

FOREWORD

Carl Tobias

It is my honor and pleasure to write the 2024 Foreword to the *University of Richmond Law Review's Annual Survey of Virginia Law*, which has become a valuable tradition that summarizes recent developments in numerous areas of Virginia statutory and common law. The *Law Review* is grateful to have informative contributions from authors who have frequently written for the *Annual Survey*, some who have occasionally done so, and a few new writers.

I. CIVIL PRACTICE AND PROCEDURE

The *Law Review* is grateful that Christopher S. Dadak, a Guynn Waddell Principal and a former *Law Review* Editor-in-Chief who has written earlier *Annual Survey* pieces about Civil Practice and Procedure, contributes again by evaluating Supreme Court of Virginia and Court of Appeals of Virginia decisions reviewing civil procedural issues. The article concomitantly “discusses revisions to civil procedure provisions of the Code of Virginia and Rules of the Supreme Court of Virginia in the last year.”

The author devotes most of the part concerning the Supreme Court of Virginia’s opinions to “an interesting and consequential issue on personal jurisdiction.” The question involved whether a Virginia court had personal jurisdiction over a physician who allegedly engaged in medical malpractice in North Carolina when treating a Virginia patient. The supreme court applied “traditional due process principles to the unique fact pattern” of the case and concluded that those principles forbade Virginia courts’ exercise of personal jurisdiction.

Dadak found that the “General Assembly did enact some worthy changes in Virginia civil procedure,” although they were “not as major as some changes in the recent past.” The writer then

surveyed legislation regarding the availability of jury panels, civil actions for trafficking, decedents' adopted children's entitlement to wrongful death damages, acceptance of digital signatures, non-attorney representation of certain entities in small claims court, permissible venue in personal injury and wrongful death actions, and legal notices and publications in online-only news publications.

Dadak concluded that there were few amendments to the Rules of the Supreme Court of Virginia involving civil procedure. One addressed objections to discovery by prohibiting "[g]eneral or blanket objections," stating that "[a]ny part of an interrogatory that is not objected to must be answered," and objections to requests for production "must also be made with specificity." The second amended requirements for appendices.

II. CRIMINAL LAW AND PROCEDURE

Virginia Assistant Attorneys General Tanner Russo, Hallie Hovey-Murray, and Alli Mentch have contributed a thorough survey of recent developments that involve criminal law and procedure in the Commonwealth. The authors remark that they have confined the discussion to the most important published appellate opinions and significant legislation.

When evaluating appellate court decisions, the writers principally address opinions that the Supreme Court of Virginia and the Court of Appeals of Virginia issued. Russo, Hovey-Murray, and Mentch examine a broad spectrum, which encompasses indictments; speedy trial; competence to stand trial; guilty pleas; jury selection, instructions and verdicts; admissibility of evidence; Fourth Amendment searches and seizures; the Fifth Amendment; the Confrontation Clause; double jeopardy; sentencing; motions to set aside or modify a verdict; expungement; appellate procedure; probation revocation; and sufficiency of the evidence decisions.

When examining legislation, the authors review drugs; driving under the influence; firearms; sexual offenses; unlawful creation and dissemination of images; forced labor; custodial interrogation of a minor; juvenile defendants trafficked or sexually assaulted by victims; elder abuse; animal cruelty; failure to appear; interference with election officials; post-trial communications with jurors; venue; written complaints for felonies; admission to bail of defendants charged with acts of violence; violations of pretrial

conditions of release; search warrants for menstrual health data; expungement of deferral dispositions; evaluations for a community corrections alternative program; criminal injuries; a compensation fund; and public defender caseloads.

III. TAXATION

The *Law Review* is very grateful that McGuire Woods Partner Craig D. Bell has generously contributed again this year a piece regarding taxation, which canvasses important recent developments in laws that affect the Commonwealth's state and local taxation. The article reviews considerable General Assembly activity, court decisions, and selected opinions during the last year. The contribution's first part evaluates taxes that the Virginia Department of Taxation administers, while the second portion analyzes local taxes, encompassing real and tangible personal property, machinery, tools, license taxes, and other distinct local taxes. Overall, the piece aims to furnish Virginia and general practitioners a concise summary of recent developments implicating the Commonwealth's taxation that will probably affect their clients. However, the article does not treat a number of the many insignificant locality-specific or technical General Assembly modifications in Title 58.1 of the Virginia Code that governs taxation.

Bell finds that the legislature's 2024 session considered numerous significant tax proposals that could have "broadened the tax base," which included applying the "Virginia Retail Sales and Use Tax to digital products." However, Governor Youngkin decided to veto each of the bills. This resulted in "a series of tax bills designed to maintain a number of expiring income tax credits and improve several areas of tax administration." Most notable among the latter was the implementation of "installment agreements for omitted tax assessments" that involved "state and local administered taxes." Nonetheless, the Assembly passed fewer state and local taxation statutes. The majority of tax bills enacted basically involved targeted and technical modifications in tax laws.

Bell asserts that the Court of Appeals of Virginia is increasing the exercise of the judges' jurisdiction to entertain tax cases. The quantity of opinions has increased, and this development helps attorneys who attempt to interpret Virginia's Tax Code because the court has, thus far, minimally construed Title 58.1. The court of appeals' expanded jurisdiction should "help to fill this void." Bell

ascertains that most decided cases implicate specific features of real property taxation, while a few treat the income tax. He also detects that very few cases involve sales or use taxes.

Bell asserts that the Tax Department keeps exhibiting reluctance to promulgate tax regulations that he thinks the business community needs to ensure compliance. The writer advises that the Department did *not* issue Tax Guidelines “pursuant to the Virginia Administrative Process Act,” so they “are not rules and regulations to which courts may give deference” and “do not constitute formal rulemaking and therefore do not have the force and effect of law or regulation.” Bell contends that Governor Youngkin’s decision to make James Alex—who brings accounting, legal, and U.S. Treasury Department tax policy experience—the new State Tax Commissioner might have considerable significance for the Tax Department and the business community. Bell, therefore, intimates that Alex could promulgate tax regulations under the Virginia APA that may foster business compliance.

IV. ADMINISTRATIVE LAW

The *Law Review* is very pleased that Gentry Locke Partner Noah P. Sullivan’s contribution constitutes the first update of administrative law in the *Annual Survey* since 2014. Reflecting on the past decade, the writer suggests that “Virginia administrative law has remained remarkably stable” when contrasted to federal administrative law. There has been little controversy about a “major questions doctrine,” which has been extremely controversial in the federal system, because the General Assembly has been comparatively active and “remains the dominant policy-making body in Virginia government.” There has been no debate respecting the *Chevron* deference notion, which the Supreme Court of the United States rejected this year, because “agencies have never received deference for their reasonable interpretations of ambiguous Virginia statutes.”

However, the author finds that “there has been change,” and his paper emphasizes the most significant judicial decisions, legislative changes, and executive-branch modifications in administrative law. Although Sullivan contends that Virginia administrative law has remained “stable, Virginia politics have not.” He states that “political dynamics have *significantly* changed in the last ten years,” and predicts that administrative law will become less quiet over the next decade.

The author concludes by scrutinizing a pair of administrative law cases. One involves the decision of the Virginia Air Pollution Control Board to exit the Regional Greenhouse Gas Initiative at the behest of Republican Governor Glenn Youngkin. The second concerns Youngkin's model policy governing transgender policies for local school districts, which essentially attempted to reverse Democratic Governor Ralph Northam's earlier transgender model policy and the transgender legislation passed by the 2020 General Assembly. Litigation which challenges both Youngkin initiatives has been filed and is proceeding through the Virginia court system.

V. WEALTH TRANSFERS

Professor Allison Tait and McGuire Woods Associate Hunter Glenn, who both generously contributed to the 2023 *Annual Survey* issue, consider the past year's legislative and judicial activity, although the General Assembly passed comparatively fewer significant laws and the Supreme Court of Virginia issued relatively fewer decisions regarding central wealth transfer issues. However, the writers find that "modest legislative changes helped bring the rules for revocable trusts in line with the rules for wills," standardizing wealth transfer and estate planning regulation; and clarified present rules, amplifying procedures and supplying more detail for administrative processes.

The authors concomitantly state that the Court of Appeals of Virginia furnished most of the new guidance in this practice field, which covers matters including rights to an accounting, the Commissioner's role, and no contest clauses. Much judicial activity treated the numerous questions that can result when individuals use estate plans to leave "property and residence rights to individuals." The writers suggest that providing an appeal as a matter of right to the Court of Appeals of Virginia made clear that its "docket has expanded in all areas, including for matters relating to wills, trusts, and estates."

VI. THE CASE FOR VIRGINIA SPECIALTY DOCKETS

Jacqueline S. McClenney, the Chief Judge of the Thirteenth Judicial Circuit in Virginia and the Presiding Judge for the Circuit Court Behavioral Health Docket, contributed a piece titled "The Case for Specialty Dockets." The writer advises that Supreme Court of Virginia Rule 1:25 "authorizes Specialty Dockets for Drug

Treatment Courts, Behavioral Health/Mental Health Dockets, and Veterans Courts.” Her article principally focuses on the second “and, by analogy, also references” the first while referencing Veterans Courts to a lesser degree.

Judge McClenney helpfully employs the situation of “Defendant Doe,” an actual defendant who appeared before a local Virginia court, to explain the intersection between the court system and the mental health system. More specifically, the thirty-one Virginia circuits address cases that involve “civil involuntary commitments and criminal matters” that implicate people who are “diagnosed with serious mental illnesses.” The General Assembly passes and amends the statutory frameworks which these populations need, while the judiciary applies and construes these laws and rules that effectuate the statutes to ensure “protection of individual rights and public safety.” The jurist finds that “Specialty Dockets are another ‘tool’ in the ‘toolkit’ to ensure individual liberties and public safety are protected.”

The writer presents data from 2022 that explains the issues. For example, in Virginia, “between 248,528 and 476,906” people over eighteen were diagnosed with serious mental illness; “9,205 inmates (31.64%) were known or suspected to be mentally ill;” and 121,178 individuals were admitted to Virginia psychiatric hospitals.

Judge McClenney then traces the historical research and recommendations of the Joint Legislative and Audit Review Commission (JLARC) related to the “involuntary commitment process, psychiatric hospitalizations, and CSBs” (community service boards) to appreciate how three decades of “recommendations have signaled the future importance of Specialty Dockets.” She finds that the involuntary commitment process, CSBs, and Virginia psychiatric hospitals are within Assembly and executive branch purview and urges clarification of Specialty Dockets’ origins and operations.

The jurist next explains the origins and development of Specialty Dockets by tracing their history. The General Assembly passed the Drug Treatment Court Act (DTCA) in 2004 and the Behavioral Health Docket Act (BHDA) in 2020. After the DCTA’s enactment and before the BHDA’s passage, the Supreme Court of Virginia promulgated Rule 1:25, which recognized the three kinds of Specialty Dockets and their respective purposes. The writer describes how circuits and districts apply for supreme court

approval, how the lower courts and their judges operate following approval, and what requirements defendants must satisfy to qualify for participation.

McClenney advises that all people who have “serious mental illness do not qualify for participation,” but the jurist describes another option which the General Assembly passed in 2020. The law codifies the Supreme Court of Virginia’s opinions in *Hernandez v. Commonwealth* and *Starrs v. Commonwealth* by clarifying that trial jurists possess “inherent authority to accept a defendant’s plea and then, under certain circumstances, withhold findings and defer findings.” She warns that this alternative does not provide the collaborative efforts available between the involuntary commitment process, psychiatric hospitals, and CSBs because it lacks support from a team “whose function is to focus on the mental health and criminogenic needs of the defendant.”

Judge McClenney wonders what the next three decades “will hold in the judicial landscape given” important changes in Virginia Specialty Dockets, especially in the mental/behavioral health area, while optimistically predicting that Specialty Dockets hold promise for those with serious mental illness.

VII. IN RECOGNITION OF JOHN DOUGLASS

I also want to thank and recognize the invaluable contributions of Professor John Douglass, who is retiring from the law school after nearly thirty years of dedicated service. Before Douglass joined the faculty, he participated in a broad spectrum of public and private practice legal endeavors. In 1981, Douglass began his career as a law clerk to revered Fourth Circuit Judge Harrison Winter. From 1981 to 1983, he was an associate doing general civil litigation at McGuire, Woods & Battle. From 1983 to 1986, Douglass was an Assistant United States Attorney (AUSA) in the District of Maryland. From 1986 until 1987, he was an associate with Richmond’s Wright Robinson law firm while also serving as Associate Counsel for the Office of Independent Counsel for the Iran/Contra Investigation. Between 1988 and 1991, Douglass was a partner at the firm. From 1992 until 1996, he returned to public service as an AUSA and Chief of the Criminal Section in the Eastern District of Virginia, Richmond Division, U.S. Attorney’s Office.

In 1996, Douglass joined the University of Richmond School of Law as an Assistant Professor of Law. In 1999, he earned a promotion to Associate Professor of Law, and in 2005, he won promotion to Professor of Law. Douglass published articles in the prestigious *Columbia*, *Fordham*, and *George Washington Law Reviews* as well as the *Emory Law Journal*. From 2008 until 2011, he served as Dean of the Law School. In 2011, Douglass returned to the faculty where he has been a beloved, masterful teacher and a wonderful colleague.

Douglass also comprehends the meaning of public service and leads by example through participation in that valuable service. For instance, in 2009 and 2010, even while serving as Dean, he chaired the City of Richmond Charter Review Commission, a daunting and complicated, yet critically important, assignment. Douglass also presently chairs the American Bar Association's Virginia Assessment Team on the Death Penalty and serves on the Virginia Indigent Defense Commission. The *Law Review* and I fondly remember his service as the journal's faculty advisor.

John Douglass' hallmark is his generosity of spirit, and Douglass embodies Learned Hand's admonition that the "spirit of liberty is the spirit which is not too sure that it is right." Douglass' first and consistent response to individuals, organizations, entities, and governments—including students, litigants, bar associations, universities, and colleagues—seeking his guidance or advice invariably is, "How can I help?" We shall all remember and miss Douglass' many diverse, valuable contributions. The *University of Richmond Law Review* and I wish him all the best.