

State of the Judiciary
Chief Justice Harry L. Carrico, Virginia Supreme Court of Appeals
Message to the Judicial Conference of Virginia
May 20, 1991

When the end of 1991 rolls around, this country will have completed five years of national celebration. The celebration has commemorated the signing of the United States Constitution in 1787, the ratification of the Constitution by the states in 1788, the passage of the Judiciary Act, establishing the federal court system, in 1789, the first sitting of the United States Supreme Court in 1790, and the ratification by the states of the first ten constitutional amendments in 1791.

In 1987, the Virginia judiciary, in ceremonies held in a number of circuits throughout the State, recognized the 200th anniversary of the signing of the Constitution. On June 25, 1988, the bicentennial of Virginia's ratification of the Constitution, I had the privilege of participating in a ceremony honoring the occasion, held at the ratification site in what is now the Medical College of Virginia complex in Richmond. Then, in a ceremony held in the courtroom of the Supreme Court in Richmond during the early part of January, 1990, we recognized the 200th birthday of the federal court system and the bicentennial of the first meeting of the United States Supreme Court. We were honored by the participation of Justice Lewis F. Powell, Jr., in that ceremony.

Since it was Virginia's ratification of the first ten amendments on December 15, 1791, that made the Bill of Rights a reality, I considered it imperative that we take time to remember this important event. Furthermore, we in the judiciary deal with the provisions of the Bill of Rights almost on a daily basis. Hence, I thought it appropriate to devote at least a portion of this year's State of the Judiciary Report to the commemoration of the ratification of the Bill of Rights.

I do not believe that the importance of the Bill of Rights can be overemphasized. In my opinion, without the Bill of Rights, our Constitution long since would have gone the way of most of the constitutions adopted by the other nations of this world. And, without the Constitution, our freedom might well have been lost.

But, lest we Americans become too complacent about the rights we enjoy, we must constantly remind ourselves that we have not always lived in freedom. We once were the subjects of a foreign king who, in the words of the Declaration of Independence, displayed "a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny and whose character is thus marked by every act which may define a tyrant. . . unfit to be the ruler of a free people."

The Signers of the Declaration said the people had the right and the duty to "throw off" any government that "evinces a design to reduce them under absolute despotism." As a substitute for this tyrannical rule, the Signers envisioned for America a government "deriving [its] just powers from the consent of the governed" — a government securing to the people their inalienable right to "life, liberty, and the pursuit of happiness."

Taking the first bold steps toward throwing off the yoke of despotism, the early patriots embarked upon a pursuit in which equal justice under law was the ultimate goal. The Virginia Declaration of Rights, adopted in Williamsburg in June 1776, proclaimed that "no free government or the blessings of liberty, can be preserved to any people but by a firm adherence to justice." In the Declaration of Independence, the Signers complained that the British king had "obstructed the administration of justice by refusing his assent to laws for establishing judiciary powers." And in the Preamble to the Constitution, the Framers listed the necessity to "establish justice" second only to the need to "form a more perfect union."

The Framers of the Constitution perceived that a successful pursuit of justice necessarily would involve constant adherence to a rule of law. To this end, they provided in Article VI that the "Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land."

The American rule of law is what sets this nation apart from every totalitarian state. Our system is founded upon the proposition that people should be governed by rule, reason, and right, rather than by force and fear. We have succeeded by placing the peoples' destiny in their own hands, subject to the supreme law of the land, while other nations have failed by seizing all power unto themselves, subject to no restraints.

Through rebellion, our early patriots threw off the despotic government under which the colonies suffered. But did the Signers of the Declaration intend that the kind of government they envisioned for America should also be lost in rebellion. Of course not! They laid down in the Declaration the clear and strong admonition that "[p]rudence, indeed, will dictate that governments long established should not be changed for light and transient causes."

The government envisioned by those early patriots found fruition in the Constitution. One need only read the Constitutions' preamble to learn the nature of the journey upon which the people of the United States were about to embark. The preamble says that the people, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessing of liberty to themselves and their posterity, did ordain and establish the Constitution for the people of the United States of America.

What follows in the Constitution truly guarantees to every American the very kind of government the Signers of the Declaration intended for our nation. Can any among us claim that America today, in any of her actions, "evinces a design to reduce [the people] under absolute despotism?" Can any of us deny that what the Signers of the Declaration dreamed of for America — a government "deriving its just powers from the consent of the governed" — has really come to pass? Can one of us pretend that he or she is the unwilling subject of a "tyrant [who] is unfit to be the ruler of a free people?"

Again, I say, of course not! Americans today have more freedom, enjoy more liberty, and exercise more rights than any people in history. Americans have more voice in their government, more power over their leaders, and more control of their destiny than any people in the world.

All this is true because, although born in rebellion, our freedom has matured and flourished under the protection, not of military might alone, but of a rule of law. Liberty has found real expression in America through the lips of those who prayerfully praise the fundamental concepts upon which our rule of law is founded.

Law is the very language of liberty. It is as well the language of order and justice. But we cannot hope to secure order, or promote justice, or aspire to be free if we speak in a strange tongue, mouthing untested and unworthy ideas offensive to the notion that "governments long established should not be changed for light and transient causes." We can achieve the lofty ideals of a truly democratic society only if we speak strongly in defense of the principles that have made this country the finest, freest place on the globe.

And how has our nation become the freest place in the world? Not by chance, you can be sure. The answer is found in the Constitution. All the freedom Americans enjoy, all the rights they exercise, are preserved to them by the Constitution and especially the Bill of Rights.

How wonderful is our freedom! How great are our rights! We can assemble, as we do here this morning, without anyone's leave. We can say what we want, write as we wish, and worship the way we please, all without fear of governmental reprisal. We can refuse to incriminate ourselves, avoid being twice put in jeopardy, and prevent being deprived of property or having it taken for public use without just compensation. We can keep and bear arms, petition for the redress of grievances, enjoy freedom from unreasonable searches and seizures, stand upon a presumption of innocence, demand trial by jury, and insist upon the aid of counsel, all as a matter of course. And we take for granted that we can travel where we will, work at what we might, and marry whom we choose. In short, we truly live in freedom.

Yes, all this is guaranteed by the Bill of Rights. And this, in truth, is what has made this nation great. Is it not amazing, however, that, as approved by the Philadelphia Convention on September 17, 1787, the Constitution contained no bill of rights? How could the delegates to that convention possibly have refused to include provisions so vital to the liberty of the American people?

Yet, refuse they did, but not unanimously. One delegate felt so strongly about the lack of a bill of rights that he refused to sign the finished document and went home in an outrage.

Home to this delegate happened to be Virginia. And he was the outstanding authority on bills of rights. Indeed, in June 1776, he authored for posterity one of the major documents in world history and the first definitive exposition of the natural rights of humankind. I refer, of course, to George Mason, the master of Gunston Hall in Fairfax County, and his political masterpiece, the Virginia Declaration of Rights.

Time does not permit me to detail the events surrounding Mason's authorship of the Declaration of Rights or all the effects it would have upon the course of history. It is a fascinating story, and I commend it to you for future study. It suffices for the moment to say that the Declaration was

written by Mason as a delegate to the Virginia Convention, held in Williamsburg to frame a bill of rights and a constitution for Virginia, and that, with minor changes, it was adopted unanimously by the Convention on June 12, 1776.

I will take the time, however, to recite a paragraph of the Declaration that will serve to display the notability of the entire writing, not only as a legal document but also as a literary work. The fifteenth paragraph states that "no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles."

And one need only compare the Virginia Declaration of Rights and the first ten constitutional amendments to discern the profound effect of the one upon the other. Taken from the Declaration are the First Amendment rights of freedom of the press and free exercise of religion, the Second Amendment right to bear arms, the Fourth Amendment proscription against unreasonable searches and seizures, the Fifth Amendment rights of freedom from self-incrimination and due process of law, the Sixth Amendment rights of speedy trial by an impartial jury, of confrontation of witnesses, and of compulsory process, the Seventh Amendment right of jury trial in civil cases, and the Eighth Amendment prohibitions against excessive bail and cruel and unusual punishment.

Furthermore, I think it can be fairly stated that Americans might not enjoy all the freedom they have today had it not been for George Mason's authorship of the Virginia Declaration of Rights. His stubborn insistence at Philadelphia upon the inclusion of a bill of rights in the Constitution, his dramatic refusal to sign the Constitution as originally drafted, and his persistent efforts to have a bill of rights added later all contributed directly to the ultimate adoption of the first ten amendments to the Constitution.

Yet, history has never properly credited George Mason for his great contributions to the cause of independence and the establishment of constitutional government in this country. Perhaps, someday, that oversight will be corrected. In the meantime, it is not inappropriate that we in this Conference take note of and express gratitude for George Mason's contributions. And, as we mark the adoption of the Bill of Rights, I think it is quite appropriate that we take the occasion to remind ourselves of the obligation that is ours as members of the judiciary of Virginia.

That obligation, as defined in the Report of the Futures Commission, is "[t]o provide an independent, accessible, responsive forum for the just resolution of disputes in order to preserve the rule of law and to protect all rights and liberties guaranteed by the United States and Virginia Constitutions." To help the courts provide the kind of independent, accessible, and responsive forum the Futures Report contemplates, the Judicial Council recently adopted Foresight 2000: A Strategic Plan, to serve as a comprehensive guide for the judicial system for the next two years.

Needless to say, budget restraints have hampered our efforts to improve the court system. Yet, the system has been active on several fronts during the past year. Perhaps receiving the most attention has been the action of Judicial Council in adopting Case Processing Guidelines. Council adopted the guidelines in recognition of the truism that delay in the disposition of cases

is the principal cause of the loss of public respect for the courts and the main factor contributing to the lack of public confidence in the quality of justice.

I will have more to say about the guidelines tomorrow, but I want to stress two things now: (1) the guidelines are voluntary, aspirational goals representing a consensus of the time reasonably required to dispose of most cases, and (2) nothing, in my opinion, has happened since Council adopted the guidelines to deter any court from electing to implement them, and any court that does elect to proceed will have my full support.

To further improve the services the courts provide the public, a training program has been developed for district court clerks and magistrates. Entitled "Proven Techniques to Build and Maintain Public Support," the program seeks to instill a sense of service in court personnel. Attention is also given to detecting and eliminating subtle forms of discrimination and to elevating sensitivity to the treatment of others, with the result that those who use the court system do not receive disparate treatment because of race, religion, gender, age, handicap, or socio-economic status.

With respect to another project involving the users of the courts, I reported last year that Judicial Council had received a federal grant to establish within the judicial system the ongoing capacity to acquire citizens' feedback and to translate such information into creative methods of improving the services offered by the courts. This project has not been implemented as yet, but work should begin within the next few months.

As I also reported last year, pursuant to the recommendation of the Futures Commission and with Judicial Council's approval, we applied for a federal grant to create a state-wide office of alternative dispute resolution services within the judicial system. The grant has been received, and the office was established in April. As I said last year, the office will serve as a channel to help fund and encourage the creation of ADR programs by providing support to the judicial circuits and by improving public understanding of ADR services.

All these programs and others I could mention are designed to improve the public's confidence in the courts. But no program directed to building public confidence could be more important than one improving the way we select judges in this state. Let me hasten to say that no one could be more proud than I of the men and women who occupy the benches of Virginia, and I will defend to my utmost their reputation for integrity, proficiency, and ability.

In nearly all of the State of the Judiciary Reports I have made since becoming Chief Justice, I have urged a change in our method of judicial selection. However, in 1989 and 1990, I did not mention the subject, mainly, I suppose, out of a sense of frustration over the lack of success by such stalwarts as, first, Senator Parkerson, and, later, Senator Holland, in securing passage of bills they introduced to improve judicial selection.

But, because I believe that a change is absolutely essential to continue the high quality of the Virginia judiciary, I feel compelled more than ever to call for merit selection of judges through creation of a Judicial Nominations Commission, with the authority to screen and nominate all

candidates for judicial office. And I submit the proposal for the serious consideration of all those concerned with providing the people of this Commonwealth with an independent, accessible, and responsive forum for the just resolution of disputes.

One final word. You are all aware of the difficulties the budget crisis has imposed upon the judiciary. We have come to a virtual standstill in implementation of new projects. We have taken action to reduce educational programs, shorten the hours clerks' offices are open to the public, curtail the use of technology, and leave vacant positions unfilled. Employees have given up pay raises and judges have been requested to forego a salary increase. Furthermore, we have reduced spending by more than \$14 million over the biennium. And I cannot promise when the hard times will end.

Yet, despite all the difficulties, I have sensed a great spirit of cooperation throughout the judiciary. And I want everyone to know how deeply appreciative I am of the unselfish, professional response they have given to all the requests for cooperation and for the response I am sure they will give to similar requests in the months ahead. This is, indeed, a public-spirited reaction. But, it does not surprise me because I know it comes from people who are always ready to share the responsibilities that go along with the benefits they receive. This is what living under the Bill of Rights really means, and it is why I am proud to join all the members of the judiciary in celebrating the adoption of that great document.