

State of the Judiciary Address

May 15, 2018

Chief Justice Donald W. Lemons

Supreme Court of Virginia

In years past, the state of the judiciary presentation has been much like a report card. There have been too many subjects to talk about and it has been too long. This year I would like to do something different. I have identified several important topics to address and I will leave the remainder to a letter that you will receive and read, or not, at your leisure. This will allow me to include some remarks that I think are even more important to present today.

The General Assembly left town without a budget. This is nothing to be unduly worried about. It has happened before and most certainly it will happen again. Not only are there differences of opinion concerning expenditures in the budget, there are significant issues about sources of revenue. I have no doubt that our legislature, after a

few rounds, will emerge from the fray with a workable budget for the Commonwealth.

The General Assembly requested the court to present an updated weighted caseload study to them prior to the 2018 Session. You will recall that the 2014 caseload study had recommended 429 judgeships. In the 2018 fiscal year we had only 407 funded judgeships. Quite a few judges were somewhat unhappy that they were being asked to keep track of time spent on specific cases again. A few said that they had left law practice in part so that they would not have to keep time. I am sympathetic. And I thank you for your efforts. As I am sure you know, a statute defines the number and location of authorized judges. We now have 435 authorized judges. But that alone does not get a warm body on the bench. There must be an appropriation. With retirements and accompanying uncertainty with the budget, we currently will have 402 funded positions on July 1, 2018. In the days and weeks ahead, I

am confident that more positions will be funded. How many and where are still the subject of debate. Simply stated, we need more judges.

Additionally, the Office of the Executive Secretary has certain metrics to assess the need for Deputy Clerks in the General District and Juvenile and Domestic Relations Courts. I am unhappy to report that we are 271 positions below needs state-wide. In March of 2018 we had 54 district courts staffed below 80% of demonstrated need with 6 of those district courts below 60% of demonstrated need. With this acute shortage, the OES, the Committee on District Courts and I are doing the best we can to allocate resources to the most needy courts. Without being overly dramatic, it is like battlefield triage. Our population continues to grow. The demands of our citizens for court services increase accordingly. Simply stated, we need more deputy clerks.

Some of you have expressed concern about a bill that passed the General Assembly and has been signed into law requiring that judges on the recall list be certified by Senate and House Courts Committees

before the Chief Justice may engage them in service. It is abundantly clear in Virginia that the legislature selects judges. This bill simply extends the process into retirement and recall years. The great bulk of our recall judges do splendid work. But when a recall judge is not performing properly, the word gets to our legislators. This new law allows the legislature to exercise oversight in the recall process. Some recall judges have expressed concern that they will be routinely called to Richmond every 3 years for interviews. From my discussions with members of House and Senate courts committees, these concerns are not warranted. There may be a few such interviews and there may be a few instances where the opportunity for an interview is not extended. But they will be few. They have to be few because we need the services of our recall judges in order meet the demands of the public. In calendar year 2017, recall judges served 5,111 days in circuit courts and 4,929 days in district courts. Under our current circumstances, the judiciary would be severely disabled without our recall judges. And it is

to you, our retired judges, that I extend my thanks and gratitude. We could not serve the citizens of the Commonwealth without you.

There have been a number of important developments in the JPE program during the past year. The pilot appellate JPE took place in 2017. Justice Powell, Judge Chafin, and I were the first three appellate judges to be evaluated. Three Court of Appeals judges (Judges Beales, Decker, and Petty) will have interim evaluations in 2018. That process is underway, and reports are expected by the end of June.

There are 166 trial court judges scheduled for evaluation during 2018. Of those, 57 judges will complete end-of-term evaluations for re-election during the 2019 session of the General Assembly. All judges receiving end-of-term evaluations are expected to have their reports in hand by September 1, 2018.

In 2017, 47 end-of-term reports were furnished to the General Assembly. One judge retired and did not seek re-election, one judge

passed away, and one judge was not nominated for re-election. The remaining judges were re-elected.

Beginning in 2018, court reporters have been added to the JPE program as a new respondent group. Clerks in circuit and district courts are asked to collect names of court reporters who work in the courtroom where the evaluated judge sits for a period of three months prior to survey distribution. The clerks have been very helpful in collecting the names, and the court reporters have had a very good response rate. In fact, court reporters have provided a higher response rate than attorneys to the evaluations.

As I mentioned, there are many other subjects of great interest to the judiciary. I will address them in a letter to you. But now I would like to segue to something of even greater importance.

What is the role of a judge in the American system of government? What makes a good judge? Some people may choose different things to emphasize, but today I would like to share with you my own views.

I believe a judge should be animated and informed by allegiance, deference, courage, and humility.

1. The allegiance is to an oath of office that requires adherence to the rule of law in the affairs of our citizens and fidelity to the commands of our constitutions and statutes. A judge must never substitute personal views for those expressed in our laws. I remember a day while serving as a Circuit Court Judge in the City of Richmond when a lawyer tendered an order for me to sign. I reviewed the document and said to the lawyer, "I do not have authority to do this," to which the lawyer responded, "Judge you may not have the authority, but you do have the power." I remembered my oath. It is your oath as well. "I do solemnly swear that I will uphold the Constitution of the United States and the Constitution of the Commonwealth of Virginia and that I will faithfully and impartially discharge all of the duties incumbent upon me as a Judge." As I handed the tendered order back to the lawyer, I said what I hope would be your response as well: "The

day that I knowingly exercise power without authority is the day that I forfeit my office as Judge.”

2. The deference I speak of is to the executive and legislative branches of government which by their method of selection and breadth and scope of powers are closer to the will of the people. On matters of public policy, they are far better able to arrive at democratic solutions to problems and issues than the judiciary is intended to be. Throughout our history, many a case has considered the concept of separation of powers and sought to draw lines between branches of government. Sometimes independent powers are clear; however, in many instances those lines are not sharply drawn. The territory is occupied by more than one branch of government. Here, institutional respect is required from all branches of government if workable solutions are to be achieved.

3. A judge must have courage to make decisions consistent with the oath of office — decisions that may be unpopular and may be in



tension with the other branches of government. Our system of government presumes majority rule; however, embedded in our collective values is respect for and protection of minority rights. If we are candid we will confess that at times in our history we have failed to adhere to these principles. But our episodic failures must not keep us from renewing our commitment to these principles and striving to do better. When basic rights and freedoms are at issue, our citizens often seek relief in the judicial branch of government. On these occasions, which should be infrequent, a judge must have courage to fulfill the oath of office, however unpopular it may be.

4. Finally, a judge must demonstrate humility — jurisprudential and personal humility. A judge must resist temptation to usurp the roles and prerogatives of coordinate branches. It is not ours to promote social agendas or broad public policy initiatives. A deliberate and measured restraint is required of a judge.

There are enormous responsibilities that come with wearing the robe. Chief among these is the attitude and demeanor of humility. One who wears the robe must understand that we are the servants — servants of the law and servants of the people. Simply stated, all participants in the judicial system expect, deserve and must receive courtesy and respect from those who are privileged to wear the robe.

We must always remember what we do is not personal; it is institutional. We must protect the dignity of the office. A certain amount of personal gravitas goes a long way to communicate this fundamental concept. More and more citizens are representing themselves in the courts of our country and many of them get their ideas about how people are supposed to behave from popular television shows. Sometimes their behavior is way out of line. Sometimes it is combative – even toward the judge. But a judge should never respond to a litigant, clerk, Sheriff, police officer, witness or lawyer in a manner that reveals the judge has taken the matter

personally. The institution may be deserving of great respect, but the judge should never take the matter personally. It must be said that holding someone in contempt of court should be a remedy of last resort. Of course, some behavior is so immediately and grossly improper that the last resort has come quickly, but these circumstances should be rare.

When I served on the Circuit Court of the City of Richmond, Chief Justice Carrico called me and asked if I would handle a case in another jurisdiction. I immediately said I would be happy to assist and inquired about the nature of the case. It was a de novo appeal of an unlawful detainer and all the judges in the entire circuit recused themselves. I asked, "Is it commercial in nature?" The answer was "no." "Does it involve political figures in the community." The answer was "no." "Can you shed some light on why all of the judges in the circuit have recused themselves." The answer was, "I don't know."

Curious but uninformed, I travelled to this courthouse some distance from Richmond. After the solemnities of court were intoned, I said to all present, “you may be seated.” Everybody accepted the invitation except the woman who was sitting at the plaintiff’s table. As politely as I could, I said, “Ma’am, you may sit down as well.” Her response was rather strongly stated: “No, I want to stand.” “Alright Ma’am, you may stand, but at any time if you want to sit down, go ahead and do so.” Before I could say anything else, she read from a sheet of paper, “I want to recuse you.” I told her that we pronounce that word “recuse”, but I know what you mean – you don’t want me to hear your case.” “That’s right” she replied.

“Alright Ma’am, we will take up that matter first. You need to have a good reason to recuse a judge. What is yours?” She said, “it’s simple, you are too stupid to hear my case.” An audible gasp was heard in the sizeable audience and I noticed that the deputy sheriff was moving in her direction. Without making eye contact, I waived off the

sheriff. I paused for a moment and then said, “you know Ma’am I know some people who might agree with you, but the difference between them and you is that they actually know me. Without having any prior contact with me, how can you conclude that I am too stupid to hear your case?” Her response was more revealing than anyone had expected. She said, “well you obviously aren’t smart enough to notice the toxic fumes that are coming off the walls of this courtroom and floating through the room.” It was in that moment that I discovered why all the judges in the circuit had recused themselves. I denied the motion and the case proceeded – with a few bumps in the road –but we proceeded.

There were lawyers in the gallery and at least one law professor who told me later that they fully expected this woman to be held in contempt of court, and even suggested that most judges would have and they wondered what informed my response. I told them that I did not take what she said personally. My view of the role of a judge is such

that I needed to move on and get the job done. Perhaps the matter could have evolved into far more egregious behavior that undermined the court institutionally, but it didn't.

There are judges who refer to where they sit with a robe as "my court." "Here's how things are done in my court." I have never referred to the courtroom where I have been privileged to sit as "my court." It belongs to the people. It is a venerated institution. It has been in existence before me and it will be there long after I die. It is not mine. It is not personal. This relatively simple but profound realization is at the heart of professional humility. We are servants of the law. We are servants of the people. The Judge who knows this is a good judge.

My friends, I have sat where you sit. I have been there. I have done that. I can say with great appreciation for what you do that it is my honor to be your colleague in this enterprise that is called "judging." May we all do so with allegiance to the rule of law, with appropriate

deference to coordinate branches of government, with courage to do what is right even in the face of opposition, and with jurisprudential and personal humility that emphasizes that we are the servants – servants of the law, servants of the people.

May God bless you all.