

State of the Judiciary Address
By Chief Justice Donald W. Lemons
To General District and Juvenile & Domestic Relations Court Judges
October 26, 2016
By Email

I am sorry I was unable to be with you in person at your conference. This follow up email was promised to you. My fellow judges, it is an honor to be your colleague in the judiciary. Being selected to be a judge is recognition of professional achievement. A high level of confidence is placed in you to serve the citizens of the Commonwealth in matters of great importance to them. Chief Justice John Marshall famously and succinctly summarized the enterprise we are in. He said:

“The judicial department comes home in its effects to every man’s fireside; it passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience?”

Recently, *The New York Times* carried an article about what it called the “partisan warfare over control of the Supreme Court.” Interestingly, the article was not addressing the current vacancy on the United States Supreme Court; rather, it was directed at the battles currently being waged in the various states. These controversies have enormous consequences for the independence of the judiciary.

“Ground-zero” for the controversies appears to be in Kansas where the executive and legislative branches have been angered by particular state supreme court decisions. Among these rulings, the Kansas Supreme Court held that their Constitution required more equitable distribution of funding for public schools and declared that the state’s public schools must shut down altogether if poorer districts do not get more money. The governor and the legislature

responded by threatening to suspend all funding for the Kansas court system. Additionally, a bill has passed the Kansas Senate that expands the basis for impeachment of judges. A few of the new provisions, stated in vague terms, provide for impeachment for:

1. Failure to perform adequately the duties of office;
2. Attempting to subvert fundamental laws and introduce arbitrary power;
3. Attempting to usurp the power of the legislative or executive branch of government;
4. Exhibiting discourteous conduct toward litigants, jurors, witnesses, lawyers, or others with whom the judge deals in an official capacity;
5. Exhibiting wanton or reckless judicial conduct; or
6. Failure to properly supervise, administer, or discipline judicial personnel.

Of course, the elective process for selecting justices in most states attracts well-financed campaigns in support of special interests. Thirty-eight states have popular elections for their justices either directly or by retention elections. Spending on television ads for the election of two justices in Arkansas this year reached over \$1.2 million with the candidates being attacked as being too cozy with trial lawyers.

Ads in Wisconsin from out-of-state groups from the political right and the political left have pushed campaign spending to more than \$3.2 million dollars for one seat in 2016.

The cost of television ads from unions and plaintiff's lawyers in Pennsylvania reached \$16.5 million in a recent election for 3 of its supreme court seats.

In Oklahoma, where the court ruled that a Ten Commandments monument must be removed from the Capitol, bills have been introduced to give the governor and the legislature more control over the election of the court, and another bill has been introduced to increase the size of the court. Of course, it is being called a "court-packing" bill.

These efforts are often referred to as a means to make the judiciary more responsive to the people and to make the judiciary more “democratic.”

I believe we are witnessing a fully engaged battle over the fundamental role of judges in America.

In "Federalist 78," Hamilton states that "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them." Arguing that the judiciary has "no influence over either the sword or the purse," Hamilton concludes that the judiciary is "the weakest of the three departments of power" primarily, he states, because it has "neither Force nor Will, but merely judgment." If he were transported in time to this era in our nation's history, perhaps Mr. Hamilton would revise his analysis. At the very least, we can see that not everyone in America agrees with him.

There are those who forcefully maintain that the judiciary has strayed beyond its designated role in the American system and usurped the powers of the two other branches, showing little regard for democratic majority rule. There are those who are informed by the Madisonian principal of protection of fundamental rights and minority interests who assert that the judiciary is the only place where protection of such rights and interests will be found. The debate is not new. It has gone on since our founding. It is a particularly hot topic today.

Despite the difficulties of the selection process for a justice of our Supreme Court during this last session of the General Assembly, we do not have nearly the tension experienced in other states. The judiciary has a good, cooperative relationship with the other two branches of government in Virginia, and we should all be grateful for that.

There are many things of significance to report; here are a few.

Last fall, I proposed to the chairs of House and Senate Courts Committees that a presentation be made to a joint meeting of the committees concerning the Judicial Performance Evaluation Program. The suggestion was well received; and, on the first day of the 2016 General Assembly Session, Justice Powell and Pat Davis, the JPE coordinator, joined me at the Capitol. I told the members that we desire transparency in the process, and a good start to achieve that objective would be to give them up-to-date information on how we are implementing the program. I am pleased to say that the meeting was extremely productive and resulted in members of the Courts Committees volunteering to reciprocate in this effort at transparency by appearing at our Judicial Conferences. I hope you found the replication of this program at your conference to be informative and helpful. In my opinion, the JPE program is a good thing. It is here to stay. We need to embrace it and continue to improve it.

As you may know, we had worked very hard to negotiate a 3% raise for all judges and judicial branch employees, and for an additional \$2.5 million to provide a one-time increase to our deputy district court clerks at the lower end of the pay scale. Unfortunately, those raises were contingent upon the Commonwealth's revenue forecast, and due to the budget shortfall, the anticipated raises will not occur. I know this is disappointing news, but please be assured that we will continue to work with the executive and legislative branches to make these raises a priority as soon as the Commonwealth's fiscal health improves.

We continue to make progress on the number of funded judgeships in the Commonwealth. As you may recall, a Weighted Caseload Study was conducted by the National Center for State Courts and submitted to the General Assembly in 2014. At the time that study was submitted, there were 402 authorized judgeships in the Code of Virginia, but only approximately 350 were funded and filled. The Weighted Caseload Study indicated a need for

429 judgeships. This past session, the General Assembly filled 23 vacant and newly-created judgeships, bringing the funded number of judgeships to 408. I congratulate and welcome all of our new judges to the bench.

The General Assembly has also asked us to update the weighted caseload model, with a report due by the 2018 session. Additional factors to be considered are use of interpreters, law clerks, retired or substitute judges, pro se litigants, and population growth or decline.

Last year, at this conference, I noted that one quarter of Virginia's judges were newly elected to their positions. That presented a significant training challenge. I would like to thank Dr. Caroline Kirkpatrick and her staff for all the work they did to meet those increased training needs. One key component of our new judge training is the mentor program. I would also like to thank Judge Marla Decker, Chair of the Mentor Program Advisory Committee, and the 57 judges who participated in the new mentor judge workshop in March. This program would not be possible without the many volunteer hours put in by our mentor judges.

For a number of years, court appointed counsel seeking a waiver of the statutory cap were denied payment of the waiver if the funds appropriated for waivers were exhausted at the time the case was concluded. Typically, this meant that court appointed counsel submitting their vouchers in the latter months of the fiscal year may not have received the approved waiver amounts they were expecting. I am happy to report that the appropriation for waiver of the statutory caps for court appointed counsel has been increased by \$450,000 to \$4.65 million each year of the biennium budget.

Like many other states, we are experiencing an unfortunate surge in heroin use in the Commonwealth. Judges, medical professionals, police, legislators, and executive branch leaders have joined together to seek solutions. For the first time in over a decade, in this session of the

General Assembly, drug courts received new funding. First, \$100,000 was allocated to pilot programs in Norfolk and Henrico in each year of the biennium budget for the utilization of a non-narcotic, non-addictive, injectable prescription drug treatment regimen that has been successful in other states. In addition, to support drug court dockets, \$300,000 the first year of the biennium and \$960,000 in the second year was appropriated for jurisdictions with high drug-related caseloads.

I have often pointed out that when we speak of drug courts, what we are really talking about are dockets in the court system. The legislature creates courts. Courts create dockets to manage caseloads. In addition to drug court dockets, many localities have sought to create other specialty dockets. Among them are veterans' dockets and mental health dockets. First, we must remember that the localities must desire and request such specialty dockets. Additionally, the interests of public safety require that local commonwealth's attorneys retain a veto over participation in these dockets. We must have approval, oversight, and supervision of these dockets by the Supreme Court. These well-meaning efforts will be subject to deserved criticism without best practices being observed and implemented. Members of the General Assembly have requested that the Supreme Court develop a Rule of Court to accomplish this objective. In response to that request, I have appointed a Specialty Dockets Taskforce to assist with drafting such a Rule and preparing best practice guidelines. This draft Rule has been released for public comment.

Justice Bernard Goodwyn and his co-chair, John Whitfield, continue to provide impressive leadership to the Access to Justice Commission. Let me share some highlights with you:

- Upon the urging of the Commission, the Supreme Court amended the commentary to Canon 4B to make it clear that judges may participate in pro

bono recognition efforts and are permitted to encourage lawyers to provide pro bono services;

- Additionally, the commentary to Canon 3B was amended to clarify the assistance a judge may provide to self-represented litigants;
- Practice points for judges concerning self-represented litigants have been developed, and you have received a copy of these suggestions for your use;
- Upon the encouragement of the Commission, the Virginia State Bar now hosts an on-line pro bono website which permits low-income Virginians to ask legal questions in a private forum and have the questions answered by volunteer Virginia lawyers. The portal is called Virginia.freelegalanswers.org and began operation in August.

In March, the Civil Rights Division of the Department of Justice sent a letter to all chief justices and to all state court administrators to call attention to what was characterized as illegal enforcement of court fines and costs in certain jurisdictions, and to share best practices with respect to imposition and collection of fines and costs. This letter was certainly timely, as the General Assembly passed legislation providing for the Supreme Court to draft a new Rule regarding payment plans for court fines and costs. I put together a working group to craft such a rule, which will not only facilitate the collection of court fines and costs, but also assure the fair treatment of the citizens of this Commonwealth, many of whom are indigent. A draft has been prepared and was just approved by the Justices at our most recent business meeting, and will soon go into effect.

The Judicial Ethics Advisory Committee is up and running and is chaired by former Chief Justice Cynthia Kinser. The Committee provides a place where judges may ask judicial ethics questions and have them answered with opinions that are made public. The opinions do not reveal the name of the requesting judge. You may find the order creating the committee on

the Supreme Court website. The process is described in detail in the order. I want to point out there is a provision for emergency requests. Kenney Grigg in the Office of the Executive Secretary is counsel to the committee. You may contact him directly with any questions you may have. Please avail yourself of this advisory service. It was created to support and assist the judges of the Commonwealth.

All of you are subject to the provisions of the Conflict of Interest Act. It is very clear that COIA was enacted with the legislative and executive branches in mind, not the judicial branch. Many of you have expressed frustration in the attempt to interpret rules that do not seem to have you in mind but, literally construed, sweep you within its provisions. We have expressed our concerns and suggested that a separate statute applicable to the judiciary should be considered. I am pleased to share with you the language of House Bill 1362 and Senate Bill 692 which include an enactment clause that provides:

That the Supreme Court of Virginia shall report to the Virginia Conflict of Interest and Ethics Advisory Council on the application of the State and Local Government Conflict of Interests Act to members of the judiciary. Such report shall be made no later than October 1, 2016, and shall include an evaluation of the feasibility of creating separate statutory provisions applicable to members of the judiciary. In making its report, the Supreme Court of Virginia shall consult with staff of the Virginia Conflict of Interest and Ethics Advisory Council, statewide bar associations, and others as the Court deems necessary.

I put together a Study Committee composed of various judges, and we met with staff from COIA Council and shared our concerns. They were very receptive, and have worked with the Study Committee and OES staff to prepare proposed amendments to COIA that will address our concerns. We are hopeful that our report will result in improvements to this Act so that its application to members of the judiciary will be more appropriate.

Finally, let me comment on a matter of concern to all of us that has received much attention in the media. I am speaking of the writ of actual innocence issued on behalf of Keith

Allen Harward. I commend Olga Akselrod from the Innocence Project and Alice Armstrong from the Office of the Attorney General for their admirable cooperation in search of the truth. And the comprehensive reporting of Frank Green of the Richmond Times Dispatch deserves special acknowledgement. In recent years, the Supreme Court of Virginia has issued five writs of actual innocence based upon biological evidence. Nationwide, according to the National Registry of Exonerations, there have been 1,778 exonerations since 1989. All of us who have taken an oath to uphold the Constitution of the United States and the Constitution of Virginia and to faithfully and impartially discharge our duties should be vigilant to the circumstances that may cause a miscarriage of justice, and we must be alert to the possibility that others may be wrongly imprisoned. One innocent person who is imprisoned is one person too many.

It is an honor to be your colleague. Thank you for your service to the citizens of the Commonwealth.