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ESSAYS

THE COURT OF APPEALS OF VIRGINIA CELEBRATES THIRTY YEARS OF SERVICE TO THE COMMONWEALTH

*The Honorable Stephen R. McCullough **

*The Honorable Marla Graff Decker ***

On June 2, 2015, the Supreme Court of Virginia convened a special session to celebrate the thirtieth anniversary of the Court of Appeals of Virginia. This anniversary affords the opportunity to look back on the court's creation and to consider its evolution over the last three decades.

I. DEBATE, STUDY, AND CREATION OF AN INTERMEDIATE APPELLATE COURT

The Supreme Court of Virginia served as the Commonwealth's sole appellate tribunal for the near entirety of its history.¹ Over

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1. Virginia's highest court was called the "Court of Appeals" and the "Supreme Court of Appeals" before our 1971 constitution renamed it the "Supreme Court." W. Hamilton Bryson, *Judicial Independence in Virginia*, 38 U. RICH. L. REV. 705, 707 n.9 (2004). Previous constitutions and statutes had provided for a special appellate court to serve as a substitutionary court or to hear cases as assigned by the supreme court. *See generally* David K. Sutelan & Wayne R. Spencer, Note, *The Virginia Special Court of Appeals: Constitutional Relief for an Overburdened Court*, 8 WM. & MARY L. REV. 244 (1967) (tracing the history of the Special Court of Appeals). This court was convened only a few times, the last being from 1926 to 1928. *See id.* at 272-74. Our 1971 constitution did not provide for such a court.

the centuries, Virginia's economy and population changed significantly. By 1968, the perception of a growing crisis in the administration of justice prompted the General Assembly to create a commission to engage in a "full and complete study of the entire judicial system of the Commonwealth."² Supreme Court Justice Lawrence W. I'Anson chaired this Court System Study Commission (the "Commission").³

While the Commission was deliberating, in 1970, Virginia took one preliminary step to effect change when it adopted a revised constitution that expressly granted the General Assembly the power to establish an intermediate appellate court, thereby removing any doubt as to its power in that regard.⁴

Following the establishment of the Commission, then University of Virginia law professors Graham Lilly and Antonin Scalia provided a further impetus for reform by co-authoring an article titled, *Appellate Justice: A Crisis in Virginia*, stressing the need for reform of Virginia's appellate process.⁵ The authors pointed out that "[t]he size and structure of Virginia's Supreme Court of Appeals, its basic jurisdiction, and even most of its procedures remain unchanged from what they were—not merely in 1953, but in 1928."⁶ The article described the supreme court as "overburdened," as evidenced by the significant increase in appeals filed with the court and its backlog of cases.⁷ The authors theorized that the court was turning down meritorious appeals to cope with the volume.⁸ Lilly and Scalia recommended the establishment of a lower appellate court.⁹ They noted, pointedly, that Virginia was the only state of its size without an intermediate appellate court.¹⁰

2. S.J. Res. 5, Va. Gen. Assembly (Reg. Sess. 1968).

3. VA. COURT SYS. STUDY COMM'N, REPORT TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA 1 (1971) [hereinafter COURT SYS. REPORT].

4. VA. CONST. art. VI, § 1.

5. Graham C. Lilly & Antonin Scalia, *Appellate Justice: A Crisis in Virginia?*, 57 VA. L. REV. 3, 3-4 (1971).

6. *Id.* at 3.

7. *Id.* at 15.

8. *Id.* at 14.

9. *Id.* at 45-46.

10. *Id.* at 22-26.

In 1971, after more than two years of study and a National Conference on the Judiciary (attended by President Richard Nixon and Chief Justice Warren Burger, among others), the Commission issued its report.¹¹ The report presented a sobering picture of the Commonwealth of Virginia's judiciary. In addition to a significant increase in population, litigation had increased by 250% from 1940 to 1970.¹² At the appellate level, petitions and applications had increased by 400% from 1951 to 1971.¹³ Even with this increase the report noted, the number of appeals the court granted had increased by only 30%.¹⁴ The judiciary as a whole confronted a mounting backlog of cases.¹⁵ The Commission's report concluded that the supreme court was "overburdened."¹⁶

To help cope with these problems, the Commission recommended that the General Assembly establish "an intermediate appellate court, to be called the Court of Appeals."¹⁷ Such a step, it concluded, was necessary "to preserve the quality of justice in Virginia."¹⁸ The appellate court envisioned by the Commission, however, differed significantly from the Court of Appeals of Virginia in its present form. The Commission suggested a court of appeals that would initially consist of three permanent appellate judges, who would sit with judges from courts of record in panels of three.¹⁹ The Clerk of the supreme court would support the court of appeals.²⁰ The Commission generally envisaged that the court of appeals would prepare few "full written opinions."²¹ The court of appeals' decisions would be final, unless a panel member dissented.²² In the Commission's view, there would be no new appeals of right.²³ The jurisdiction of the court of appeals would extend to appeals from the Workers' Compensation Commission

11. COURT SYS. REPORT, *supra* note 3, at 1-2.

12. *Id.* at 7.

13. *Id.* at 12.

14. *Id.*

15. *See id.* at 11.

16. *Id.* at 12.

17. *Id.* at 13.

18. *Id.*

19. *Id.* at 2, 11.

20. *Id.* at 15.

21. *Id.* at 16.

22. *Id.* at 14.

23. *Id.* at 2.

(then the Industrial Commission), domestic relations cases, and misdemeanor cases where imprisonment was not involved.²⁴

The gestational period for this intermediate court would prove to be quite long. Over a decade passed between the Commission's report and the creation of the Court of Appeals of Virginia.²⁵ In 1979, the National Center for State Courts issued a study that, again, recommended the creation of an intermediate state appellate court,²⁶ but the final impetus for this court's creation came from a report by the Judicial Council of Virginia.²⁷ This report provided yet another view of the court's structure. It called for an intermediate appellate court, composed of four divisions with three judges who would rotate in each division.²⁸ Under the Judicial Council proposal, appeals were to be discretionary, and the court would have broad jurisdiction over all appeals, except for the narrow class that could proceed as a matter of right to the supreme court.²⁹ The Judicial Council contemplated discretionary review of the decisions of the intermediate appellate court in all but a few cases. Specifically, decisions by this court would be final in domestic relations cases, misdemeanor cases involving a monetary sentence, cases originating before administrative agencies, and civil cases involving less than \$10,000.³⁰

Finally, after many years of studies, discussions, and recommendations, in 1982, Delegate Theodore V. Morrison, Jr. introduced legislation to create the Court of Appeals of Virginia.³¹ His proposed legislation was based on the Judicial Council report.³²

24. VA. CODE ANN. § 65.2-200A (Repl. Vol. 2012); COURT SYS. REPORT, *supra* note 3, at 14.

25. Compare Act of Mar. 25, 1983, ch. 413, 1983 Va. Acts 519, 520 (codified at VA. CODE ANN. § 17.1-400 (A) (Repl. Vol. 2015)) (indicating that the General Assembly created the court of appeals in 1985), with COURT SYS. REPORT, *supra* note 3, at 1-2 (recommending the creation of the court of appeals in 1971).

26. NAT'L CTR. FOR STATE COURTS, FINAL REPORT: VIRGINIA COURT ORGANIZATION STUDY, 4-5, 39-40, 85 (1979).

27. See Martha B. Brissette, Comment, *The Virginia Judicial Council's Intermediate Appellate Court Proposal*, 16 U. RICH. L. REV. 209, 209 (1981) (citing JUDICIAL COUNCIL OF VIRGINIA ADOPTS PROPOSAL FOR INTERMEDIATE APPELLATE COURT, 29 VA. B. NEWS 4 (1981)).

28. *Id.* at 215.

29. *Id.* at 219, 223.

30. *Id.* at 226.

31. H.B. 455, Va. Gen. Assembly (Reg. Sess. 1982) (enacted as Act of Mar. 25, 1983, ch. 413, 1983 Va. Acts 519, 519-20).

32. Brissette, *supra* note 27, at 209.

The General Assembly adopted the legislation in 1983, which created an intermediate court of appeals beginning January 1, 1985.³³ Although the General Assembly would refine the composition and jurisdiction of the court, the legislation, in broad outlines, created the court we recognize today: a court of limited jurisdiction, composed of full-time appellate judges who travel the Commonwealth to hear cases in panels of three judges.³⁴

II. LAUNCHING A NEW COURT

Retired Chief Judge Johanna L. Fitzpatrick spoke at the Supreme Court of Virginia's special session celebrating the thirtieth anniversary of the court of appeals.³⁵ Her remarks included some anecdotes about the court's formative years.³⁶ Judge Fitzpatrick described the first ten judges as the perfect jurists to launch the court.³⁷ She explained that their intellect, vision, and energy made the newly minted court work.³⁸ She said, "I believe that the choices that they made set the tone for the court becoming what it is today, and it is a wonderful institution"³⁹ The retired chief judge spoke passionately about the different personalities of the first ten judges who hailed from all over the Commonwealth, all bringing different experiences and perspectives to what immediately became recognized as a "court of and for the people."⁴⁰ Judge Fitzpatrick spiritedly referred to the jurisdictional areas of the court as those involving people—"people cases."⁴¹

The legislation provided the basic building blocks, but as Judge Fitzpatrick noted, the details were missing—there was "a blank slate."⁴² She spoke of the enormous challenges that faced the court in 1984 and 1985, and the decisions that had to be made in order

33. Ch. 413, 1983 Va. Acts 520 (codified at VA. CODE ANN. § 17-116.01 (Cum. Supp. 1992)).

34. *See id.*

35. The Hon. Johanna L. Fitzpatrick, Address at the Supreme Court of Virginia's Special Session, Recognition of the Thirtieth Anniversary of the Court of Appeals of Virginia (June 2, 2015) [hereinafter Fitzpatrick].

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

for the court to function as efficiently as it does today.⁴³ Decisions ranged from basic, fundamental matters, to small details.⁴⁴

One of the first decisions the judges had to make, while seemingly trivial, was resolved in a way that reflected the congenial nature of the new court. In an oral history interview about the court's early days, Judge Norman K. Moon, another former chief judge of the court, recalled that soon after the General Assembly established the court, the new judges had to determine a system of seniority because the General Assembly had elected all ten of them at the same time.⁴⁵ The court did not "give it a great deal of thought."⁴⁶ Judge Moon suggested assigning seniority by ascending alphabetical order of last name (which would not favor him).⁴⁷ The court quickly adopted that method.⁴⁸

The court needed to determine where panels would sit, how to best accommodate the litigants, whether panels should rotate the ten judges through, how judges should communicate with one another, and how to efficiently administer justice. The considerations focused on how the court could best function as the "people's court" of appeals.⁴⁹ In his oral history interview, retired Judge Sam W. Coleman, III emphasized that the court strived to be "user friendly" and accessible to people across the Commonwealth.⁵⁰

As Judge Fitzpatrick noted, there "was no game book" for the court.⁵¹ Questions regarding operational matters continued to surface through the early days. There was no furniture for the court's offices.⁵² There was no budget.⁵³ There were no law clerks.⁵⁴

43. *Id.*

44. *Id.*

45. See Interview by Dr. Cassandra Newby-Alexander with the Hon. Lawrence L. Koontz, Jr., the Hon. Norman K. Moon, the Hon. Sam W. Coleman III, the Hon. Barbara M. Kennan, and the Hon. James W. Benton, Jr., Judges, Court of Appeals of Virginia, in Richmond, Va. 5 (Mar. 27, 2013) (interviewing the five judges who sat on the inaugural 1985 Court of Appeals of Virginia), <http://cavhistory.org/court-of-appeals-oral-history-in-terview-march-27-2013> [hereinafter Interview by Dr. Cassandra Newby-Alexander].

46. *Id.*

47. *Id.* at 5–6.

48. *Id.* at 6.

49. See *id.* at 6–7 (J. Coleman discussing the desire to make the court more accessible).

50. *Id.*

51. Fitzpatrick, *supra* note 35.

52. *Id.*

53. *Id.*

At first, there were no cases—the judges had to wait for them to start filtering into the new system. Senior Justice Lawrence L. Koontz, Jr. recalled from his experience as one of the initial ten judges that, after waiting about three weeks before receiving a case, he asked himself, “What kind of job is this?”⁵⁵

All of these matters needed to be addressed for the court to begin hearing and deciding cases. The court machinery sprang to life with the help of the Executive Secretary of the supreme court and the assistance of appellate judges from other states.⁵⁶ The Executive Secretary ensured that three or four of the new judges were able to attend an appellate judges’ conference at New York University.⁵⁷ The court was also provided funding for a computer system, which was especially helpful for the court’s process of circulating opinions.⁵⁸ Ironically, the court of appeals had a functional computer system before the supreme court.⁵⁹

Leadership in the formative years was critical to success. The untimely death of the court’s first Chief Judge, E. Ballard Baker, was an early setback, but the court quickly responded and asked Lawrence Koontz to serve as the Chief.⁶⁰ Judge Fitzpatrick spoke of Justice Koontz’s ability to lead the group of independently-elected and independent-minded judges to make important decisions for the court.⁶¹ His manner and approach to problem solving encouraged discussion and collegiality.⁶²

Judge Fitzpatrick reminisced how, with each “step” the court took, the group of judges went from being strangers to being colleagues and friends.⁶³ As Senior Justice Koontz explained, “Every single person on the court wanted the court to be successful and

54. *Id.*

55. Interview by Dr. Cassandra Newby-Alexander, *supra* note 45, at 13.

56. *Id.* at 8.

57. *Id.* at 23.

58. *Id.* at 23–24.

59. *Id.* at 23.

60. Rob Walker, *Court of Appeals Ends Its 1st Year*, RICH. TIMES-DISPATCH, Dec. 22, 1985, at D-6.

61. Fitzpatrick, *supra* note 35.

62. *Id.*

63. *Id.*

did everything we could to make it successful, and in a very short time . . . we became friends and not just colleagues."⁶⁴

Judge Fitzpatrick explained that the judges were committed to doing justice, and had to decide the best way to make that happen.⁶⁵ They understood their responsibility to provide reasoned decisions in every case.⁶⁶ The judges also understood the importance of providing opinions that would guide the trial judges and litigants in future cases.⁶⁷

Another decision the court had to make regarding guidance for trial courts and the Bar was what form was best suited for their written opinions. The statute creating the court of appeals required a written opinion for every petition and appeal of right.⁶⁸ The judges interpreted this as requiring an opinion explaining the legal reasoning behind the decision, rather than simply stating, for example, "Not finding any reversible error, the trial judge is affirmed."⁶⁹ In the oral history interview, retired Judge James W. Benton, Jr. emphasized the importance of written opinions for both the legitimacy of the court and as a guide for the supreme court, by explaining why the case was decided in a certain way.⁷⁰

Judge Fitzpatrick pointed out that because of the limited access provided through the Supreme Court of Virginia, few Virginia attorneys had ever appeared before an appellate court.⁷¹ With the advent of the intermediate court, more attorneys had the opportunity to litigate appeals. She told a story of one of her first three-judge panels, where an attorney proclaimed, during his argument, that the case was tried by one of the best trial judges in the Commonwealth.⁷² The attorney went on to add, "I believe this was probably the first error he ever made or probably ever will make, but even Judge Coleman can be wrong once, and he proba-

64. Interview by Dr. Cassandra Newby-Alexander, *supra* note 45, at 10.

65. See Fitzpatrick, *supra* note 35.

66. *Id.*

67. *Id.*

68. Act of Mar. 25, 1983, ch. 413, 1983 Va. Acts 519, 522 (codified at VA. CODE ANN. § 17-116.010 (Repl. Vol. 1996 & Cum. Supp. 1997)).

69. Interview by Dr. Cassandra Newby-Alexander, *supra* note 45, at 7.

70. *Id.*

71. Fitzpatrick, *supra* note 35.

72. *Id.*

bly was only once.”⁷³ Of course, Judge Coleman was a judge of the court of appeals at that time.⁷⁴

A sea change in the law occurred around the same time the court of appeals was established—the passage of the equitable distribution statute.⁷⁵ This area of the law fell uniquely within the jurisdiction of the court.⁷⁶ It is what led retired Judge William “Billy” Hodges to proclaim that the job of a judge of the court of appeals would be great, except for all the reading and writing.⁷⁷

Judge Fitzpatrick speculated that, although the prospect of an additional layer of scrutiny might not have enthused many trial judges, most came to appreciate the guidance they received from the body of law that developed, particularly in the area of equitable distribution.⁷⁸ She noted that many issues would have taken decades to work their way through the supreme court, had it remained the only appellate court.⁷⁹ In fact, in its first year, the court of appeals received 1641 filings and granted more than 200 appeals.⁸⁰ The number of cases filed with the supreme court decreased from 1900 to 1000.⁸¹

III. A COURT CLOSE TO THE PEOPLE

The court of appeals’ jurisdiction and the cases that come before it are central to the people’s concerns. Judge Fitzpatrick referred to it as a “people’s court.”⁸² The life, liberty, property, and well-being of the citizens are involved, and the stakes are high. The judges of the court know and understand their formidable responsibility to ensure justice under the law.

73. *Id.*

74. *Id.*

75. Act of Apr. 9, 1982, ch. 309, 1982 Va. Acts 515, 516–17 (codified at VA. CODE ANN. § 20-107.3 (Cum. Supp. 2015)).

76. See VA. CODE ANN. § 17-116.05(3) (Repl. Vol. 1996).

77. Fitzpatrick, *supra* note 35.

78. *Id.*

79. *Id.*

80. *A Short History of the Court of Appeals of Virginia*, COURT OF APPEALS OF VIRGINIA JUDGES, 1985-PRESENT, <http://cavhistory.org/a-short-history-of-the-court-of-appeals-of-virginia/> (last visited Oct. 1, 2015).

81. *Id.*

82. Fitzpatrick, *supra* note 35.

The statutory mandate calls for an accessible court. It requires the court to provide “convenient access to the various geographic areas of the Commonwealth.”⁸³ The General Assembly has directed the Chief Judge to “schedule sessions of the court as required to discharge expeditiously the business of the court.”⁸⁴ Furthermore, in fashioning rules for the court of appeals, the supreme court has been tasked with doing so in a way that “achieve[s] the just, speedy, and inexpensive disposition of all litigation in that court.”⁸⁵

The court of appeals hears oral arguments at the petition and merit stages of criminal cases.⁸⁶ The court also hears arguments in civil cases that are appeals of right.⁸⁷ This practice provides extended access to the court and gives every party seeking or pursuing an appeal full opportunity to be heard. It also provides an open court setting for the public.

The decision to have the court hear cases primarily in three-judge panels in different regions of the Commonwealth is consistent with the effort to bring the appellate court to the litigants, practitioners, and the public. The court borrows courtrooms from the circuit courts, except when sitting in Richmond, where there is a modest courtroom housed in the supreme court building.⁸⁸ The judges rotate panels and locations so that no single group of three sits together on a regular basis, nor does any single judge sit in only one region.⁸⁹ Judges essentially “ride the circuit,” which, for the court of appeals, is the entire Commonwealth.

The court has a docket for all panel sessions. Counsel are advised in advance of the time and location for oral argument in their case.⁹⁰ The dockets are also posted on the court’s website.⁹¹ One of the three judges on the panel serves as the presiding

83. VA. CODE ANN. § 17.1-402(A) (Repl. Vol. 2010 & Cum. Supp. 2015).

84. *Id.*

85. *Id.* § 17.1-403 (Repl. Vol. 2010 & Cum. Supp. 2015).

86. See VA. SUP. CT. R. 5A:12(g), 5A:28(a) (Repl. Vol. 2015).

87. See R. 5A:28(a) (Repl. Vol. 2015).

88. See VA. CODE ANN. § 17.1-402(A) (Repl. Vol. 2010 & Cum. Supp. 2015); THE COURT OF APPEALS OF VIRGINIA, <http://www.courts.state.va.us/courts/cav/cavinfo.pdf> (last visited Oct. 1, 2015).

89. See VA. CODE ANN. § 17.1-402(B) (Repl. Vol. 2010 & Cum. Supp. 2015).

90. See R. 5A:28(a) (Repl. Vol. 2015).

91. See COURT OF APPEALS OF VIRGINIA DOCKETS, <http://www.courts.state.va.us/courts/cav/dockets/home.html> (last visited Oct. 1, 2015).

judge, who calls the cases and keeps track of time limits.⁹² As part of its tradition, after every case that is heard on the merits, the judges leave the bench and greet counsel before proceeding to the next case on the docket. Over the years, this practice has been well received by the Bar. During his oral history interview, Senior Judge Walter S. Felton, Jr., who previously served as one of the court's chief judges, noted, "[W]e come down off the bench and shake hands with the attorneys or pro se litigants and . . . thank them for their argument, because this is justice."⁹³

The court is well aware of the significance of the cases before it. Consistent with one of the original bases for the creation of the court, cases proceed through the system in an efficient and timely manner. While many factors affect the length of time it takes for a case to be decided and an order or opinion to be issued, the court, through internal tracking, ensures that cases work their way through the system in as timely a manner as possible.⁹⁴

When they are not hearing cases, researching, or writing opinions, the judges of the court have developed a tradition of service to the community and the Bar. They give of themselves to the legal community as well as the citizenry. The judges teach, provide presentations, attend Bar association meetings, and generally interact regularly with attorneys and citizens.⁹⁵ The concept of educating the legal community and public at large about the work of the court is ingrained in the court's history. That tradition continues and is quite robust.

92. VA. CODE ANN. § 17.1-402(B) (Repl. Vol. 2010 & Cum. Supp. 2015).

93. Interview by Dr. Cassandra Newby-Alexander with the Hon. Walter S. Felton, Jr., in Richmond, Va. 39 (Nov. 7, 2014), <http://cavhistory.org/walter-s-felton-jr-september-1-2002-december-31-2014-chief-judge/walter-s-felton-jr-september-1-2002-december-31-2014-chief-judge-2006-2014/>.

94. See BRIAN J. OSTROM ET AL., VIRGINIA JUDICIAL WORKLOAD ASSESSMENT REPORT, NAT'L CTR. FOR STATE COURTS: RESEARCH DIV. 9–10 (2013), http://www.courts.state.va.us/courts/scv/virginia_Judicial_workload_assessment_report.pdf (last visited Oct. 1, 2015).

95. See FAIRFAX BAR ASSOCIATION, YOUNG LAWYERS SECTION, <http://www.fairfaxbar.org/?page=73> (last visited Oct. 1, 2015); RICHMOND BAR ASSOCIATION CLASS DESCRIPTIONS, "TRIAL PREPARATION: GETTING AHEAD OF THE CURVE," AND "COMMON YOUNG LAWYER MISTAKES (AND HOW TO AVOID THEM): ADVICE FROM THE BENCH," <http://www.richmondbar.org/cle/schedule-class-descriptions/> (last visited Oct. 1, 2015); UNIVERSITY OF RICHMOND, "GET TO KNOW . . . THE HONORABLE WALTER S. FELTON, JR.," <http://calendar.richmond.edu/search.html?tag=law> (last visited Oct. 1, 2015).

IV. EVOLUTION OF THE COURT OVER THIRTY YEARS

The General Assembly initially contemplated a court consisting of nine judges⁹⁶ but, before the court even went into service, expanded the number to ten⁹⁷ and, several years later, to eleven.⁹⁸ The judges select one of their colleagues to serve as Chief Judge for a term of four years.⁹⁹

When discussing thirty years of service to the citizens of the Commonwealth and the Bar, it is fitting to at least briefly mention those who have served on the court. There have been thirty-nine judges who have served over the thirty-year period.¹⁰⁰ Eight of them have gone on to serve as justices of the Supreme Court of Virginia;¹⁰¹ two, as judges on the United States Court of Appeals for the Fourth Circuit;¹⁰² and one, as a federal district court judge in the Western District of Virginia.¹⁰³ The first female appeals court judge in Virginia was one of the original ten judges on the court.¹⁰⁴ One judge on the court previously served as the Attorney General of Virginia.¹⁰⁵ Over the course of thirty years, there have been six individuals who have served as Chief Judge of the court.¹⁰⁶

96. Act of Mar. 25, 1983, ch. 413, 1983 Va. Acts 519, 520.

97. Act of Apr. 9, 1984, ch. 701, 1984 Va. Acts 1521, 1522 (codified as amended at VA. CODE ANN. § 17-116.01 (Repl. Vol. 1988)).

98. Act of Mar. 1, 2000, ch. 8, 2000 Va. Acts 8, 9 (codified as amended at VA. CODE ANN. § 17-116.01 (Repl. Vol. 2015)).

99. VA. CODE ANN. § 17.1-400(B) (Repl. Vol. 2015).

100. *A Short History of the Court of Appeals of Virginia*, COURT OF APPEALS OF VIRGINIA JUDGES, 1985-PRESENT, <http://cavhistory.org/a-short-history-of-the-court-of-appeals-of-virginia/> (last visited Oct. 1, 2015).

101. *Id.*

102. They are Judge G. Steven Agee (commission date July 1, 2008) and Judge Barbara M. Keenan (commission date March 9, 2010). *Judges of the Court*, UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, <http://www.ca4.uscourts.gov/judges/judges-of-the-court> (last visited Oct. 1, 2015).

103. That was Judge Norman K. Moon (commission date November 12, 1997). *History of the Federal Judiciary*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=2743&cid=166&ctype=dc&instat=va&highlight=null> (last visited Oct. 1, 2015).

104. See Tom Jackman, *Longtime Va. Judge Nominated for U.S. Appeals Court Has Been a Trailblazer*, WASH. POST, Sept. 15, 2009, at B05; cf. *Chronological List of Justices, 1779-Present*, SUPREME COURT OF VIRGINIA JUSTICES, 1779-PRESENT, <http://scvahistory.org/chronological-list-of-justices-1779-present/> (last visited Oct. 1, 2015).

105. Jason Winter, *Beales Sworn in During Historic Boydton Ceremony*, S. HILL ENTERPRISE, April 28, 2006, http://www.southhillerenterprise.com/news/article_574fdc17-1950-5934-add4-4de56a50439b.html.

106. *A Short History of the Court of Appeals of Virginia*, COURT OF APPEALS OF

Thirty-one of the thirty-nine judges who have served on the court graduated from Virginia law schools. Eight judges graduated from the University of Richmond School of Law, and three of them served as Chief Judge at some time during their tenure.¹⁰⁷ This included the first Chief Judge, E. Ballard Baker, a 1947 graduate.¹⁰⁸ Three of the court's current members and one senior judge are University of Richmond graduates.¹⁰⁹

Fourteen of the thirty-one judges graduated from the University of Virginia School of Law.¹¹⁰ This is the most from a Virginia law school. Five graduated from the William and Mary Law School.¹¹¹ Four graduated from Washington and Lee University School of Law.¹¹² One graduated from the George Mason University School of Law.¹¹³

The judges on the court have a great diversity of backgrounds. The vast majority of the judges—thirty-five out of thirty-nine—have spent time in private practice.¹¹⁴ Eighteen of the judges di-

VIRGINIA JUDGES, 1985-PRESENT, <http://cavhistory.org/a-short-history-of-the-court-of-appeals-of-virginia/> (last visited Oct. 1, 2015).

107. See generally *Biographical Directory*, COURT OF APPEALS OF VIRGINIA JUDGES, 1985-PRESENT, <http://cavhistory.org/> (providing biographical information about former and current judges on the Court of Appeals of Virginia including tenure as Chief Judge and alma mater) [hereinafter *Biographical Directory*].

108. *E. Ballard Baker, January 1, 1985–March 24, 1985; Chief Judge, January 7, 1985–March 24, 1985*, COURT OF APPEALS OF VIRGINIA JUDGES, 1985-PRESENT, <http://cavhistory.org/e-ballard-baker-chief-judge-january-1-1985-march-24-1985/> (last visited Oct. 1, 2015).

109. *Biographical Directory*, *supra* note 107 (providing biographies for Judges Teresa M. Chafin, Marla Graff Decker, and Stephen R. McCullough).

110. *Id.* (providing biographies for Judges G. Steven Agee, Joseph E. Baker, Bernard G. Barrow, Randolph A. Beales, James W. Benton, Jr., Jean Harrison Clements, Robert P. Frank, James W. Haley, Jr., Barbara Milano Keenan, Donald W. Lemons, Norman K. Moon, Nelson T. Overton, Cleo E. Powell, and Jere M.H. Willis, Jr.).

111. *Id.* (providing biographies for Judges Richard Y. AtLee, Jr., Richard S. Bray, D. Arthur Kelsey, Leroy F. Millette, Jr., and William G. Petty).

112. *Id.* (providing biographies for Judges Rudolph Bumgardner, III, William H. Hodges, and Mary Grace O'Brien; see also VIRGINIA STATE LAW LIBRARY, A GUIDE TO THE COURT OF APPEALS OF VIRGINIA ORAL HISTORY INTERVIEWS, 2009-2015, <http://ead.lib.virginia.edu/vivaxtf/view?docId=vsl-scw/vil00008.xml> (providing a short biography of Judge Samuel W. Coleman, III).

113. *Biographical Directory* (providing a biography for Judge Wesley G. Russell, Jr.).

114. *Id.* (providing biographies for Judges G. Steven Agee, Rossie D. Alston, Jr., Rosemarie Annunziata, Richard Y. AtLee, Jr., E. Ballard Baker, Joseph E. Baker, Bernard G. Barrow, Randolph A. Beales, James W. Benton, Jr., Richard S. Bray, Rudolph Bumgardner, III, Teresa M. Chafin, Jean Harrison Clements, Marvin F. Cole, Charles H. Duff, Larry G. Elder, Walter S. Felton, Jr., Johanna L. Fitzpatrick, Robert P. Frank, James W. Haley, Jr., William H. Hodges, Glen A. Huff, Robert J. Humphreys, Barbara Milano Keenan,

vided their legal careers between public service and private practice.¹¹⁵ Twenty-eight previously served as judges on the bench of one or more lower courts.¹¹⁶

Although the national trend has been for appellate courts to hear fewer and fewer oral arguments,¹¹⁷ the Court of Appeals of Virginia has maintained the opportunity for counsel to present oral argument in the overwhelming majority of its cases.¹¹⁸ The court retains a strong institutional preference to afford counsel the opportunity to present oral argument. This practice is consistent with tradition and the goal of making the court accessible.

The vast majority of the court's cases fall into the four areas of jurisdiction originally assigned to it. Criminal cases have historically filled approximately 80% of the court's docket, domestic and workers' compensation cases each average between 5% and 9%, and administrative law and other cases comprise the remainder.¹¹⁹

D. Arthur Kelsey, Lawrence L. Koontz, Jr., Donald W. Lemons, Elizabeth A. McClanahan, LeRoy F. Millette, Jr., Norman K. Moon, Nelson T. Overton, William G. Petty, Cleo E. Powell, Wesley G. Russell, Jr., and Jere M.H. Willis, Jr.).

115. *Id.* (providing biographies for Judges G. Steven Agee, Rossie D. Alston, Jr., E. Ballard Baker, Joseph E. Baker, Bernard G. Barrow, Randolph A. Beales, James W. Benton, Jr., Rudolph Bumgardner, III, Larry G. Elder, Walter S. Felton, Jr., Johanna L. Fitzpatrick, James W. Haley, Jr., William H. Hodges, Robert J. Humphreys, Barbara Milano Keenan, Lawrence L. Koontz, Jr., Donald W. Lemons, Elizabeth A. McClanahan, LeRoy F. Millette, Jr., William G. Petty, Cleo E. Powell, Wesley G. Russell, Jr., Jere M.H. Willis, Jr.).

116. *Id.* (providing biographies for Judges Rossie D. Alston, Jr., Rosemarie Annunziata, Richard Y. Atlee, Jr., E. Ballard Baker, Joseph E. Baker, Bernard G. Barrow, Richard S. Bray, Rudolph Bumgardner, III, Teresa M. Chafin, Jean Harrison Clements, Marvin F. Cole, Charles H. Duff, Larry G. Elder, Johanna L. Fitzpatrick, Robert P. Frank, James W. Haley, Jr., William H. Hodges, Barbara Milano Keenan, D. Arthur Kelsey, Lawrence L. Koontz, Jr., Donald W. Lemons, LeRoy F. Millette, Jr., Norman K. Moon, Mary Grace O'Brien, Nelson T. Overton, Cleo E. Powell, and Jere M.H. Willis, Jr.); see also VIRGINIA STATE LAW LIBRARY, A GUIDE TO THE COURT OF APPEALS OF VIRGINIA ORAL HISTORY INTERVIEWS, 2009–2015, <http://ead.lib.virginia.edu/vivaxtf/view?docId=vsl-scv/vil00008.xml> (providing a short biography of Judge Samuel W. Coleman).

117. Lawrence T. Gresser & Elizabeth F. Bernhardt, *Oral Argument: An Endangered Species?*, N.Y. L.J. (Aug. 22, 2011), <https://www.cohengresser.com/assets/publications/25.pdf>.

118. Compare VA. SUP. CT. R. 5A:12(g) (Repl. Vol. 2015), and R. 5A:28(a) (Repl. Vol. 2015), with R. 5A:27 (Repl. Vol. 2015) (allowing the court to dispose of cases without oral argument if all of the judges on the panel agree to do so).

119. See SUPREME COURT OF VIRGINIA, 1990 VIRGINIA STATE OF THE JUDICIARY REPORT A-36 (1990); see SUPREME COURT OF VIRGINIA, 1995 VIRGINIA STATE OF THE JUDICIARY REPORT A-48 (1995); see SUPREME COURT OF VIRGINIA, 2000 VIRGINIA STATE OF THE JUDICIARY REPORT A-59 (2000); *Caseload Statistical Information*, VIRGINIA'S JUDICIAL

The General Assembly has taken small steps to increase the original jurisdiction of the court, for example, by adding nonbiological writs of actual innocence to its jurisdiction.¹²⁰ However, the General Assembly has consistently resisted sweeping expansions of the court's jurisdiction. For example, in 1991, a study committee recommended against a Commission on the Future of Virginia's Judicial System report, which proposed the expansion of the court of appeals' jurisdiction to all civil cases.¹²¹ Again, in 2007, the Commission on Virginia Courts in the Twenty-First Century recommended, with limited exceptions, "[e]xpanding the civil appellate jurisdiction of the Court of Appeals to include all appeals from circuit courts."¹²² That recommendation, like others, has not resulted in any jurisdictional expansion.¹²³

The caseload has also evolved. For the court's first fifteen years, the caseload steadily increased.¹²⁴ The year 2001 witnessed the highest number of cases—3499.¹²⁵ For most of that decade, the caseload exceeded 3000 cases per year.¹²⁶ It then began to decline before climbing again, slightly, in 2013.¹²⁷ There were 2350 cases filed in 2014.¹²⁸ From its inception in 1985 to 2014, the most current year for which data is available, case filings have increased 43.2%, still a great deal higher than the approximately 1200 cases per year in 1967–69, numbers in the supreme court thought to trigger a "crisis."¹²⁹ Data from the National Center for State

SYSTEM, <http://www.courts.state.va.us/courtadmin/aoc/judpln/csi/home.html#coa> (last visited Oct. 1, 2015) (follow the "Caseload Reports" dropdown under "Court of Appeals" for available years, 2006 through 2014).

120. Act of May 21, 2004, ch. 1024, 2004 Va. Acts 2097, 2097–98 (codified at VA. CODE ANN. §§ 19.2-327.10–327.14 (Repl. Vol. 2008 & Cum. Supp. 2015)).

121. REPORT OF THE JOINT SUBCOMM. STUDYING THE COMMONWEALTH'S SYSTEM OF APPELLATE REVIEW IN CIVIL CASES, H. Doc. No. 4, at 10 (1991); *id.* at app. B.

122. COMM'N ON VA. COURTS IN THE 21ST CENTURY: TO BENEFIT ALL, TO EXCLUDE NONE, FINAL REPORT 24 (2007).

123. *See, e.g.*, REPORT OF THE JOINT SUBCOMM., *supra* note 121, at 10; *id.* at app. B.

124. *See* JUDICIAL PLANNING DEP'T, OFFICE OF THE EXEC. SEC'Y, SUPREME COURT OF VA., COURT OF APPEALS OF VIRGINIA STATISTICAL REVIEW 2013 1 (2014) [hereinafter JUDICIAL PLANNING DEP'T 2013].

125. *Id.*

126. JUDICIAL PLANNING DEP'T, OFFICE OF THE EXEC. SEC'Y, SUPREME COURT OF VA., JUDICIARY'S YEAR IN REVIEW A-9 (2010); JUDICIAL PLANNING DEP'T, OFFICE OF THE EXEC. SEC'Y, SUPREME COURT OF VA., JUDICIARY'S YEAR IN REVIEW A-47 (2006).

127. JUDICIAL PLANNING DEP'T 2013, *supra* note 124, at 1.

128. JUDICIAL PLANNING DEP'T, OFFICE OF THE EXEC. SEC'Y, SUPREME COURT OF VA., COURT OF APPEALS OF VIRGINIA STATISTICAL REVIEW 1 (2015).

129. *Compare* JUDICIAL PLANNING DEP'T, OFFICE OF THE EXEC. SEC'Y, SUPREME COURT

Courts indicates that current per judge caseload for the court of appeals is consistent with those of our sister states' intermediate appellate courts.¹³⁰

One of the most dramatic changes that the court has experienced with regard to its caseload over its history is the increase in the number of pro se filings. The Clerk of the Court, Cynthia L. McCoy, explains that

between the years 1987 and 2014, pro se filings have increased 362%.¹³¹ Putting it in a different perspective, in 1996, cases in which parties represented themselves, combined with *Anders*¹³² cases, in which appellants were permitted to file pro se supplemental petitions for appeal, comprised just 12% of the court's docket; in 2014, those same types of cases made up 30% of the court's docket. Of course, the heavy influx of cases in which parties are proceeding pro se presents a unique set of challenges for court staff, as well as for the judges of the court.¹³³

As an intermediate appellate court, certain categories of cases can be appealed to the supreme court through petitions to that court.¹³⁴ In other areas, the court of appeals is the final stage of appeal.¹³⁵ The supreme court has not often reversed the court of appeals. From 1990 to 2014, the supreme court has reversed the court of appeals an average of fifteen times per year, with the lowest number of reversals—two—occurring in 1990 and the highest—thirty-nine—occurring in 2008.¹³⁶ In a typical year, of

OF VA., COURT OF APPEALS OF VIRGINIA STATISTICAL REVIEW 2014 1 (2015), with Lilly & Scalia, *supra* note 5, at 7, 41, 58.

130. This observation is based on a comparison of incoming cases per 100,000 total population. *Appellate Court Caseloads 2012*, COURT STATISTICS PROJECT (Dec. 2014) <http://www.courtstatistics.org/Appellate.aspx>. These statistics take on greater significance in view of the number of judges sitting on respective states' intermediate appellate courts. *See id.*

131. Statement of Cynthia L. McCoy, Clerk of the Court of Appeals of Virginia (on file with authors).

132. *Anders v. California*, 386 U.S. 738, 744 (1967) (approving California's procedure for filing appeals that counsel deems without colorable issues).

133. Statement of Cynthia L. McCoy, Clerk of the Court of Appeals of Virginia (on file with authors).

134. VA. CODE ANN. § 17.1-411 (Repl. Vol. 2010 & Cum. Supp. 2015).

135. *See id.* § 17.1-410 (Repl. Vol. 2010 & Cum. Supp. 2015); *id.* § 19.2-408 (Repl. Vol. 2008).

136. Authors' review of publicly available data.

the few court of appeals cases granted further review, the supreme court affirms more than it reverses.¹³⁷

The supreme court's adoption of the "interpanel accord" doctrine has promoted stability in the court of appeals' decisions. Under that doctrine, a panel of the court of appeals cannot overrule a prior published opinion by another panel.¹³⁸ A panel decision can be overturned en banc,¹³⁹ but this is rare.

The court strives to continuously improve the way it handles its docket, decides cases, and issues opinions and orders. Typically, when the court holds a retreat, members of the Bar and judiciary are invited to interact with the court and offer suggestions. The Chief Judge and judges of the court also interact with leaders of the various bar groups in order to be accessible and available for input regarding general court procedures and practices. The court holds regular internal business meetings to discuss court procedure and operational matters. The Chief Judge meets on a regular basis with the Clerk of Court and the Chief Staff Attorney on court and court-system matters. The Chief Judge also meets regularly with the Chief Justice of the supreme court and the Executive Secretary of the supreme court. Additionally, he serves on the Judicial Council's Executive Board. All of the judges attend the yearly Judicial Conference.

In terms of its original objectives—reducing the appellate backlog, relieving pressure on the supreme court, and developing the law in its assigned areas of jurisdiction—the court of appeals has been an unqualified success. Neither the supreme court nor the court of appeals currently has a backlog. In addition, the court of appeals has developed an extensive body of case law. It also continues to provide maximum access and retains time-honored appellate traditions, such as oral argument.

137. See SUPREME COURT OF VIRGINIA, 1990 VIRGINIA STATE OF THE JUDICIARY REPORT A-38 (1990); SUPREME COURT OF VIRGINIA, 1995 VIRGINIA STATE OF THE JUDICIARY REPORT A-50 (1995); SUPREME COURT OF VIRGINIA, 2000 VIRGINIA STATE OF THE JUDICIARY REPORT A-61-A-62 (2000); SUPREME COURT OF VIRGINIA, 2005 VIRGINIA STATE OF THE JUDICIARY REPORT A-53-A-54 (2005); SUPREME COURT OF VIRGINIA, 2010 VIRGINIA STATE OF THE JUDICIARY REPORT A-13 (2010).

138. *Clinchfield Coal Co. v. Reed*, 40 Va. App. 69, 73–74, 577 S.E.2d 538, 540 (2003); see also *Commonwealth v. Burns*, 240 Va. 171, 174, 395 S.E.2d 456, 457 (1990) (quoting *Selected Risks Ins. Co. v. Dean*, 233 Va. 260, 265, 355 S.E.2d 579, 581 (1987)).

139. VA. CODE ANN. § 17.1-402(D) (Repl. Vol. 2010 & Cum. Supp. 2015); *Reed*, 40 Va. App. at 73, 577 S.E.2d at 540.

V. WHAT THE FUTURE HOLDS

An appellate court, like any other organization or agency, must always look to the future. No entity, not even a court system, should remain wedded to the status quo and fail to look for ways to continue to improve services. The court of appeals has evolved with the needs of its litigants and those who represent them. The court has also remained cognizant of operational challenges, advancements in technology, and external factors that affect the justice system, always trying to address these matters within the confines of its budget. The ever-changing nature of society requires a dynamic judicial system. The court strives to meet that requirement.

The thirty-year anniversary marks an opportunity to look back at milestones as well as to look forward to the future challenges and growth of the court. Consistent with these objectives, the judges, their staff, the Clerk's Office, and the Chief Staff Attorney's Office continue to plan for the future. In his remarks at the special session of the supreme court, celebrating the thirtieth anniversary of the court of appeals, Chief Judge Glen A. Huff referenced strategic planning's importance for the future.¹⁴⁰ He spoke of remaining committed to the "founding principles" that characterize the court, while looking ahead toward improvements and further modernization to best accommodate practitioners and the people whose cases are before it.¹⁴¹

This planning includes taking a serious look at improvements in technology and records retention. Case management is a priority. Continuing to find ways to make it easier for users across the Commonwealth to access information and material is an important goal. Implementation of a system for electronic filing goes hand in hand with this goal. The court is making a tremendous effort to implement a system that eases the process of filing documents with the Clerk's Office.¹⁴²

140. The Hon. Glen A. Huff, Address at the Supreme Court of Virginia's Special Session, Recognition of the Thirtieth Anniversary of the Court of Appeals of Virginia (June 2, 2015).

141. *Id.*

142. *Id.*

The court is also reviewing internal procedures to ensure that matters before it are being handled in the most efficient and effective manner. The court's mission is straightforward—to administer justice by timely and efficiently rendering thoughtful, well-reasoned appellate decisions that are consistent with the Virginia Constitution and other applicable laws, and by treating all who come before it with courtesy and respect in a fair and impartial manner. This mission is best served when the court encourages and listens to user feedback and remains open to new ideas to improve the system. The Clerk's Office consistently assists litigants and practitioners and remains open to suggestions for improvement. Likewise, the court, in conjunction with the Clerk's Office and the Chief Staff Attorney's Office, makes every effort to accommodate parties in order to provide maximum access and to be fully informed before making a decision in a case. The court recognizes the importance of every decision it makes and, within the parameters of the law and rules of court, strives to ensure justice.

Consistent with the interest in maximizing access, the court has expanded the locations in which it sits to hear writ and merit cases. In addition to holding three-judge panel sessions in Alexandria, Chesapeake, Richmond, and Salem, the court has recently heard dockets in Fredericksburg, Norfolk, and Rockingham County.¹⁴³ Those who remember the court's early years will recall that it met in Norfolk and then moved to Chesapeake. Now, the court hears cases in both cities.¹⁴⁴ The Clerk's Office continues to review the cases filed and is looking for additional jurisdictions that are amenable to hosting the court for three-judge panel sessions.¹⁴⁵ The expansion of locations reflects the court's effort to reduce travel for practitioners and litigants, given the cases docketed for oral argument. It also is consistent with the General Assembly's intention that the court hear cases across the Commonwealth.¹⁴⁶

The court has undergone some significant changes in the past five years. Due to election of judges to the Supreme Court of Virginia and retirements, seven of the eleven active judges have

143. *Id.*

144. *Id.*

145. *Id.*

146. *See* VA. CODE ANN. § 17.1-402(A) (Repl. Vol. 2010 & Cum. Supp. 2015).

been on the court for less than five years.¹⁴⁷ This is a time of growth and further development. The mix of long-tenured jurists with newly elected judges promises a healthy future for the court. This future will be appropriately guided by the practitioners and the needs of the justice system.

As it prepares for the next thirty years, the court will strive to continue to fulfill its mandate as an efficient, collegial, accessible court—a court for the people.

147. See *Chronological List of Judges, 1985-Present*, COURT OF APPEALS OF VIRGINIA JUDGES, 1985-PRESENT, <http://cavhistory.org/about/chronological-list-of-judges-1985-present/> (last visited Oct. 1, 2015).