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Judicial Independence in Virginia Dedicated to Chief Justice Harry L. Carrico

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JUDICIAL INDEPENDENCE IN VIRGINIA

W. Hamilton Bryson *

I. INTRODUCTION

The political will of the people of the Commonwealth of Virginia is expressed in the Constitution of Virginia, which created the government of Virginia. Every Constitution of Virginia from 1776 to the present has divided the government among the General Assembly of Virginia, the legislature; the governor, who is the chief executive officer; and the judiciary, a system of courts.¹ Each of these three branches of the government was created as a separate, independent branch of the government.² However, they are not totally independent; they must of necessity interact. Furthermore, each Constitution of Virginia has put into place various checks and balances among them.³

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1. See, e.g., VA. CONST. arts. IV–VI. A fourth branch of the government, the State Corporation Commission, was created by the Virginia Constitution of 1902, but this does not impinge on the subject of this article. VA. CONST. of 1902, art. XII, § 153.

2. VA. CONST. art. III, § 1; VA. CONST. of 1902, art. I, § 5; VA. CONST. of 1870, art. II; VA. CONST. of 1851, art. II; VA. CONST. of 1830, art. II; VA. CONST. of 1776, art. III.

3. See generally 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA (1974) (discussing the evolution and operation of the Constitution of Virginia); THOMAS R. MORRIS, THE VIRGINIA SUPREME COURT: AN INSTITUTIONAL AND POLITICAL ANALYSIS (1975) (analyzing the role of the Supreme Court of Virginia in relation to other branches of Virginia state government); MARGARET VIRGINIA NELSON, A STUDY OF JUDICIAL REVIEW IN VIRGINIA, 1789–1928 (1947) (discussing the role of judicial review in Virginia); 4C MICHIE'S JURISPRUDENCE OF VIRGINIA AND WEST VIRGINIA, *Constitutional Law* § 27 (Repl. Vol. 1999) (discussing the interplay between separation of powers and a system of checks and balances); John Thomas Wren, Republican Jurisprudence: Virginia Law and the New Order, 1776–1830 (1988) (unpublished Ph.D. dissertation, College of William and Mary) (on file with the author).

The purpose of this essay is to consider the constitutional place of the judiciary of Virginia in relation to the legislative branch of the government. This is because before the Virginia Constitution of 1971, the governor was not given a strong position in the government—a reaction to the very strong position of the governor of Virginia during the colonial period.⁴

II. THE RELATIONSHIP BETWEEN THE BRANCHES

There are two fundamental constitutional issues that define the relationship between the judiciary and the political branches of the government. The first is the independence of the courts to decide cases brought before them according to the rule of law and not according to the desires of a single person or of a group of persons, including the governor or the legislature. The law can be changed by an act of the legislature signed by the governor, but even so, there are limits.⁵ The second is the separation of governmental powers among the executive, the legislature, and the judiciary. The General Assembly cannot interfere with the constitutional authority of, and mandate to, the judiciary to determine cases brought before it for decision.⁶ Until recently, there have been only a very few incidents that have raised the issue of the independence of the judiciary.

In order to preserve the independence of the judiciary, the legislature is forbidden to diminish the salary or term of office of a sitting judge.⁷ Even the possibility of such diminishment might influence or intimidate a judge in the performance of his or her official judicial duties.

4. Compare VA. CONST. art. V, with VA. CONST. of 1776, art. IX.

5. For example, no bill of attainder or ex post facto law may be enacted. VA. CONST. art. I, § 9.

6. See VA. CONST. art. III, § 1 (separating powers among the branches).

7. VA. CONST. art. VI, § 9; VA. CONST. of 1776 art. XIV.

III. LEGISLATIVE ATTEMPTS TO INFLUENCE THE JUDICIARY

A. *Appointment*

In 1788, such an incident arose. Even though it was inadvertent, the appellate court judges reacted instantly. In early 1788, the General Assembly attempted to reorganize the high courts in such a way that it happened that the judges' workload would have been substantially increased with no increase in pay.⁸ The judges on the Court of Appeals of Virginia⁹ declared the act unconstitutional because it interfered with the independence of the judiciary and violated the constitutional provision for the separation of powers within the state government.¹⁰ In response, the governor called the General Assembly into special session to respond to the problem.¹¹ The result was an amicable compromise. The courts were reorganized in a different way so that no sitting judge would be required to accept additional judicial duties,¹² and the judges voluntarily resigned their commissions in the old courts and accepted new commissions in the new Court of Appeals.¹³ Thus, it was established that an act of assembly could neither increase the judicial workload of sitting judges nor remove them from their judicial offices and that this was a matter of constitutional law.¹⁴

8. Act Establishing District Courts, ch. 39, § 3, 12 Va. Stat. 535–36 (Hening 1823).

9. The first name of the highest court in Virginia after Independence was the Court of Appeals of Virginia. Act for Establishing a Court of Appeals, ch. 12, 9 Va. Stat. 522 (Hening 1778). In 1830, its name was changed to the Supreme Court of Appeals of Virginia. VA. CONST., art. V, § 1 (1830); see also VA. CONST., § 14 (1776). However, the court continued to be informally referred to as the Court of Appeals of Virginia. See, e.g., 39 Va. (12 Leigh) (reporting cases as “argued and determined in the Court of Appeals . . .”). In 1971, the court’s name changed to the Supreme Court of Virginia. VA. CONST., art. VI, § 1 (1971); 2 HOWARD, *supra* note 3, at 706.

10. Cases of the Judges of the Court of Appeals, 8 Va. (4 Call) 135 (1788). This case may also be found as *Remonstrance of the Court of Appeals to the Gen. Assembly*, 3 Va. (1 Va. Cas.) 98 (1788). For additional information regarding this case, see 2 THE LETTERS AND PAPERS OF EDMUND PENDLETON, 1734–1803, at 504 (David John Mays ed., 1967).

11. 4 CALENDAR OF VIRGINIA STATE PAPERS AND OTHER MANUSCRIPTS 440–41 (William P. Palmer ed., 1884).

12. An Act for Amending the Act, Intituled an Act Constituting the Court of Appeals, ch. 68, 12 Va. Stat. 764 (Hening 1823).

13. See 2 DAVID JOHN MAYS, EDMUND PENDLETON 1721–1803: A BIOGRAPHY 273–75 (1952); Margaret V. Nelson, *The Cases of the Judges: Fact or Fiction?*, 31 VA. L. REV. 243, 246–47 (1944).

14. See generally 2 HOWARD, *supra* note 3, at 692–94 (discussing *Cases of the Judges of the Court of Appeals*, 8 Va. (4 Call) 135, and its impact on the Constitution of Virginia).

Although it is the constitutional function of the legislature to make and change the law, interpreting the Constitution, a legal document, is a matter of law, and the interpretation of the law is the function of the judiciary.¹⁵ Thus, the courts are to review the acts of the other branches of the government as a matter of constitutional law.¹⁶ One aspect of Virginia constitutional law is the separation of powers among the branches of government, and this requires that the judiciary give great deference to the legislature when construing a statute. For the judiciary to legislate would be for the court unconstitutionally to usurp the legislative function of the General Assembly. A corollary to this principle is that when confronted by a constitutional issue in a legislative act, the court should, if it can, resolve the issue without declaring an act of assembly unconstitutional. A good example of this is the case of *Commonwealth v. Caton*.¹⁷ This case involved an attempted legislative pardon for treason.¹⁸ Edmund Pendleton and the majority of the Court, with impressive legal skill, avoided the constitutional issue although George Wythe was willing to indulge in an unseemly constitutional confrontation with the legislature.¹⁹

The only serious clash between the judiciary and the legislature in Virginia history took place in the 1870s and 1880s. It was a major crisis that resulted in the entire Court of Appeals not being re-elected, but rather being replaced with an entirely new bench of politically pre-committed justices. The issue was the readjustment of the state debt.²⁰

After the end of the Civil War and Reconstruction, the Commonwealth of Virginia was faced with a huge debt that dated in large part from before the War, but the treasury of Virginia had been looted during Reconstruction. Furthermore, the private sector of Virginia had been economically destroyed during the War. The new Virginia Constitution of 1870 looked to universal public

15. *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 25 (1793) (stating that "[t]he interpretation of the laws is the proper and particular province of the courts").

16. See *id.* at 82-83; see generally 2 HOWARD, *supra* note 3, at 694-95 (discussing judicial review).

17. 8 Va. (4 Call) 5 (1782).

18. *Id.* at 8-9; see also Act Declaring What Shall Be Treason, ch. 3, § 3, 9 Va. Stat. 168 (Hening 1823).

19. *Caton*, 8 Va. (4 Call) at 7.

20. For an in-depth account of the Readjuster Movement, see CHARLES CHILTON PEARSON, *THE READJUSTER MOVEMENT IN VIRGINIA* (1917).

education,²¹ but there was not enough money to pay for it and also to pay the public debt or even the interest on the debt.²² Thus, the political issue of the day that divided Virginia into two hostile war camps was whether to pay the debt, or at least the interest that was due upon it, or to repudiate the state debt, or at least the interest that had accrued during the hostilities of the 1860s, so that public education and other pressing social needs could be financed. The Funders wanted to pay at least the interest on the state debt and thereby maintain the financial integrity of the Commonwealth and thus assure the future access to credit.²³ The Readjusters wanted to scale back the state debt, or at least the accrued interest, so that much needed social programs could be available for the people of the Commonwealth, who certainly needed them at that impoverished and unhappy time.²⁴

In December 1879, the Readjusters, who were led by General William Mahone,²⁵ were elected to a large majority of the General Assembly; and, in 1882, all of the justices of the Court of Appeals came up for re-election, but none of them were re-elected.²⁶ The sitting justices were thought to be Funders, and the bondholders, who were led by William L. Royall,²⁷ were arguing that the readjustment of the state debt was an unconstitutional abridgment of vested contract rights.²⁸ Thus, in order to assure the judicial approval of the legislation scaling back the state debt, the General Assembly elected an entirely new court of judges who were known to be Readjusters.²⁹ Since 1788, there had been no attempted legislative interference with the judiciary until this.³⁰

21. VA. CONST. of 1870, art. VIII, § 3.

22. See NELSON, *supra* note 3, at 111–12.

23. *Id.* at 115–16.

24. See JACK P. MADDEX, JR., *THE VIRGINIA CONSERVATIVES 1867–1879: A STUDY IN RECONSTRUCTION POLITICS* 233–55 (1970); see also ALLEN W. MOGER, *VIRGINIA: BOURBONISM TO BYRD, 1870–1925*, at 37–38 (1968).

25. See MOGER *supra* note 24, at 37; see also NELSON MOREHOUSE BLAKE, *WILLIAM MAHONE OF VIRGINIA: SOLDIER AND POLITICAL INSURGENT* (1935).

26. NELSON, *supra* note 3, at 118.

27. See generally WILLIAM L. ROYALL, *SOME REMINISCENCES* 100–09 (1909) (recounting the dispute between the Funders and the Readjusters).

28. See William L. Royall, *Constitutionality of the Funding Bill*, 2 VA. L.J. 129, 146 (1878); William Green, *The Funding Act*, 2 VA. L.J. 193, 194–209 (1878). But see JAMES LYONS, *THE FUNDING BILL: IS IT CONSTITUTIONAL* (1878); JAMES MOORE, *TWO PATHS TO THE NEW SOUTH: THE VIRGINIA DEBT CONTROVERSY, 1870–1883*, at 17 (1974).

29. NELSON, *supra* note 3, at 110–20.

30. Geo. L. Christian, *The Judicial Term of Office in Virginia*, 4 VA. L.J. 1, 14 (1880).

The denouement was that, at first, the bondholders appeared to have lost the fight, but, ultimately, they changed their legal tactics and the Supreme Court of the United States upheld their rights.³¹ By 1894, when the Court of Appeals of Virginia came up for re-election again, the Readjusters had lost their political power, and the General Assembly refused to re-elect any of those judges—putting in an entirely new bench of justices again.³²

Whether this wholesale change in the personnel of the Court was an attempt to intimidate the judges or to manipulate the results of future litigation, or whether it was simply a matter of crass political patronage, it was regrettable. The judicial selection process should be aimed at putting the most talented and well-educated legal minds on the bench in furtherance of the administration of impartial justice. The performance of the General Assembly in 1882 was poor. In terms of judicial independence, it was a disgraceful episode.

Even though it was a poor performance, there are some considerations that help put the matter into perspective. The Court of Appeals before 1870 was only infrequently presented with constitutional issues to decide.³³ However, from then on, litigants put many constitutional cases before the judges, and, before 1882, several had involved the state debt issue.³⁴ The courts cannot avoid hearing a constitutional case. The courts are open to everyone who can pay a nominal filing fee or get the court to waive it. This includes foreigners as well as citizens, with the exception of enemies of the state. It is the courts' purpose, the reason for their existence, to decide issues of law. The constitution is a legal document, and if a litigant argues that a statute is void because it is unconstitutional, the courts must decide the issue one way or the other. Thus, the Court of Appeals was drawn into the politi-

31. *McGahey v. Virginia*, 135 U.S. 662, 693 (1890). See generally John V. Orth, *The Virginia State Debt and the Judicial Power of the United States, 1870-1920*, in *AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH* 106 (David J. Bodenhamer & James W. Ely, Jr. eds., 1984).

32. MORRIS, *supra* note 3, at 22-23. To avoid such a wholesale turnover in the highest court of the Commonwealth in the future, the Virginia Constitution of 1902 provided that the judges of the Supreme Court of Appeals would be elected in staggered classes. See VA. CONST. of 1902, art. VI, § 91.

33. See MORRIS, *supra* note 3, at 12-13; NELSON, *supra* note 3, at 32.

34. See, e.g., *Clarke v. Tyler*, 71 Va. (30 Gratt.) 134 (1878); *Wise Bros. v. Rogers*, 65 Va. (24 Gratt.) 169 (1873); *Antoni v. Wright*, 63 Va. (22 Gratt.) 833 (1872); see also NELSON, *supra* note 3, at 113-19 (discussing litigation regarding state debt).

cally sensitive issue of the state debt by the general public and could not have avoided the difficulties. Even though the General Assembly had been elected expressly to readjust the state debt, the legislature and the general public were still bound by the constitutions of the United States and Virginia. The legislative manipulation of the courts in 1882, however well intentioned, was an attempt to manipulate the course of justice, and statesmen would have acted otherwise.

B. *Removal from Office*

In seventeenth century England, the independence of the judiciary was severely threatened by the arbitrary removal of judges from their places in court.³⁵ Having judges who are independent from the politicians and who can adjudicate according to the rule of law is a political right that was hard fought against the crown. The king finally was forced to accept this principle with the Act of Settlement of 1701.³⁶ The Virginia patriots were well aware of British constitutional history, and this concept of judicial independence was firmly embedded in the first Constitution of Virginia in 1776, which required that the appellate judges, once elected by the General Assembly, shall “continue in office during good behaviour.”³⁷

The Virginia Constitution of 1851 took away what was the equivalent of life tenure of the judges and provided for a term of years.³⁸ At the same time, it also took away the election of the appellate judges by the legislature and made all judges subject to election by the general voting populace.³⁹ One member of the

35. See W. H. BRYSON, *THE EQUITY SIDE OF THE EXCHEQUER: ITS JURISDICTION ADMINISTRATION PROCEDURES AND RECORDS* 52–57 (1975); Alfred F. Havighurst, *The Judiciary and Politics in the Reign of Charles II*, 66 L.Q. REV. 62, 76–77 (1950); C. H. McIlwain, *The Tenure of English Judges*, 7 AM. POL. SCI. REV. 217, 219 (1913).

36. An Act for the Further Limitation of the Crown and Better Securing the Rights and Liberties of the Subject, 12 & 13 Will. III, c. 2, § 3, cl. 7 (1701) (Eng.); see also W. S. Holdsworth, *The Constitutional Position of the Judges*, 48 L.Q. REV. 25 (1932).

37. VA. CONST. of 1776, art. XIV; see also VA. CONST. of 1830, art. V, § 1.

38. VA. CONST. of 1851, art. VI, § 10.

39. VA. CONST. of 1851, art. VI, §§ 6, 10, 27, 34. See generally ROBERT P. SUTTON, *REVOLUTION TO SECESSION: CONSTITUTION MAKING IN THE OLD DOMINION* 126–27, 152–53 (1989) (discussing the evolution of the judiciary in Virginia); Alex B. Long, *An Historical Perspective on Judicial Selection Methods in Virginia and West Virginia*, 18 J.L. & POL. 691, 730–66 (2002) (providing an overview of the historical development of Virginia’s judicial selection process).

Convention argued for this in order to make judges independent of the legislature.⁴⁰ He thought that the legislative election of judges violated the general principle of the separation of governmental powers.⁴¹ It is to be remembered that, at that time, the county courts had administrative as well as judicial duties within their counties and could levy local taxes.⁴² It was thus a reform long overdue at the county court level. Whether it was a good idea at the appellate court level is highly questionable.

The Constitution of 1870 made all of the judges of Virginia subject to election by the General Assembly. They were to be elected for a term of years with the possibility of re-election—the terms being reasonably lengthy.⁴³ The reason for this return to the former system of selecting judges was that the legislators wished to use the judgeships for the purposes of political patronage.⁴⁴ It is, I believe, only coincidental that, at this time, the administration of the counties was taken away from the county courts and put into the hands of locally elected boards of supervisors.⁴⁵ This system of judicial selection has continued to the present.⁴⁶

This system of judicial selection provides a political check on the judiciary by the legislature. There is a periodic review of all judges by the General Assembly which balances the judges' power to declare acts of the legislature unconstitutional. Where both sides act with statesmanship, the system works extremely well. The bad example is the Readjusters' refusal to re-elect any of the sitting judges in Virginia in the late nineteenth century.⁴⁷

Not only is the Virginia judiciary subject to election and regular, i.e. predictable, re-election by the legislature, it is also theoretically liable to removal by the General Assembly through the

40. Waitman T. Willey, Speech Before the Committee of the Whole (June 20, 1851), in WAITMAN T. WILLEY, SPEECHES OF WAITMAN T. WILLEY OF MONONGALIA COUNTY, BEFORE THE STATE CONVENTION OF VIRGINIA, ON THE BASIS OF REPRESENTATION; ON COUNTY COURTS & COUNTY ORGANIZATION, AND ON THE ELECTION OF JUDGES BY THE PEOPLE 34–42 (1851).

41. *Id.*

42. VA. CODE ch. 47, § 11 (1849); *id.* ch. 53, §§ 3–5; 2 VA. CODE REV. ch. 191, § 6 (1819).

43. VA. CONST. of 1870, art. VI, §§ 5, 11, 13, and 14.

44. MADDEX, *supra* note 24, at 92–93.

45. VA. CONST. of 1870, art. VII.

46. VA. CONST. art. VI, § 7; VA. CONST. of 1902, art. VI, §§ 91, 96, 99. *See generally* 2 HOWARD, *supra* note 3, at 739–46 (discussing the selection of judges).

47. *See* NELSON, *supra* note 3, at 110–20.

impeachment process.⁴⁸ The Virginia Constitution of 1776 provided for impeachment of judges by the House of Delegates with a subsequent trial in the Court of Appeals.⁴⁹ The Constitution of 1830 moved trials upon impeachments to the Senate of Virginia where a two-thirds vote was required for a conviction and removal from office.⁵⁰ This latter procedure has been included in every constitution since 1830.⁵¹ In addition, the Constitution of 1830 provided for the legislative removal of judges without a trial upon a two-thirds vote of both houses of the General Assembly.⁵² This provision continued in force until the 1971 Constitution.⁵³

The impeachment procedure originated in England.⁵⁴ The famous impeachments of several judges in the seventeenth and eighteenth centuries were well known to the drafters of the first Constitution of Virginia. The most notable were: Sir Francis Bacon, lord chancellor;⁵⁵ the judges who ruled in favor of the ship money tax;⁵⁶ and the Earl of Macclesfield, another lord chancellor.⁵⁷ Even though major political motives guided all of those impeachments, nevertheless, the founding fathers of Virginia believed that this legislative power was a desirable check on the judiciary. It is to be remembered that, under the constitutions of 1776 and 1830, the judges held office during good behavior, which meant, in effect, for life, but for the possibility of impeachment.⁵⁸

No judge of the Supreme Court of Virginia or the new Court of Appeals of Virginia has been removed from the bench either by impeachment or by legislative recall.⁵⁹ However, there have been two removals of lower court judges. In 1903, Judge Clarence

48. VA. CONST. art. IV, § 17. See generally 1 HOWARD, *supra* note 3, at 552–58 (discussing impeachment in Virginia).

49. VA. CONST. of 1776, art. XVII.

50. VA. CONST. of 1830, art. III, § 13.

51. VA. CONST. art. IV, § 17; VA. CONST. of 1902, art. IV, § 54; VA. CONST. of 1870, art. V, § 16; VA. CONST. of 1851, art. IV, § 18.

52. VA. CONST. of 1830, art. V, § 6.

53. VA. CONST. of 1902, art. VI, § 104; VA. CONST. of 1870, art. VI, § 23; VA. CONST. of 1851, art. VI, § 17.

54. See RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 1–4* (1973); see also MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 3* (2d ed. 2000).

55. 1 F. HARGRAVE, *STATE TRIALS* 375 (1776).

56. *Id.* at 505, 696–719.

57. 6 F. HARGRAVE, *STATE TRIALS* 477 (1777).

58. VA. CONST. of 1830, art. V, § 1; VA. CONST. of 1776, art. XIV.

59. MORRIS, *supra* note 3, at 58.

Jackson Campbell, judge of the County Court of Amherst County, was removed from the bench by legislative recall for assaulting a preacher who had insulted him.⁶⁰ Charles H. Crawford, a Baptist preacher, who was the agent of the rabid Anti-Saloon League of America, publicly defamed the judge because he granted a liquor license to a pharmacist, and the preacher, when he refused to apologize, was made to feel the sharp impact of the judge's horse whip.⁶¹ Complaints were lodged in the General Assembly, and Judge Campbell's judicial career came to an end.⁶² In 1922, the people of Amherst County elected him to the House of Delegates; one of his committee assignments was the Committee for Courts of Justice.⁶³

In 1908, Judge John Wise Gillet Blackstone of the Circuit Court of Elizabeth City County was removed by legislative recall for dereliction of his duties by failing to appear in court when it was opened for the day's sitting.⁶⁴ Everyone knew very well where the judge was, and the sheriff went there to remind him that the court was awaiting his appearance.⁶⁵ However, Judge Blackstone refused to leave the house of prostitution where he was staying.⁶⁶ In the words of the report of the House of Delegates Committee for Courts of Justice:

[The sheriff] again found him alone in bed at the same place [a house of ill-fame in the town of Phoebus]. Whilst the sheriff was in the room several lewd women entered in their night gowns. One of the women got on the bed occupied by Judge Blackstone; whereupon the sheriff smacked her and told her to get out of the way. . . .⁶⁷

This was a public scandal which caused a local furor; petitions were sent to the General Assembly, and the judge was removed from the bench.⁶⁸

60. 1902-04 VA. SENATE JOURNAL 331-35, 444-52, 490, 568-74, 649, and 677; 1902-04 VA. HOUSE OF DELEGATES JOURNAL 436-43, 447-49, 600-07; ANSWER OF C. J. CAMPBELL, Va. Gen. Assembly, S. Doc. No. 7, at 2-10 (Reg. Sess. 1903).

61. 2 DICTIONARY OF VIRGINIA BIOGRAPHY 559-60 (Sara B. Bearss et al. eds., 2001).

62. *Id.* at 560.

63. *Id.* at 559-60; see also E. GRIFFITH DODSON, THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA 1919-1939: REGISTER INCLUDING MEMBERS OF 1933 CONVENTION 225 (1939).

64. 1908 VA. SENATE JOURNAL 943.

65. *Id.*

66. *Id.*

67. *Id.*

68. See 1908 VA. HOUSE OF DELEGATES JOURNAL 379-83, 716-21, 1023-31; 1908 VA. SENATE JOURNAL 941-46; see also Brooks M. Barnes, The Sins of John W. G. Blackstone

In 1871, Judge Alexander Mahood of the Fourteenth Judicial Circuit was accused of being drunk while sitting on the bench as a circuit court judge.⁶⁹ However, insufficient proof was offered, and the House of Delegates voted against his removal.⁷⁰

Again, in 1944, the legislature attempted to remove a judge; this time it was Judge Alonzo B. Carney of the Circuit Court of Norfolk County. The first attempt was to get the Supreme Court of Appeals to declare him to be incapacitated.⁷¹ However, the court ruled that there was no showing of any physical or mental incapacity, and the court suggested that the constitutional procedures for judicial removal should not be circumvented by using the statute as a ruse.⁷² The House of Delegates then voted to remove him on the ground that he had agreed with his predecessor that, if he would retire, he, Carney, would share his salary with him.⁷³ However, the Senate refused to follow, and the judge remained on the bench.⁷⁴

Perhaps the reason for the infrequent use of the impeachment process is because it is politically and procedurally cumbersome. Except in the most outrageous situations involving public scandal, it is easier simply to allow an unworthy or incompetent judge to finish his or her term of office and then not re-elect. This means that the General Assembly does not have to deal with an unpleasant situation. However, the local bar has to stand between the unfit judge and the general public to ameliorate the bad situation which will soon come discreetly to a quiet end.

14, 31–32 (Apr. 29, 1982) (unpublished manuscript, on file with the Virginia Historical Society).

69. 1870–71 VA. HOUSE OF DELEGATES JOURNAL 146, 183.

70. *Id.* at 231, 308, 346.

71. See Act of Apr. 6, 1942, ch. 441, § 5, 1942 Va. Acts 706.

72. See *In re Carney*, 182 Va. 907, 908–10, 30 S.E.2d 789, 789–790 (1944).

73. See 1945 VA. HOUSE OF DELEGATES JOURNAL 259–63.

74. See 1945 VA. SENATE JOURNAL 190–91.

IV. STRIKING A BALANCE

To resolve situations of judicial misbehavior without having to resort to a legislative impeachment, the Virginia Constitution of 1971 provided for the Judicial Inquiry and Review Commission.⁷⁵ This allows the judiciary to regulate itself.⁷⁶ The Commission, which is elected by the General Assembly, hears complaints against judges and investigates them.⁷⁷ If the investigation reveals facts that warrant further action, the Commission prosecutes the judge in a formal trial before the Supreme Court of Virginia.⁷⁸ The court then hears evidence and argument and may reprimand or remove the judge from office.⁷⁹ Under the firm leadership of Chief Justice Harry L. Carrico, this procedure has been very effective in assuring that the reputation of the Virginia judiciary stands high.

Since 1942, there have been statutes which provide for the removal of judges by the Supreme Court of Virginia for physical or mental incapacity⁸⁰ and which provide for a mandatory retirement age.⁸¹ In both cases, there are provisions for pensions.⁸² The federal Age Discrimination in Employment Act,⁸³ which prohibits generally mandatory retirement ages, does not apply to state court judges.⁸⁴

The debate over the place of the judiciary within the government centers on two issues—*independence* and *accountability*. The judges must be independent of external influences which will divert them from their duty to administer justice according to the

75. VA. CONST. art. VI, § 10.

76. See generally 2 HOWARD, *supra* note 3, at 757–66 (discussing the mandate to the General Assembly to create the Judicial Inquiry and Review Commission); MORRIS, *supra* note 3, at 58–59 (discussing the impact of the Judicial Inquiry and Review Commission on removal of judges from office in Virginia).

77. VA. CONST. art. VI, § 10.

78. *Id.*

79. See VA. CODE ANN. §§ 17.1-900 to -913 (Repl. Vol. 2003).

80. See, e.g., VA. CONST. art. VI, § 10; VA. CODE ANN. § 17.1-912 (Repl. Vol. 2003); Act of Apr. 6, 1942, ch. 441, 1942 Va. Acts 705.

81. VA. CONST. art. VI, § 9; VA. CODE ANN. § 51.1-305(B1) (Repl. Vol. 2002).

82. See VA. CODE ANN. §§ 51.1-306, -308 (Repl. Vol. 2002).

83. 29 U.S.C. §§ 621–34 (2000).

84. See Gregory v. Ashcroft, 501 U.S. 452, 473 (1991).

rule of law. The judges must be accountable if they fail to do this. However, accountability to personal or political interests is wrong where it deflects or perverts the judges from the disinterested and impartial pursuit of the rule of law.

The administration of the law does not allow for judicial legislation where the law is clearly settled. For the judges to be able to change the law whenever they individually, personally feel it appropriate is to upset expectations retrospectively and also to destroy the law as a system; the judges would be putting themselves above the law. Litigants frequently raise issues of law, the resolution of which is in doubt; if the matter were clear, reasonable parties would have settled their legal disagreements out of court. The courts cannot refuse to decide difficult issues of law and leave the parties to settle their disputes by a fistfight. However, when the law is clear, for the judiciary to say that it is otherwise would be an unconstitutional usurpation of the legislative function of the General Assembly. However, if a statute is unconstitutional, it is not the law, and the courts must so declare it. This frequently places the courts in difficult positions.

Just as the legislature is not above the law, neither are the judges. Ignorant, foolish, and corrupt judges should be held accountable. Then, the question is to whom should they be accountable. The proponents of popular election of judges argue that the judiciary should be directly accountable to the voters, just as are the other branches of the government.⁸⁵ However, a generally uneducated populace with its natural proportion of moral depravity, as is that of the United States, is not competent to know when a judge is not proceeding according to the rule of law. Therefore, popular opinions as to judicial elections will be improperly manipulated by partisan politicians trying to create a political power base, by the news media trying to sell advertising through sensational journalism, or by sinister persons for private and selfish motives.

In many states, judges run for election and re-election as part of a national political ticket. However, political preferences should not govern the issues of the administration of the rule of law or judicial corruption. Politics are irrelevant to such concerns.

The news media frequently oversteps the bounds of responsible journalism and attempts to control the outcome of pending litiga-

85. Long, *supra* note 39, at 702–10, 718–23, 742–49.

tion. Whatever the underlying motive might be, the threat of a media campaign against a sitting judge who is subject to re-election should not pervert the course of justice. One of the worst examples is the conviction of Dr. Samuel H. Sheppard in Cleveland, Ohio.⁸⁶ The local newspapers decided that Dr. Sheppard was guilty of killing his wife, a prominent socialite, and a campaign of publicity was launched to have him convicted. The judge was due to be re-elected shortly after the trial, and the prosecutor was running for election to a different judgeship.⁸⁷ Public pressure was brought to bear upon the trial procedure, and the defendant was convicted of murder.⁸⁸ A federal court found that the newspaper publicity was so powerful that the defendant was denied his right to a fair trial, and the conviction was ultimately overturned.⁸⁹ Examples of media pressure can also be found in Virginia. In 1898, the judge of the County Court of Norfolk County was attacked by the press as being favorable to criminals because he was affording accused persons their constitutional rights:

The misdoings of the alleged criminal referred to in the editorial complained of, were, at the very time of the publication, under investigation. There was a difference of opinion as to whether the locality of the crime was in Norfolk city or Norfolk county. The manifest tendency of such a publication, at that time, was to influence and affect the judgment of the public, from whom the trial jury was to be selected; to embarrass, obstruct and impede such investigation; to influence, direct and control the final result.⁹⁰

In that case, the editor of the newspaper was convicted of criminal contempt of court.⁹¹

The balance between the freedom of the press and the independence of the judiciary is clearly stated by Judge Prentis in that case:⁹²

Under every form of government, which is able to maintain its own existence, there must always be somewhere a sovereign authority

86. See *Sheppard v. Maxwell*, 384 U.S. 333 (1966). See generally PAUL HOLMES, *THE SHEPPARD MURDER CASE* (1961) (providing a more detailed account of the *Sheppard* case).

87. See *Sheppard*, 384 U.S. at 342.

88. See *id.* at 335.

89. See *id.* at 335-36.

90. *Elam v. Commonwealth*, 13 Va. Cir. 536, 536-39 (Cir. Ct. 1898) (Norfolk County).

91. *Id.* at 536, 541.

92. Judge Robert Riddick Prentis later became Chief Justice of Virginia and predecessor of Chief Justice Harry L. Carrico. See MORRIS, *supra* note 3, at 64, 166, 170, and 174.

with power to enforce all of its own decrees. Under our system the people themselves claim and hold this ultimate sovereignty. From them the courts and all the other departments of the government derive their limited powers. The sovereign people express their will or law through their agents, and when expressed all citizens owe it their respect and allegiance.

The courts, by the will of the sovereign people, are intrusted with so much of this ultimate sovereignty as is necessary for the due administration of justice. Any attack upon them, therefore, certainly while in the act of administering justice, is an attack upon the sovereign people, whom the courts simply represent and serve. It is an assault upon the government which the people have ordained. Of course as to his private conduct and affairs, the judge cannot be accorded any special privilege. He must defend himself from unjust aspersions here just like other men. Not so when he is exercising his official duties. The sorry spectacle of a judge descending from his high public place to vindicate his official conduct, either by personal violence or by a suit for damages, would be unseemly and intolerable. A wrong committed against him thus in his public capacity is a wrong to the government he represents. It should be punished not as a private injury, but as a public wrong. So contempts of court have always been treated, and so it must continue if the courts themselves are to continue. The judge, by the very nature of his office, is of necessity constantly placed in positions of antagonism to those whose rights he determines. His judgments necessarily cross and thwart the purposes of unsuccessful suitors. He should, as a matter of public policy, therefore, be protected by the whole power of the State from the malicious assaults of disappointed litigants, as well as from attacks, criticisms and influences which would, in advance, direct and control his judgments for selfish and evil ends.⁹³

V. CONCLUSION

The Constitution of Virginia makes the judiciary independent of the other branches of the government.⁹⁴ As for accountability, the popular election of judges sounds good in theory, but in practice it has proved to be a mistake. The preferable alternative is the present system of accountability to the legislature and to the Judicial Inquiry and Review Commission. The legal history of Virginia has proved these to be effective ways of dealing with situations of public scandal while protecting the impartial administration of the rule of law.

93. *Elam*, 13 Va. Cir. at 536-537.

94. *See* VA. CONST. art. III, § 1.

The General Assembly has not politicized the judiciary by using its re-election process to re-adjudicate or review the judges' administration of the rule of law as to any particular legal or social issue.⁹⁵ The result is that the Virginia judiciary is fortunately independent of party politics when it performs its duties. It would be destructive of judicial independence if the legislature were to politicize the re-election of judges. If it were to do so, it should expect that its judiciary would join in the political process. The declaration of its statutes as unconstitutional would become routine, and the separation of governmental powers would be upset. It would also seriously damage the foundation of our society, which is the rule of law. It is thus imperative that the legislature and the judiciary continue to respect the separate governmental roles of each other.

95. The only exception took place long ago, when the Readjusters resorted to court-packing politics in the 1880s. See NELSON, *supra* note 3, at 116–20.