YEAR-END REPORT ON THE JUDICIARY, reprinted in STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at 5–6; 1978 REPORT, *supra* note 12, at 4–5; 1976 REPORT *supra* note 11, at 3–4; 1975 REPORT, *supra* note 25, at 6–7; 1974 Report *supra* note 10, at 7; 1973 Remarks, *supra* note 9, at 5; 1972 Remarks, *supra* note 6, at 11.

34. Richard D. Freer, *The Political Reality of Diversity Jurisdiction*, 94 S. CAL. L. REV. 1083, 1109–11 (2021).

35. Exxon Mobil Corp. v. Allapattah, 545 U.S. 546, 553–54 (2005); Scott Dodson, *Beyond Bias in Diversity Jurisdiction*, 69 DUKE L.J. 267, 268–69 (2019); Freer, *supra* note 34, at 1084–87; Howard M. Wasserman, *The Forum-Defendant Rule, the Mischief Rule, and Snap Removal*, 62 WM. & MARY L. REV. ONLINE 51, 57 (2021).

36. 1987 REPORT, *supra* note 33, at 7; 1988 REPORT, *supra* note 33, at 10; 1973 Remarks, *supra* note 9, at 5.

litigants reside in different states.”³⁷ Rehnquist continued this crusade, suggesting in 1987 (his second Report) that eliminating or curtailing diversity jurisdiction “merits serious consideration”³⁸ and complaining in 1988 (his third) that diversity cases comprised a growing percentage of the federal docket.³⁹

By 1991, Rehnquist recognized that eliminating diversity jurisdiction had proven “difficult,” but identified “more modest” ways of limiting it.⁴⁰ He supported a proposal prohibiting plaintiffs from filing diversity actions in federal court in their home states; the federal forum would be limited to plaintiffs seeking to avoid bias when suing on the defendant’s home court.⁴¹ This “Forum Plaintiff Rule” would have functioned as a counterpart to the “Forum Defendant Rule,” which prohibits defendants sued in their home states from removing diversity actions to federal court.⁴² Given diversity jurisdiction’s local-bias rationale, a local defendant does not need the protections of a federal forum against a non-local plaintiff. The plaintiff chose to forego those protections by suing on the defendant’s home turf; the defendant benefits from any local bias and does not need a federal forum for protection.⁴³ The Forum Plaintiff Rule applies that logic in reverse—a plaintiff pulling outsiders onto their home turf does not need the protections of a federal forum and should not have that option when any local bias runs in their favor.

Rehnquist celebrated a decrease in the percentage of diversity cases by 1995, attributing the change to a decrease in personal injury and products liability cases.⁴⁴ Cases decreased without Congress narrowing the scope of diversity jurisdiction as Rehnquist proposed and preceded by a year Congress raising the statutory amount in controversy to \$75,000.⁴⁵ Roberts has never discussed diversity jurisdiction in a Report.⁴⁶ This may reflect political, legal, ideological, and scholarly realignment surrounding diversity.

Richard Freer attributes this to a sharper understanding of bias. It is “counterintuitive and contrary to experience” to argue that geographic

37. 1973 Remarks, *supra* note 9, at 5.

38. 1987 REPORT, *supra* note 33, at 7.

39. 1988 REPORT, *supra* note 33, at 2 n.3.

40. 1991 REPORT, *supra* note 33, at 4.

41. 1998 REPORT, *supra* note 33, at 7; 1991 REPORT, *supra* note 33, at 4.

42. 28 U.S.C. § 1441(b)(2); Wasserman, *supra* note 35, at 57–58.

43. Wasserman, *supra* note 35, at 57–58.

44. 1995 REPORT, *supra* note 15, at 7 n.1.

45. Federal Courts Improvement Act of 1996, Pub. L. 104-317 § 205, 110 Stat. 3847 (1996) (amending 28 U.S.C. § 1332(a)).

46. See REPORTS cited *supra* note 2.

bias does not exist. But “bias” is more complicated than the simple picture of in-state or out-of-state. Bias can be regional (across many states) or sub-state (across areas within one state), and the degree of bias can vary by state.⁴⁷

Another change considers the role of the Bar, a powerful political force resisting efforts to limit or eliminate diversity jurisdiction and supporting efforts to expand it.⁴⁸ Although it is not clear why the Bar favors diversity,⁴⁹ Congress recognizes and respects that those who use the courts on behalf of clients and have experienced the difficulty of litigating in unfriendly forums want to retain choice and control over where to litigate.⁵⁰ And Roberts may understand similar concerns as he picks battles to fight in his Year-End Reports.

Finally, the political valence of diversity jurisdiction has shifted. Commentators and advocates view diversity and the federal forum as tools to protect corporate-defendant interests from business-unfriendly state courts and state juries.⁵¹ Corporate defendants want to litigate in federal court and to avoid “Judicial Hellholes”—plaintiff-friendly, corporate-defendant-unfriendly state courts—especially in mass-tort actions.⁵² That preference requires extending, rather than limiting or eliminating, diversity jurisdiction. Corporate interests pushed Congress to enact the Class Action Fairness Act, which expanded jurisdiction by allowing courts to hear large-scale class actions on minimal diversity, where at least one party is from a different state as at least one adverse party.⁵³ House Republicans and corporate-defendant advocates pushed a 2016 hearing to consider eliminating complete-diversity and establishing minimal diversity for all cases.⁵⁴

The new political alignment around diversity jurisdiction would reject Rehnquist’s Forum-Plaintiff Rule. Under that proposal, a local plaintiff could not sue an out-of-state corporation in federal court.⁵⁵ But that corporate defendant wants to be in federal court to avoid the

47. Freer, *supra* note 34, at 1113–14.

48. *Id.* at 1116.

49. *Id.* at 1113, 1118.

50. *Id.* at 1117–18.

51. Dodson, *supra* note 35, at 308–09; Freer, *supra* note 34, at 1112–13.

52. Georgene Vairo, *The Role of Influence in the Arc of Tort “Reform,”* 65 EMORY L.J. 1741, 1744 (2016); Penny J. White, *“The Appeal” to the Masses*, 86 DENV. U. L. REV. 251, 265 (2008).

53. Class Action Fairness Act, Pub. L. 109-2, 119 Stat. 4 (2005) (codified at 28 U.S.C. § 1332(d)); Freer, *supra* note 34, at 1112–13.

54. Ronald Weich, Dean, Univ. of Balt. School of Law, Exploring Federal Diversity Jurisdiction 9 (Sept. 13, 2016) (testifying before the Subcommittee on the Constitution and Civil Justice, within the Committee of the Judiciary of the House of Representatives, 114th Cong).

55. *Id.* at 5.

perceived judicial hellhole and its anti-corporate bias. Rehnquist's proposal runs counter to that preference, blocking the federal forum and keeping the case in state court.⁵⁶ Alternatively, if Rehnquist's proposal required a forum plaintiff to file in state court, the out-of-state defendant could remove, meaning the case lands in and must be adjudicated in federal court.⁵⁷ That outcome runs contrary to Rehnquist's goal of reducing the number and percentage of diversity actions on the federal docket, regardless of how they reach federal court.

B. Rulemaking Process

In his 1981 Report, Burger urged Congress to remove the Court from the rulemaking process under the Rules Enabling Act (REA).⁵⁸ Burger wrote that, "[i]n light of the Supreme Court Justices' ever-mounting burdens, it remains uncertain whether the Justices should set aside the time and effort required to examine proposed rules affecting the federal court system."⁵⁹ Roberts appeared more sanguine in 2015 when he described the REA process in detail:

This process of judicial rule formulation, now more than 80 years old, is elaborate and time-consuming, but it ensures that federal court rules of practice and procedure are developed through meticulous consideration, with input from all facets of the legal community, including judges, lawyers, law professors, and the public at large.⁶⁰

But Roberts downplayed the Court's role under the REA, mentioning in passing that proposed rules are submitted to the Court for approval.⁶¹ He focused on the committees studying, holding conferences and hearings, taking public comment, and reworking the discovery proposals over several years.⁶² While not echoing Burger's call to remove the Court from the process, Roberts accepted and furthered the view that the committees, rather than the Court, do the real rulemaking

56. *Id.* at 6–7.

57. *Id.* at 5, 10.

58. 28 U.S.C. §§ 2072–2074.

59. WARREN E. BURGER, YEAR-END REPORT ON THE JUDICIARY (1981), *reprinted in* STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at 17.

60. 2015 REPORT, *supra* note 1, at 4.

61. *Id.* at 3–4.

62. *Id.* at 4–6.

work.⁶³ In 2016, Roberts highlighted the many district judges serving on the Judicial Conference and the rules committees.⁶⁴

Roberts' emphasis on the committees' central role in procedural rulemaking highlights the importance of his power in appointing committee members,⁶⁵ as well as the need to scrutinize appointments and committee composition. Brooke Coleman highlighted the lack of race and gender diversity among committee members.⁶⁶ Stephen Burbank and Sean Fahrang and Patricia Moore emphasized the lack of political and ideological diversity—members are appointed by the Chief, most judge members were appointed to the bench by Republican presidents, and all share and espouse particular views of civil litigation.⁶⁷ The 2015 discovery amendments, narrowing and limiting the scope of discovery, illustrate these committees produce rules reflecting that shared viewpoint.⁶⁸

C. Changes to the Federal Rules of Civil Procedure

1. Highlighting Rules Changes

The three Chiefs have celebrated changes to the rules governing civil litigation, particularly changes that purport to streamline the judicial process, at the risk of limiting access to the courts.

Burger's 1983 Report discussed changes to Rule 11, on ethical obligations in litigation and sanctions, and Rule 26, on the scope of discovery; he highlighted the significance of the "pretrial stage" of litigation, how it affects the subsequent history of the case, and the need for greater judicial control over that phase.⁶⁹ These amendments imposed stricter requirements on parties in filing claims and other papers and in seeking evidence in discovery, while increasing and making more explicit a court's power to impose sanctions for violating

63. Wasserman, *supra* note 7, at 333–34.

64. JOHN G. ROBERTS, 2016 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2016) [hereinafter 2016 REPORT], *reprinted in* STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at 9.

65. DENIS STEVEN RUTKUS & LORRAINE H. TONG, CONG. RESEARCH SERV., RL32821, THE CHIEF JUSTICE OF THE UNITED STATES: RESPONSIBILITIES OF THE OFFICE AND PROCESS FOR APPOINTMENT (2005).

66. Brooke D. Coleman, *#SoWhiteMale: Federal Procedural Rulemaking Committees*, 68 UCLA L. REV. DISC. 370, 388–89, 396 (2020).

67. STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT; THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 244–45 (2017); Patricia W. Hatamayar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1087–88, 1144–49 (2015).

68. Moore, *supra* note 67, at 1086–87; Coleman, *supra* note 66, at 399.

69. WARREN E. BURGER, 1983 YEAR-END REPORT ON THE JUDICIARY, *reprinted in* STATE OF THE FEDERAL JUDICIARY, *supra* note 1, at 8.

the rules.⁷⁰ Burger returned to those amendments the following year, insisting that “already some positive results can be seen.”⁷¹

Roberts did the same with the 2015 discovery amendments, which he regarded as significant, contra the usual “modest and technical, even persnickety”⁷² rule changes. The amendments redefined discoverability under Rule 26(b)(1)⁷³ in three respects. They removed language defining relevant evidence as anything “reasonably calculated to lead to the discovery of admissible evidence.”⁷⁴ They eliminated so-called “subject matter” discovery, in which a party could obtain, on motion and with court permission, evidence relevant to the subject matter of the action, allowing parties to obtain evidence relevant to unpleaded claims arising from the same transaction or occurrence.⁷⁵ And they added a new element to the definition of discoverability, requiring that information be “proportional” to the needs of the case.⁷⁶ Roberts praised the last as a “common-sense” and “fundamental principle” that “lawyers must size and shape their discovery requests to the requisites of a case.”⁷⁷

But Roberts went further to emphasize judicial involvement and buy-in to the rules. Amendments achieve desired results “only if the entire legal community, including the bench, bar, and legal academy, step up to the challenge of making real change.”⁷⁸ He followed in 2016 by insisting that these changes were “beginning to have a positive effect” because judges were taking them seriously and were willing to wield the enhanced power to control their dockets.⁷⁹ Roberts likened judges applying the new rules to a lumberjack saving time by sharpening his ax in advance.⁸⁰

Chiefs follow familiar patterns when highlighting rules changes in their Reports. They emphasize changes that tighten civil litigation and erect barriers to court access, rather than those that loosen restrictions or open courthouse doors. Rehnquist did not mention, much less celebrate, the 1993 revisions to Rule 11,⁸¹ which made sanctions

70. *Id.* at 8–9.

71. 1984 Report, *supra* note 33, at 13.

72. 2015 REPORT, *supra* note 1, at 4.

73. Compare FED. R. CIV. P. 26(b)(1) (2014), with FED. R. CIV. P. 26(b)(1) (2015).

74. Steinman, *supra* note 6, at 33.

75. *Id.* at 36–37.

76. FED. R. CIV. P. 26(b)(1) (as amended); Steinman, *supra* note 6, at 28–37.

77. 2015 REPORT, *supra* note 1, at 6–7.

78. *Id.* at 9.

79. 2016 REPORT, *supra* note 64, at 6–7.

80. *Id.* at 16–17.

81. FED. R. CIV. P. 11 (as amended).

discretionary and more difficult to obtain, a direct response and attempt to undo the perceived harshness of the 1983 rule.⁸² Nor did he mention the 2000 amendments that made automatic disclosure—production of certain evidence without awaiting request from the opposing party—mandatory in all districts.⁸³

Chiefs also do not highlight significant procedural changes from other sources, even those achieving the same goal of streamlining litigation by narrowing or closing the courthouse doors. No Report has discussed recent cases interpreting the rules; Rehnquist did not mention the 1986 summary judgment trilogy,⁸⁴ and Roberts did not mention cases ratcheting the pleading standards⁸⁵ or stifling class action.⁸⁶ Yet those decisions affected litigation more than most textual changes, and critics argue they functionally amended the rules outside the REA process.⁸⁷

Similarly, no Report has mentioned congressional efforts to control civil litigation, such as raising the amount-in-controversy requirement in diversity actions⁸⁸ or eliminating that requirement in federal-question actions.⁸⁹ Even proposed legislation to amend the Federal Rules has gone unmentioned.⁹⁰

2. Criticizing the Focus on Rules Changes

Roberts' 2015 Report stands alone in attracting extensive public attention and criticism. Adam Steinman questioned the accuracy of Roberts' description of the amended discovery rules, arguing the

82. Benjamin P. Cooper, *Iqbal's Retro Revolution*, 46 WAKE FOREST L. REV. 937, 952–53 (2011); Charles Yablon, *Hindsight, Regret, and Safe Harbors in Rule 11 Litigation*, 37 LOY.-L.A. L. REV. 599, 611 (2004).

83. FED. R. CIV. P. 26(a)(1); Carl Tobias, *The 2000 Federal Rules Revisions*, 38 SAN DIEGO L. REV. 875, 880–81 (2001).

84. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

85. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

86. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

87. Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 876–77 (2010); Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 116 (2009); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 832 (2010); Vaughn R. Walker, Jr., *Class Actions Along the Path of Federal Rulemaking*, 44 LOY. U. CHI. L. REV. 445, 451 (2012); Wasserman, *supra* note 7, at 334.

88. Federal Courts Improvement Act of 1996, Pub. L. 104-317, § 205, 110 Stat. 3847 (1996).

89. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. 96-486, 94 Stat. 2469 (1980).

90. *Cf.* Lawsuit Abuse Reduction Act of 2011, H.R. 966, 112th Cong. (2011); Lonny Hoffman, *The Case Against the Lawsuit Abuse Reduction Act of 2011*, 48 HOFSTRA L. REV. 545 (2011).

changes were not as significant as the Chief suggested.⁹¹ Steinman highlighted three “disconnect[s]” between Roberts’ Report and the enacted rule.⁹² First, proportionality was not new, having been part of the discoverability analysis for several years; the amendment converted it from an exception from otherwise-discoverable information to part of the definition of what is discoverable.⁹³ Second, eliminating the “reasonably calculated to lead to the discovery of admissible evidence” language did not narrow the remaining definition of relevancy; it made it less specific.⁹⁴ Finally, no meaningful discovery would be lost in eliminating second-tier “subject matter” information because a plaintiff can amend the complaint to add a new claim, making the sought discovery relevant to a claim and thus discoverable as of right.⁹⁵

Steinman criticizes Roberts for attempting to “spin” the amendments to restrict discovery, when the broader changes he described did not reflect the rule enacted through the rulemaking process.⁹⁶ The Report was a “glaring admission” that the rulemaking process failed to achieve Roberts’ desired results.⁹⁷ Roberts used the 2015 Report to gain an additional bite at the apple of influencing the shape of discovery. Having failed to achieve the desired policy through the REA process, he used the Report to lobby lower-court judges to interpret and apply the rules to reflect his preferences.⁹⁸

To the extent that Roberts sought to work the referees (or, because this is Roberts, the umpires),⁹⁹ he succeeded. Courts cite the 2015 Report as a piece of amended Rule 26(b)’s legislative history explaining its scope and application.¹⁰⁰ One Southern District of Florida magistrate ordered the parties to read the Report as a sanction when they failed to

91. Steinman, *supra* note 6, at 44.

92. *Id.* at 52.

93. *Id.* at 51.

94. *Id.* at 34.

95. *Id.* at 36–37.

96. *Id.* at 52–53.

97. *Id.* at 52.

98. BURBANK & FARHANG, *supra* note 67, at 244; Steinman, *supra* note 6, at 51; Dorf, *supra* note 6.

99. *Confirmation Hearings of John G. Roberts, Jr., to be Chief Justice of the United States, Before the Senate Committee on the Judiciary*, 109th Cong. (2005); Chad M. Oldfather, *Umpires, Judges, and the Aesthetics of the Infield Fly*, 13 FIU L. REV. 957 (2019).

100. *See, e.g.*, *Helena Agri-Enterprises, Inc. v. Great Lakes Grain, LLC*, 988 F.3d 260, 273–74 (6th Cir. 2021); *Ezell v. City of Chicago*, No. 18 C 1049, 2021 WL 2136395 (N.D. Ill. May 26, 2021); *Bistline v. Snow Christensen & Martineau, PC*, No. 2:16-cv-788 TS, 2020 WL 4430466, at *4 (D. Utah July 31, 2020); *Tanner v. Murray*, 405 F. Supp. 3d 1115, 1184 (D.N.M. 2019).

control discovery by adhering to the amended rules as Roberts described them.¹⁰¹

The 2015 Report warrants criticism for its rhetorical disingenuousness in using dueling as an historical analogy. Roberts' dissertation introduced an 1838 booklet establishing detailed procedures for dueling, identified historical figures lost or nearly lost to duels, and described changes in public opinion about dueling before and after the Civil War, when a "public weary of bloodshed turned increasingly to other forums, including the courts, to settle disputes."¹⁰²

The analogy implied that failure to reform civil litigation and to increase efficiency made dueling an attractive alternative. The 175-year-old dueling guide provided a "stark reminder of government's responsibility to provide tribunals for the peaceful resolution of all manner of disputes. Our Nation's courts are today's guarantors of justice. Those civil tribunals, far more than the inherently uncivilized dueling fields they supplanted, must be governed by sound rules of practice and procedure."¹⁰³

While vivid and, without saying so, steeped in the cultural zeitgeist,¹⁰⁴ Roberts mischaracterized the dueling's purpose. He insisted that dueling's defenders justified the practice as the last resort "where there is no tribunal to do justice to an oppressed and deeply wronged individual."¹⁰⁵ But dueling as it existed in the United States—what Edward Rubin calls the "duel of chivalry"¹⁰⁶—was not primarily a means of dispute resolution. The duel of chivalry was distinct from earlier, pre-U.S. forms of "trial by combat" or "judicial duel," under which physical tests or physical combat followed from an accusation of a legal wrong and success in battle indicated the rightness or justness of one's position or cause in the legal dispute.¹⁰⁷

The chivalry duel evolved from the judicial duel,¹⁰⁸ but rested on different ideals. It addressed and vindicated not legal wrongs under new

101. *Rosovich v. Geltech Solutions, Inc.*, No. 16-81425-CV-MARRA/MATTHEWMAN, 2017 WL 238470, at *1 n.1 (S.D. Fla. Jan. 19, 2017).

102. 2015 REPORT, *supra* note 1, at 1-2.

103. *Id.* at 2-3.

104. *Hamilton* premiered on Broadway in January 2015, so dueling and Alexander Hamilton's death in a duel had entered the public consciousness. Roberts cited Hamilton's death, but not the musical. He alluded to the show four years later, in explaining why John Jay wrote only five Federalist essays. 2019 REPORT, *supra* note 2, at 1.

105. 2015 REPORT, *supra* note 1, at 1 (quoting John Lyde Wilson, *The Code of Honor; or Rules for the Government of Principles and Seconds in Dueling* (1838)).

106. Edward L. Rubin, *Trial by Battle, Trial by Argument*, 56 ARK. L. REV. 261, 270 (2003).

107. *Id.* at 268-69, 281.

108. Rubin argues the chivalry duel remained an outlet for noble violence when legal codes replaced lawful Dark Age violence. *Id.* at 269-70.

legal codes, but “real and perceived personal affronts” to honor and integrity.¹⁰⁹ Chivalry duels did not determine who owned Blackacre or who was in the right in a commercial dispute. They addressed what most regarded as disputes of honor for which substantive law provided no judicial redress.¹¹⁰ Players preferred to resolve such personal disputes in accord with nostalgia for a bygone era than resorting to newly established, but less-esteemed judicial processes.¹¹¹

Roberts conflated the two. And that conflation is clear from his closing: the tale of two French cavalry officers who waged a series of duels over fifteen years over a “trifling slight.” That long-running dispute was personal, grounded in competing understandings of honor and integrity rather than in any assertion of legal right.¹¹² The story thus did not support Roberts’ conclusion that changes to procedural rules were necessary to “ensure that federal court litigation does not degenerate into wasteful clashes over matters that have little to do with achieving a just result.”¹¹³

D. Envisioning Civil Litigation and the Role of District Judges

Across three Chiefs and fifty years, the Reports embody a consistent vision of civil litigation and of the role district judges should and do play in civil litigation.

Burger introduced this vision of the district judge in 1978:

[S]trong control of the pre-trial processes has a marked effect on early disposition either by trial or settlement. We can no longer indulge the old notion that it is “up to the lawyers to push cases.” Once a case is filed it is public business as well as private. It is up to judges to see to it that dilatory tactics by neither party can frustrate speedy justice.¹¹⁴

Four years later, Judith Resnik labeled what Burger described as: “managerial judges.”¹¹⁵ Managerial judges meet with parties; supervise case preparation; negotiate with parties about the course, timing, and

109. Douglas H. Yarn, *The Attorney as Duelist's Friend: Lessons from the Code Duello*, 51 CASE. W. RES. L. REV. 69, 84–85 (2000).

110. *Id.*

111. Rubin, *supra* note 106, at 269.

112. 2015 REPORT, *supra* note 1, at 11–12.

113. *Id.* at 12.

114. 1978 REPORT, *supra* note 12, at 4.

115. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 384, 376–77 (1982).

scope of pretrial and posttrial litigation; and learn more about cases at an earlier stage.¹¹⁶ This “pretrial process” may be all there is.¹¹⁷

Roberts followed his scrutinized 2015 Report with a more anodyne 2016 paean to district judges. He began with the history of the original thirteen district judges appointed by George Washington, a distinguished group, although none is well-known in the modern era. He transitioned to the work of the nearly seven hundred modern district judges who, like their predecessors, “stand alone, and unassisted.”¹¹⁸ He questioned “why any lawyer would want a job that requires long hours, exacting skill, and intense devotion—while promising high stress, solitary confinement, and guaranteed criticism,” finding the answer in “the rewards of public service” and “making our society more fair and just.”¹¹⁹

Roberts’ celebration of district judges’ roles and skills centered on managing and supervising the “important pretrial process” efficiently and effectively. District judges must be masters of complex rules of procedure and evidence. They must be capable administrators and active and astute problem solvers. They must be adept at case management, working to narrow cases and resolve them without trial. Roberts acknowledged the judicial role in conducting trials, but described trials as “carefully structured mechanisms,” reflecting judges’ essential pre-trial work long before any trial commences.¹²⁰

Calls for controlling civil litigation are framed in neutral terms. Roberts directed equal ire at attorneys who make burdensome discovery requests and attorneys who evade legitimate requests through dilatory tactics and urged district courts to pull both in line.¹²¹ But these calls have a one-sided political valance. “Speedier litigation” is code for getting defendants out of litigation. Plaintiffs do not win cases quickly; defendants do. It takes time and effort for plaintiffs to gather the information they need and to carry their burden of persuasion (which only can be done at trial). Making speed the primary virtue benefits defendants more than plaintiffs.

The incentive structures in the 1983 or 2015 amendments limit what requesting plaintiffs can obtain more than they prevent dilatory

116. *Id.* at 377–78.

117. Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 522 (1986).

118. 2016 REPORT, *supra* note 64, at 3.

119. *Id.* at 8.

120. *Id.* at 3–4.

121. 2015 REPORT, *supra* note 1, at 7.

actions by producing defendants.¹²² Plaintiffs depend on expansive discovery to uncover information that, in many cases, is uniquely and exclusively in defendants' possession or control and unobtainable other than through discovery. By emphasizing speed and efficiency above all, Roberts pushed district judges to adopt and apply that framing—likely to the disadvantage of plaintiffs and their informational needs.

That political slant is not surprising. The last Democratic-appointed Chief Justice was Fred Vinson in 1946,¹²³ less than a decade after the Federal Rules took effect and before the multi-layered REA process had been expanded or formalized. Three Chiefs appointed by conservative Republican presidents have shared a vision of narrower discovery and tighter civil litigation; appointed rules-committee members with similar bents;¹²⁴ voted it in major procedure cases;¹²⁵ and recorded it in their Year-End Reports.

IV. CONCLUSION

The Chief Justice's Year-End Report on the Federal Judiciary has evolved into an institution, more than fifty years old, carried by three Chiefs, and certain to continue. Modern news outlets, Court-focused news sites,¹²⁶ and commentators on Twitter pay attention to and immediately cover what the Chief Justice writes about the federal courts each New Year's Eve.¹²⁷

Civil procedure and civil litigation have been of significant interest for the Roberts Court, an obvious trend in the first years of his Chief Justiceship¹²⁸ that has accelerated in the past decade.¹²⁹ In wielding the

122. Moore, *supra* note 67, at 1086.

123. See generally *Justices 1789 to Present*, U.S. SUP. CT., https://www.supremecourt.gov/about/members_text.aspx (last visited Mar. 25, 2022).

124. Coleman, *supra* note 66, at 399; Moore, *supra* note 67, at 1086–87; *supra* notes 65–68 and accompanying text.

125. See, e.g., *Wal Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (Roberts, C.J., in majority); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (Roberts, C.J., in majority); *Scott v. Harris*, 550 U.S. 372 (2007) (Roberts, C.J., in majority); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (Rehnquist, J., for the Court).

126. E.g., Amy Howe, *Roberts to Congress on Court Reforms: We're on It*, SCOTUSBlog, (Dec. 31, 2021), <https://www.scotusblog.com/2021/12/roberts-to-congress-on-court-reforms-were-on-it/>.

127. See Nina Totenburg, *Chief Justice Roberts' Annual Report Focuses on COVID, Skips Trump and Controversy*, NPR (Dec. 31, 2020) <https://www.npr.org/2020/12/31/952388851/chief-justice-roberts-annual-report-focuses-on-covid-skips-trump-and-controversy>; Barb McQuade (@BarbMcQuade), TWITTER (Jan. 1, 2020, 8:22 AM), <https://twitter.com/barbmcquade/status/1212363400774332416>.

128. Wasserman, *supra* note 8, at 314.

129. See, e.g., *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021); *Dodson*, *supra* note 7, at 187; *Freer*, *supra* note 7, at 285; *Mulligan*, *supra* note 7 at 201; *Parness*, *supra* note 7, at 335; *Rhodes*, *supra* note 7, at 157.

Year-End Report to address issues otherwise on the Court's agenda, Roberts has expanded his predecessors' work and turned the Report into a powerful additional opportunity through which the Chief Justice shapes civil procedure. As a member of the Court, he approves rules and interprets them in later cases.¹³⁰ As Chief, he appoints rules committee members.¹³¹ This final bite at the apple is unique, singular, public, and entirely in the Chief's hands.

130. See sources cited *supra* notes 84–86, 125.

131. RUTKUS & TONG, *supra* note 65.