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FOREWORD

A CALL TO ARMS: THE NEED TO PROTECT THE INDEPENDENCE OF THE JUDICIARY

The Honorable Harry L. Carrico

It is a source of great personal pleasure for me to write this foreword to the issue of the *University of Richmond Law Review* that will publish the remarks made by a distinguished group of speakers at the symposium on judicial independence, held on March 21, 2003, at the Modlin Center. I am deeply grateful to the University of Richmond School of Law, the Bar Association of the City of Richmond, and the Allen family for their great kindness in sponsoring the symposium in my honor.

I also wish to express my sincere appreciation to Chief Justice William H. Rehnquist for his outstanding keynote address, and to Chief Judge J. Harvie Wilkinson III, of the Fourth Circuit, for his able introduction of the Chief Justice. My heart-felt thanks also go to Timothy L. Sullivan, President of the College of William and Mary, who moderated a panel discussion on judicial independence, and to the panel members, Kenneth W. Starr, former Solicitor General of the United States, now partner with the law firm of Kirkland & Ellis, P.C., in Washington, D.C.; Penny J. White, former justice of the Supreme Court of Tennessee, now Professor of Law at the University of Tennessee College of Law; and H. Jefferson Powell, Professor of Law at Duke University School of Law.

The speakers at the symposium dramatically demonstrated the extreme importance of the necessity for maintaining the independence of the judiciary in this country. They also emphasized the gravity of recent events tending to indicate a serious lessening of respect for the concept of judicial independence. It is my hope that the publishing of the text of the symposium speeches

will serve to alert the members of the legal profession—and the public in general—to the necessity of preserving the concept of judicial independence. I also hope the speeches will serve to warn of the dangers the concept might face as time goes by.

There is a belief held by many that the method of judicial selection has a direct impact upon the concept of judicial independence. In most states, judges are chosen by some form of popular election, involving about eighty percent of the state court judges chosen to serve on the bench in this country.¹ I strongly oppose this method because it throws candidates, whether for initial selection or for retention, into the rough and tumble of the political thicket, with all its unpleasant connotations.

In Virginia, judges are elected by the General Assembly,² with provision made for the filling of vacancies occurring while the Assembly is not in session.³ For example,

whenever the term of office of a justice of the Supreme Court will expire or the office will be vacated at a date certain between the adjournment of the General Assembly and the commencement of the next session . . . a successor may be elected at any time during a session preceding the date of such vacancy.⁴

Otherwise, the vacancy is filled by appointment of the Governor, subject to confirmation by the General Assembly at its next session.⁵

Much of the present concern about the independence of the judiciary stems from the effect a judge's decision in a particular case might have upon his or her chances of retention in office. This concern is expressed in states that select judges by popular vote as well as those using some other method. Since I am more

1. See *State Judicial Independence: A Review of Recent Issues and Arguments*, A.B.A. COMM'N ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, at <http://www.abanet.org/govaffairs/judiciary/r5.html> (last visited Jan. 23, 2004).

2. See VA. CONST. art. VI, § 7 (regarding election of Supreme Court justices); VA. CODE ANN. § 17.1-400 (Repl. Vol. 2003) (regarding election of Court of Appeals judges); VA. CODE ANN. § 17.1-509, -512 (Repl. Vol. 2003) (regarding election of circuit court judges).

3. VA. CONST. art. VI, § 7 (regarding election of Supreme Court justices); VA. CODE ANN. § 17.1-303 (Repl. Vol. 2003) (Supreme Court provision); *id.* § 17.1-400 (Repl. Vol. 2003) (Court of Appeals provision); *id.* § 17.1-509, -512 (Repl. Vol. 2003) (circuit court provision).

4. VA. CODE ANN. § 17.1-303 (Repl. Vol. 2003).

5. VA. CONST. art. VI, § 7 (Supreme Court provision); VA. CODE ANN. § 17.1-400 (Repl. Vol. 2003) (Court of Appeals provision); VA. CODE ANN. § 17.1-509 (Repl. Vol. 2003) (circuit court provision).

knowledgeable about Virginia's selection method than any other, I will speak only of my personal experience under the Virginia method—i.e., selection by the legislature.

I have been on the Supreme Court of Virginia for a long time. I was appointed by Governor J. Lindsay Almond, Jr., in 1961, my appointment was confirmed by the General Assembly at its next session, and I have been reelected by the General Assembly three times over the intervening years, the last time in 1991. Never, when I was up for reelection, did I feel any threat to my independence, nor did I fear that I might not be retained because of a decision I had made with which some member or group of members of the General Assembly might have disagreed. In this favorable kind of atmosphere, the concept of judicial independence remained strong and healthy.

However, before my last term ended, there was good reason to believe that the atmosphere had changed. Consequently, I do not know what my situation would have been had I not reached the mandatory retirement age, had asked for reelection, and, in the meantime, had made an unpopular decision.

Not having been placed in such a situation, I cannot imagine, much less know, how distracting it would be if each time a judge is called upon to decide a case he or she is faced with the threat that his or her retention would depend upon how a particular case is decided. Nor can I imagine anything that would be more destructive of the concept of judicial independence.

Long ago, Chief Justice John Marshall posed this question: "Is it not, to the last degree important, that [a judge] should be rendered perfectly and completely independent, with nothing to controul or influence him but God and his conscience?"⁶ Our modern-day answer should be a resounding "Yes!" We must make certain that no judge is ever influenced in deciding a case by the threat of being turned out of office because the decision, while made in good faith, differs from the way those responsible for the judge's retention might think it should have been decided. The views expressed in the symposium on judicial independence last March will go a long way toward achieving that certainty.

6. 2 PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-1830, at 616 (De Capo Press 1971) (1830).
