REPORT OF THE
JOINT SUBCOMMITTEE STUDYING

The Commonwealth's System of Appellate Review in Civil Cases

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

HOUSE DOCUMENT NO. 4

COMMONWEALTH OF VIRGINIA
RICHMOND
1991

Members of Subcommittee

J. Samuel Glasscock, Chairman
Joseph V. Gartlan, Jr., Vice-Chairman
Daniel W. Bird, Jr.
Bernard S. Cohen
A. Christian Compton
C. Richard Cranwell
William D. Dolan III
Edward M. Holland
William S. Moore, Jr.
James C. Roberts

Staff

Division of Legislative Services

Oscar R. Brinson, Senior Attorney
Mary K. Geisen, Research Associate
Sherry M. Smith, Executive Secretary

Anne Howard, Committee Clerk
Office of the Clerk, House of Delegates

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To
The Governor and the
General Assembly of Virginia
Richmond, Virginia
1990

TO: The Honorable L. Douglas Wilder, Governor,
and
The General Assembly of Virginia

I. AUTHORITY FOR STUDY

House Joint Resolution No. 329 (Appendix A), for which Delegate J. Samuel Glasscock served as chief patron, was approved by the 1989 Session of the General Assembly.

Under the provisions of HJR 329, this subcommittee was established to:

1. Study whether the present structure of Virginia's appellate system of judicial review should be modified to expand the opportunity and type of review given civil cases at the appellate level.

2. Consider the recommendations of the Commission on the Future of the Virginia Judicial System.

3. Recommend to the 1990 Session of the General Assembly any necessary changes in the form and structure of the Commonwealth's appellate system to best serve the administration of justice and to allow a full and timely review of all civil cases.

Behind authorization for this study lay a growing concern over delays in receiving final appellate confirmation or reversal of rulings in civil cases and the resulting damage, not only to litigants, but also to the public's perception of the system of justice in the Commonwealth.

II. HISTORICAL BACKGROUND

The Virginia appellate court system had its inception in 1779 when the Supreme Court of Virginia first convened in Williamsburg.

By 1848, an overburdened Supreme Court was faced with a case backlog of eight to nine years. To address this intolerable delay, the General Assembly

created a "Special Court of Appeals" to assist in "dispatching the business" of the Supreme Court.[1]

During the Constitutional Convention of 1851, this special court was designated a constitutional court which could be convened by legislative act.[2] In 1872, 1924, and 1927, the General Assembly exercised its prerogative to establish temporary courts of appeal to ease the Supreme Court's workload. However, this power was removed from the General Assembly by the constitutional revision of 1971.

Responding to growing delays in the disposition of appellate cases in more recent times, the I'Anson Commission in 1972 recommended creation of an intermediate court of appeals to which there would be no appeal of right. In 1978, a study by the National Center for State Courts reiterated the I'Anson Commission's recommendation, but additionally called for appeals of right in most civil and criminal cases.

These recommendations and a subsequent report from the Judicial Council resulted in an unsuccessful attempt to legislatively create a court of appeals in 1982. Following that session, the House and Senate Committees for Courts of Justice held a series of public hearings which culminated in the passage of a bill during the 1983 Session. This bill created the first permanent court of appeals in the Commonwealth. The Virginia Court of Appeals was established, effective January 1, 1985, and given appellate jurisdiction as a matter of right over circuit court decisions in criminal[3] (except death cases) and domestic cases and for appeals from administrative agencies and the Industrial Commission. However, the bulk of appellate jurisdiction in civil cases remained with the Supreme Court.

In response to delays of over three years in the disposition of civil appeals to the Supreme Court and to a lack of appellate review in civil cases,[4] legislation was introduced in the Virginia Senate during the 1988 Session to expand the jurisdiction of the Virginia Court of Appeals to include most civil cases and to authorize an appeal of right to both criminal and civil litigants. This bill, carried over to the 1989 Session, failed in deference to the creation of this study.

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[1]Senate Document No. 36, Report of the Revisors, Virginia General Assembly, 1948-49 Session.

[2]Virginia Constitution, Act VI, § 12 (1851).

[3]Senate Bill No. 253, 1984, made the Court of Appeals' appellate jurisdiction discretionary for appeals from circuit court criminal cases.

[4]In 1987, for example, the Supreme Court elected to review only 17 percent of those cases for which an appeal was presented to it by petition. Virginia State of the Judiciary Report 30 (1987).

III. PARALLEL STUDIES

A. Appellate Process and Capacity in Virginia
The Virginia Bar Association

In response to concern over a growing backlog of civil cases on appeal and lengthening delays in the final disposition of the relatively small percentage of cases heard on appeal, the Virginia Bar Association commissioned its Judiciary Committee, in the fall of 1987, to study Virginia's appellate process.

The Judiciary Committee's report was completed in late 1988. This study reviews successful efforts at appellate reform in other states[5] and lists six possible alternatives for appellate reform in Virginia:[6]

1. Increase the number of justices on the Supreme Court.

2. Have full appeals decided by panels of the Supreme Court.

3. Expand the jurisdiction and size of the Court of Appeals (e.g., Minnesota Intermediate Court of Appeals).

4. Authorize the submission of cases without oral argument (used by the California Court of Appeals, Third District in Sacramento).

5. Authorize the submission of cases without full briefings (adopted by the Rhode Island Supreme Court in routine criminal cases).

6. Establish a case management system involving the use of strict scheduling orders to keep cases on a "fast track" for disposition (e.g., the case management approach adopted by the Illinois intermediate appellate court).

In view of the then existing backlog and length of delay in the disposition of civil appeals before the Supreme Court, the Bar Association report concluded that "the problem of appellate capacity in Virginia requires a remedy of significant proportions."[7] Although the study recognized that some of the listed alternatives for internal revision might merit consideration by both the Supreme Court and the Court of Appeals, none of these measures were felt adequate to meet the demands of the Commonwealth's growing appellate caseload.

Consequently, the report recommended that appellate jurisdiction of the Court of Appeals be expanded to include all civil cases, with the exception of those cases required by the Constitution of Virginia to be heard by the

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[5]Appellate Process and Capacity in Virginia (Richmond: Virginia Bar Association, 1988), pp. 30-36.

[6]Id., pp. 37-42.

[7]Id., p. 43.

Supreme Court.[8] Additionally, it was recommended that an appeal of right be available for all civil case appeals to the Court of Appeals, except in those cases where summary reversal is clearly indicated by the appearance of errors on the face of the record or where summary affirmance is dictated in a case obviously without merit. However, the report stressed that the "by-pass" authority of the Supreme Court to transfer cases before the Court of Appeals to its own docket where significant public interest or importance is involved should be expanded to permit a transfer on motion of any party before the Court of Appeals.[9]

To make feasible the transfer of virtually all civil appellate cases to the Court of Appeals, the Bar's Judiciary Committee concluded that the size of the Court of Appeals should be increased by the addition of three to five judges.

B. Report of the Commission on the Future of Virginia's Judicial System[10]
The Supreme Court of Virginia

In order to assist Virginia courts in meeting the challenges and opportunities in future years, in 1987 Chief Justice Harry L. Carrico appointed a 34-member Commission to develop a "vision" for an effectively functioning judicial system for the 21st century.

Although the Commission study focused on a wide variety of issues, recommendations 4.2 and 4.3 in the Commission's May 1989 report dealt specifically with matters germane to this study.

In summary, the Commission recommended that jurisdiction of the Court of Appeals be expanded to include all civil appeals and that appeals from the trial court to the Court of Appeals be as a matter of right in both civil and criminal cases. Further appellate review by the Supreme Court would be by certiorari within the Court's discretion.

An appeal of right was opposed by seven members of the Commission (see separate statements I and V, Appendix B) and giving the Court of Appeals full civil jurisdiction was opposed by three members (see separate statement IV, Appendix B).

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[8]Cases involving imposition of the death penalty, decisions of the State Corporation Commission, and cases involving judicial censure, retirement or removal. Article VI, Sections 1 and 10; Article XI, Section 4, Constitution of Virginia (1971).

[9]Currently, this transfer mechanism is available only upon motion of the Court of Appeals or the Supreme Court.

[10]Copies of applicable portions of this study are attached as Appendix B.

IV. STATUS OF APPELLATE REVIEW IN CIVIL CASES IN THE COMMONWEALTH

On the average, state appellate court caseloads nationwide have doubled every ten years since the Second World War.[11] As a result of significant population growth and an even more rapid increase in litigation, Virginia has not been immune to a similar ever-increasing burden on its appellate system. Between 1960 and 1985, Virginia's population increased by 44 percent while the number of lawsuits filed rose from 423 to 1,043.[12]

The subcommittee found that, following creation of the Court of Appeals in 1985, the average time required to complete a civil appeal in Virginia, rather than diminishing, had increased significantly. By 1988, this time period had increased by eleven months over the 1984 average. Consequently, in 1988, a personal injury victim in Virginia who received no compensation as a result of trial court error could anticipate a wait of 3.2 years before getting a final determination on appeal to the Supreme Court.[13] Even this wait would apply only to the less than one case in five which the Supreme Court elected to review on appeal (see footnote 4).

The seriousness of appellate delay in Virginia was emphasized by the National Appellate Judges' Conference proposal that the standard period between the filing of an appeal and the issuance of a decision should be 300 days[14] and by the findings of the studies discussed under section III of this report.

During the course of its study, the joint subcommittee found that significant progress has been made by the Supreme Court in dealing with its civil case backlog.

By July 1989, petitions pending before the Court (including civil, criminal, and original jurisdiction cases) were reduced to 360. The argument docket (cases in which petitions for appeal have been granted and are awaiting argument before the full Court) totalled 130 cases. As recently as January 1988, this figure had stood at 270.

By the end of the Court's Session on November 10, 1989, all pre-1989 appeals had been heard, and the backlog of appeals which has existed for the last few years had been eliminated. Furthermore, only 80 appeals remained on the Argument Docket. (The Court requires 80 to 90 pending appeals to fill out a Session schedule and to function effectively.)

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[11] Standards Relating to Appellate Delay Reductions, Judicial Administration Division, American Bar Association (1988).

[12] National Center for State Courts, State Court Statistics: Annual Report 1985, at 184; Julie M. Carpenter, Appellate Delay as a Catalyst for Change in Virginia, 23 Richmond Law Review 141.

[13] Report on Case Disposition Time (Richmond: Supreme Court of Virginia, 1987).

[14] Smith, Appellate Capacity in Virginia, Va. B.A.J. 2-3 (Fall, 1987).

This dramatic progress can be partially explained by remarks by Chief Justice Carrico earlier this year to the Virginia Bar Association:

> "Most members of the bar are aware that the Supreme Court had a case backlog of considerable proportions when the Court of Appeals came into existence on January 1, 1985. Apparently, some thought our backlog would somehow disappear the moment the Court of Appeals opened its doors for business. In truth, we had on our argument docket at that time 343 cases, or approximately 2.2 years of work at our then-current rate of disposition of 156 opinions per year. In the four-plus-year period between January 1, 1985, and January 13, 1989, we granted 656 appeals and added them to the argument docket, or another 4.2 years of work, for a total of 999 cases, or 6.4 years of work. In the same four-plus-year period, we disposed of 860 argument docket cases, or 5.5 years of work in a 4-year span, calculated according to our previous rate of disposition."[15]

Additionally, the Supreme Court has taken numerous steps to deal directly with the case backlog. The rate of disposition has been increased, with each member writing an extra opinion for each session since early fall 1987. Also, a number of cases have been disposed of by order. Secretarial help has been increased, two new law clerks have been added to the Court's staff, and Court operations have been automated to achieve greater control and faster disposition of cases. More importantly, the Court has adopted a formal goal for the disposition of cases which is now being implemented. Meeting this goal will result in final disposition of a case within 12 months after the petition for appeal is filed.

V. QUESTIONS CONSIDERED BY THE JOINT SUBCOMMITTEE

During its deliberations the joint subcommittee reviewed a number of issues prior to making final recommendations. Among the questions debated were the following (together with positive and negative elements or alternatives for many issues):

1. Should the Court of Appeals be expanded to hear civil appeals?

   POSITIVES:

   - Will ease problems caused by delay and backlog in the Supreme Court by offering speedier disposition of civil cases.
   - Will assure expanded judicial review of civil cases.
   - Will bring Virginia in line with the appellate structure of most other states and with ABA standards which suggest that each appellate level have full jurisdiction.
   - Will allow the Supreme Court to concentrate on those cases necessary to the development of the law.

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[15] The Virginia Bar Association Journal, Volume XV, Summer 1989.

NEGATIVES:

- Will simply shift the backlog of cases from the Supreme Court to the Court of Appeals.
- Will increase the Court of Appeals' workload by approximately one-third, assuming no increase in filings due to an appeal of right.
- Will increase costs, approximately $257,000 per additional judge per year, plus per judge start-up costs of $72,000 and costs for additional clerks.
- Will create a two-tier appellate system for civil cases which would permit double appeals (conceivably resulting in longer delays until final resolution).

2. If the Court of Appeals is given civil appellate jurisdiction, should these appeals be of right?

POSITIVES:

- Will assure all civil litigants at least one appellate hearing.
- Will allow the court to confine each case to one hearing and set of documents; avoids the redundancy of petitions and briefs and the wasted time between granting the petition and hearing oral argument.

NEGATIVES:

- May significantly increase the number of civil appeals, thereby substantially increasing the costs of the Court of Appeals.
- May endanger collegiality and uniformity of the Court of Appeals by forcing a significant increase in the number of judges.
- May result in an inability of judges to continue to review the opinions of each judge, including those opinions issued in other panels, thereby increasing the likelihood of conflicts among panels.
- Will make reaching a consensus in en banc sessions more difficult.

3. If the Court of Appeals is given full civil appellate jurisdiction, should the "by-pass" authority of the Supreme Court be expanded to permit a transfer on motion of any party before the Court of Appeals?

4. If the Court of Appeals is given full civil appellate jurisdiction, how many additional judges will be needed and at what cost?

5. Would an expanded Court of Appeals function best by sitting in divisions (e.g., civil and criminal)?

POSITIVES:

- Will maximize expertise by the judges within each division.
- Will permit each division to function as a smaller, more manageable unit.

NEGATIVE:

- Will decrease collegiality among the Court as a whole.

6. Should decisions of the Court of Appeals in domestic relations cases be final? (Note: Although this is currently the law under § 17-116.07, the substitute to Senate Bill 5 proposed by the Senate Committee on Finance in 1988 removed this finality.)

7. Should the number of justices on the Supreme Court be increased? (Note: Article VI, section 2 of the Virginia Constitution gives the General Assembly the power to increase the number of justices up to 11 by a three-fifths vote of both houses at two successive regular sessions.)

POSITIVE:

- Should result in increased case dispositions.

NEGATIVE:

- Due to the Supreme Court's sitting and deciding cases en banc, the addition of justices will, in all likelihood, not result in a proportionally increased case disposition.

8. Should the Supreme Court be expanded to nine justices and authorized to sit in panels of three as is the case with the Court of Appeals?

POSITIVE:

- Will expand capacity for case disposition.

NEGATIVE:

- Will result in the court of last resort speaking with less than a full or majority voice on matters of significant precedential importance.

9. Irrespective of the recommendations of the study subcommittee, should the Court of Appeals and the Supreme Court be encouraged to establish procedures for expediting appeals by establishing a "fast track" for cases suitable for a streamlined procedure?

ALTERNATIVES:

- Reduce the minimum permissible time for the briefing process in appropriate cases by limiting or eliminating either oral arguments or briefs, thereby reducing the redundancy of using both avenues of communication with the court.
- Permit summary disposition in appropriate cases or the use of abbreviated records.

- Institute settlement processes at the appellate level to encourage settlement and lessen the appellate caseload.
- Continue improvement in both Virginia's appellate courts in case management techniques.

VI. ESTIMATED FISCAL IMPACT OF EXPANDING THE COURT OF APPEALS AND GRANTING AN APPEAL OF RIGHT IN CIVIL CASES

Since both the Virginia Bar Association and Supreme Court studies recommended expansion of appellate jurisdiction of the Court of Appeals to include civil appeals of right, the joint subcommittee reviewed the potential fiscal impact of these proposals.

During its 1988 Session, the General Assembly actively considered these alternatives, and Senator Wiley F. Mitchell, Jr., introduced Senate Bill No. 5. The original bill proposed to expand the jurisdiction of the Court of Appeals to include most civil cases and to grant an appeal of right to both criminal and civil litigants. However, the Senate Finance Committee, to which Senate Bill No. 5 was referred after being reported out of the Senate Committee for Courts of Justice, proposed a substitute bill.[16] This substitute (i) added three additional judges to the Court of Appeals, (ii) granted that court appellate jurisdiction over final circuit court decisions in civil cases (with appeals of right), and (iii) deleted subsection (3) of § 17-116.07, which provides that decisions of the Court of Appeals on issues involving domestic relations law shall be final. The amended bill was carried over to the 1989 Session, but no action was taken on the bill in deference to this study.

Projections were prepared by Kathy Mayes, Director of Judicial Planning for the Supreme Court, which described several methods for estimating the number of judges required to implement Senate Bill No. 5 and the proposal by the Virginia Bar Association.[17] These methods project total Court of Appeals judge requirements ranging from 16 to 18, thereby indicating an increase of six to eight judges to the Court.

Appendix F sets forth figures prepared by Ms. Mayes which reflect annual and first year costs of adding one Court of Appeals judge. Multiplying these figures times six and eight judges results in estimates ranging, respectively, from $2,520,319 to $3,372,543 for first year costs and from $2,081,129 to $2,786,263 for annual costs thereafter. A detailed breakdown of these figures appears under Appendix G.

The joint subcommittee agreed that if appellate jurisdiction of the Court of Appeals were expanded to include civil appeals of right, nine additional judges would be required (thereby creating three complete panels). Consequently, such expansion would result in first year costs of approximately $3,780,477 and annual costs thereafter of approximately $3,121,686.

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[16] A copy of the bill is attached as Appendix C.

[17] See Appendix D for impact of Senate Bill No. 5 and Appendix E for impact of Virginia Bar Association proposal.

VII. CONCLUSIONS AND RECOMMENDATIONS

A. Summary of Recommendations:

1. That the Commonwealth's appellate system not be changed at this time, with civil appellate jurisdiction by petition remaining with the Supreme Court.

2. That the operation of Virginia's Appellate Court structure as to civil appeals be reevaluated by a legislative subcommittee two years henceforth.

3. That this subcommittee also review the question of whether criminal appeals in Virginia should be of right or remain by petition.

4. That the current age limitation of 75 years for senior justices be removed.

5. That the number of retired justices allowed to serve at any one time as senior justices be increased from two to four.

6. That appellate jurisdiction of the Court of Appeals with respect to interlocutory decrees or orders be expanded.[18]

B. Discussion

The threshold question faced by the joint subcommittee involved whether or not to transfer civil appellate jurisdiction from the Supreme Court to the Court of Appeals. If this question were answered affirmatively, the issue then arose as to whether such appeals should be of right or by petition. Moreover, if civil appeals were allowed "of right," could the Commonwealth constitutionally maintain its current petition system for criminal appeals, thereby giving the appearance of a lower standard of appellate right in cases involving a loss of liberty?

Following a thorough review of the available options, a narrow majority of the joint subcommittee initially supported transferring civil appellate jurisdiction to the Court of Appeals, with such appeals being by petition. However, at its last work session in mid-January of 1990, the joint subcommittee reversed itself and concluded that the Commonwealth's existing civil appellate system should, for the time being, remain unchanged.

Although many factors contributed to this decision, the primary consideration was the Supreme Court's outstanding effort to eliminate its case backlog and the Court's projected goal of final disposition in future civil cases within 12 months of filing of the petition for appeal. This goal

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[18]Recommendations 4, 5, and 6 are encompassed within Senate Bill No. 93 (1990), which is set forth under Appendix I.

allayed "justice delayed" concerns of bar groups and others which arose from the serious civil case backlog of recent years.

The study subcommittee felt that this backlog was, to a large extent, a consequence of the heavy caseload carried by the Supreme Court for many years prior to the creation of the Court of Appeals--a consequence which required several years of concerted effort by the Supreme Court to completely remedy. Therefore, the joint subcommittee concluded that it would be premature to radically revise Virginia's appellate court structure until the current system could be fully evaluated in a context with no case backlog.

To accomplish this evaluation, the joint subcommittee recommended that a legislative subcommittee be appointed two years henceforth to thoroughly assess the operation of Virginia's appellate court system with respect to civil appeals.

Other salient arguments against expanding the appellate jurisdiction of the Court of Appeals to include civil cases were as follows:

- Such restructuring of our appellate system would be prohibitively costly (see section VI of this report) during a period of fiscal austerity and budget constraints.

- Our two-tier appellate system would be converted into a three-tier system, thereby institutionalizing delay by building into every civil case that goes to the Supreme Court a minimum two-year wait between final judgment by the trial court and final disposition of the case. Also, this factor would accentuate the advantage of those litigants with a "deep pocket."

Prominent arguments by those members who favored moving appellate jurisdiction over civil cases to the Court of Appeals included the following:

- Such restructuring would relieve the Supreme Court of its current error-correcting function and allow the court to more properly concentrate on the development of a substantive body of law for precedential purposes.

- Virginia's judicial system would be brought into line with that of most other states, which allow full appellate review at each level rather than maintaining a hybrid appellate structure with varying levels of final appeals based not on rationality, but on the substantive content of each case.

- Other states with full appellate jurisdiction at each level characteristically hear appeals in a timely and efficient manner.

- The Supreme Court cannot continue to carry its current workload, making the question of expanding the appellate jurisdiction of the Court of Appeals "when" and not "whether to."

While the issue of transferring civil appellate jurisdiction to the Court of Appeals was being debated, the related question as to whether such appeals to that Court should be of right became a primary focus. Those members in

opposition felt that the "of right" concept invited frivolous appeals which would ultimately result in backlogs in the Court of Appeals.

To arguments that each litigant should be assured at least one review of a trial court decision, they responded that, in effect, this right currently exists under our petition system. All civil litigants may appeal a trial court decision and are guaranteed a hearing under the petition system by a panel of the Supreme Court. Moreover, only one member of the Supreme Court panel conducting this review need vote in the affirmative to guarantee a hearing by the full court.

Some members of the joint subcommittee expressed concern that granting appeals of right in civil cases but retaining appeals by petition in criminal cases could raise constitutional due process issues. The subcommittee was advised by representatives of the Attorney General's Office that this was not the case so long as all cases within each category (i.e., civil and criminal) are treated similarly. Nonetheless, the subcommittee decided that policy and basic fairness issues were sufficiently strong to warrant further review of this matter by the legislative study group established under Recommendation 2.

Recommendations 4 and 5 (removing the age limitation for retired senior justices and increasing the number of justices who may serve at any one time as senior justices from two to four) represent an effort on the part of the joint subcommittee to allow the Supreme Court to internally increase the Court's capacity as needed by the expanded use of senior justices. With respect to this proposal, it was the subcommittee's intent that the effectiveness of each senior justice be reviewed each year by the Court. (Note: The final version of Senate Bill No. 93 approved by the General Assembly specifically limits each senior justice to a one-year term unless the Court, by order or otherwise, extends the term for an additional year. There is, however, no limit on the number of terms a senior justice may so serve. (See Appendix I.)

The final recommendation simply authorized aggrieved parties to appeal to the Court of Appeals from interlocutory decrees or orders entered in any case listed in § 17.116.06 which (i) required money to be paid or the possession or title of property to be charged or (ii) adjudicated the principles of a cause. (Note: During the legislative process, concerns that (i) above would authorize appeals to the Court of Appeals from temporary support orders by the circuit courts led to the deletion of this clause from the enacted bill. (See Appendix I.)

Respectfully submitted,

J. Samuel Glasscock, Chairman
Joseph V. Gartlan, Jr., Vice-Chairman
Daniel W. Bird, Jr.
Bernard S. Cohen
A. Christian Compton
C. Richard Cranwell
William D. Dolan III
Edward M. Holland
William S. Moore, Jr.
James C. Roberts

Appendices

Appendix A	House Joint Resolution No. 329
Appendix B	Report of the Commission on the Future of Virginia's Judicial System
Appendix C	Senate Bill No. 5, 1988 (Substitute)
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GENERAL ASSEMBLY OF VIRGINIA -- 1989 SESSION

HOUSE JOINT RESOLUTION NO. 329

Establishing a joint subcommittee to study the Commonwealth's system of appellate review of civil cases.

Agreed to by the House of Delegates, February 6, 1989
Agreed to by the Senate, February 23, 1989

WHEREAS, in 1972 the I'Anson Commission recommended creation of an intermediate court of appeals, without limitation as to jurisdiction, as a means of addressing the need to increase the capacity of appellate courts to review the orders and judgments of Virginia's trial courts of record, and the same recommendation was made in 1980 by an ad hoc committee of the Judicial Council of Virginia, after receipt of a study conducted by the National Center for State Courts; and

WHEREAS, in 1983 the General Assembly adopted legislation creating the Court of Appeals of Virginia with jurisdiction generally limited to review of criminal law, domestic relations and administrative agency cases; and

WHEREAS, the Virginia Bar Association, concerned by the question of appellate capacity, commissioned a study which recommended revision of the structure of Virginia's appellate system to provide for review of all civil cases in the Court of Appeals and, to accomplish that goal, recommended expanding the jurisdiction of the Court of Appeals to include all civil cases; and

WHEREAS, there may be other means of expanding the scope of appellate capacity in Virginia's judicial system; and

WHEREAS, the Commission appointed by the Chief Justice of the Supreme Court of Virginia to study the future needs of the Commonwealth's judicial system will issue its report in the spring of 1989, and it is desirable that the General Assembly be in a position to respond to the Commission's recommendations; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That a joint subcommittee be created (i) to study whether the present structure of Virginia's appellate system of judicial review should be modified to expand the opportunity and type of review given civil cases at the appellate level, (ii) to consider the recommendations of the Commission on the Future of the Virginia Judicial System and (iii) to recommend to the 1990 Session of the General Assembly such changes as are necessary, if any, in the form and structure of the Commonwealth's appellate system to best serve the administration of justice and to provide the opportunity for a full and timely review of all civil cases.

The joint subcommittee shall be composed of nine members: four members of the House Committee for Courts of Justice appointed by the Speaker of the House, three members of the Senate Committee for Courts of Justice appointed by the Senate Committee on Privileges and Elections and two members of the Virginia State Bar appointed by the Governor. The Chief Justice of the Supreme Court of Virginia or his designee from among the justices of the Supreme Court and the Chief Judge of the Court of Appeals of Virginia or his designee from among the judges of the Court of Appeals shall serve as ex-officio members of the joint subcommittee.

All agencies of the Commonwealth shall provide assistance upon request as the joint subcommittee may deem appropriate.

The joint subcommittee shall complete its work in time to submit its findings and recommendations to the Governor and the 1990 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for processing legislative documents.

The indirect costs of this study are estimated to be $10,860; the direct costs of this study shall not exceed $6,480.

COURTS IN TRANSITION

The Report of the Commisssion on the Future of Virginia's Judicial System

4.2 Recommendation: The jurisdiction of the Court of Appeals should be expanded to include jurisdiction over all civil appeals. *

Rationale: The now constricted civil jurisdiction of the Court of Appeals is unusual, if not unique, among the thirty-seven states with intermediate appellate tribunals. With the existing split jurisdiction the time required to process an appeal from the circuit courts through the Supreme Court has increased to more than three years.

The Commission recommends that the Court of Appeals be recognized as the principal means by which most litigants obtain appellate review, leaving the Supreme Court free to focus on cases of major significance and to shape the substantive law of the Commonwealth. Given this focus, each appellate court could develop procedures best suited to accomplish its role in the appellate process. For example, the Court of Appeals can sit in panels, use summary dispositions, and can be expanded as the caseload increases. While such procedures are suitable for the intermediate appellate court, they would not be appropriate for the appellate court of last resort. Rearrangement of this jurisdiction together with the necessary enlargement of the Court of Appeals would contribute to reduction of appellate delay and to expansion and improvement of appellate review.

4.3 Recommendation: Appeals from the trial courts should be to the Court of Appeals as a matter of right in both civil and criminal cases; further appellate review by the Supreme Court would be within its discretion by writ of certiorari. *

Rationale: Virginia is the only state having an intermediate appellate court that does not grant an appeal of right in most civil and criminal cases. While some appellate review is provided under the existing system of petition to the Supreme Court, the Commission recommends that appeals go from the trial court to the Court of Appeals as a matter of right rather than by petition. Although appeals in criminal cases would lie as a matter of right, defendants still would not be able to appeal when a guilty plea had been entered.

Affording an appeal of right would significantly increase the workload of the Court of Appeals, especially in criminal cases, and would have major cost implications. Additional funding would be required for judges, support staff, court facilities and the Attorney General's office. Yet, the Commission believes that an appeal of right in both civil and criminal cases accords with the preferred vision of the judicial system of the Twenty-First Century in that there should be an opportunity for a multi-judge review of any decision by a single judge. Other states have found the fiscal resources necessary to provide appeals of right.

If litigants had an appeal of right, some appeals would be frivolous, just as today some petitions for appeal are frivolous. Some contend that the overriding need for finality of decisions would be jeopardized. The Commission thus recommends that the Court of Appeals have authority to affirm frivolous appeals summarily without oral argument and to impose sanctions on parties and their attorneys who press frivolous appeals. The Court of Appeals should also have authority to reverse summarily cases which present clear error.

Traffic and misdemeanor appeals, now final at the Court of Appeals, should remain final after this one appeal. Appeals from small claims cases should also be final after this one appeal. For all other cases, appeals to the Supreme Court from the Court of Appeals should be by certiorari only.

Allowing appeals to the Supreme Court only by certiorari permits the court responsible for the development of the common law to exercise discretion as to which cases it will review. Under the current petition system, the Court must grant any petition where there is reasonable likelihood that error was committed in the trial court. By utilizing a certiorari process, the Court could accept or reject an appeal solely on its own discretion. This practice is consistent with that of the United States Supreme Court and will allow the Supreme Court to concentrate its efforts on cases of major importance and cases in areas of the law in which the practicing bar and the trial bench need guidance.

SEPARATE STATEMENTS

The following statements were submitted by Commission members.

I.

The majority report of the Commission is the product of thoughtful, conscientious, and imaginative study by a group of able, energetic, and dedicated Virginians. I admire the workmanship, I concur in most of the recommendations, in varying degrees of enthusiasm, but I disagree with some.

In my opinion, there are two critical problems in the administration of justice in Virginia—delay in the judicial process and the increasingly prohibitive cost of civil litigation. The successful administration of justice in the Twenty-First Century will depend largely upon finding satisfactory solutions to these two problems; to the extent that the majority report recommends viable solutions I endorse it. I view all other recommendations as secondary. Some are designed to improve the public relations skills of court personnel, others to apply the marketing techniques of a trade to the administration of justice, interesting but dubious concepts.

Although I approve the recommendation that the Court of Appeals be given jurisdiction over civil as well as most criminal appeals, I oppose the recommendation of an appeal of right. We were informed that giving an appeal of right may require the employment of 30 additional attorneys in the Office of the Attorney General. No estimate is given as to the additional judges that will be required. It may not be unreasonable to suggest that an increase in the number of judges of the Court of Appeals from 10 to 20 to 25 may be necessary if the jurisdiction is expanded and an appeal of right mandated.

My objection, however, is not based upon the tremendous expense incident to these proposed changes. In my view, the petition procedure applicable to appeals in the Supreme Court of Virginia, and available in the Court of Appeals, is in effect an appeal of right. The losing lawyer in the court below may make a personal appearance in support of his petition for appeal before a panel of three or more justices of the Supreme Court. His opponent may file a brief in opposition but will not be permitted to argue orally. If one member of the panel believes that the lower court may have erred, the appeal is granted. Thus, every litigant has the right to argument before a panel of the Court. If he cannot raise a doubt in the mind of at least one panel member, he can file a petition for rehearing which is reviewed by the full Court. Substantially the same procedure is available in the Court of Appeals. Code § 17-116.05:2. Under such favorable conditions the petitioner has every advantage to which he is reasonably entitled. To grant him more is to burden an already overloaded system with excess baggage without benefit to anyone. I believe the Virginia petition procedure is superior to the appeal of right provided in other states. It follows that I disagree with the recommendation that appeals from the Court of Appeals be only by certiorari. Appeals by petition should be continued at both appellate levels.

It is not easy to oppose a recommendation that merely states that certain changes should be considered. Nevertheless, I do oppose giving consideration to incorporating the federal rules of civil procedure and having the Supreme Court by rule promulgate a code of evidence. In 1987, after a lengthy study, the Supreme Court unanimously recommended to the General Assembly that no code of evidence should be adopted. Whatever demand exists for this innovation and for incorporation of the federal rules of civil procedure may be traced to lawyers who would prefer, for their own convenience in litigation, to federalize Virginia procedure and even substantive Virginia evidentiary law. I am aware of no widespread desire of either bench or bar for such drastic action.

The recommendation that the performance of judges be constantly evaluated is highly questionable. No elected officials in Virginia are subjected to such evaluation except when considered for reelection. To single out the judiciary for this kind of review is unjustified. It could impair the independence of the judicial branch by causing some judges to seek popularity at the expense of objectivity.

For the same reason, I question the recommendation that the Supreme Court establish a consumer research and service development program for the judicial system and provide forms for users of the courts to submit comments on the service received in the court system. I readily agree that all court personnel should be trained and expected to deal courteously and efficiently with users of the court facilities. I do not believe, however, that every disgruntled litigant or his relatives should be encouraged to complain about inconsequential slights allegedly received in the judicial process.

The judicial system in administering justice does provide an important service to the public generally and to litigants especially. Generally, in litigation there are winners and losers. There is no way to make the loss of a case pleasant to the loser. Litigation is civilized warfare in which antagonists have been strenuously engaged; no exchange of pleasantries, even those devised by consumer research specialists, is going to ease the disappointment of defeat. Comments on the service at a hotel may be helpful to the management; comments on the service in the judicial system may be a needless embarrassment to those who administer justice. Some critics fear that the introduction of advertising and marketing techniques has tended to convert the practice of law from a profession into a trade. Many of those engaged in the administration of justice are reluctant, I believe, to welcome such techniques into the courthouses.

I do not approve the recommendation that a system be established in each judicial circuit to receive, investigate, and report to the Judicial Council allegations of discrimination by court personnel. Complaints of discrimination or other improper conduct by judges should be made to the Judicial Inquiry and Review Commission. Complaints of discrimination or other improper conduct by other court personnel should be made to the chief judge of the circuit court or Court of Appeals, or in respect to complaints against personnel of the Supreme court, to the Chief Justice.

A judge at any level should hope to inspire respect rather than affection. In a consumer-oriented society, the danger is that a judge become a salesman who may succumb to the pressures of public opinion rather than apply the law fairly, objectively, and evenly, whether the results are popular or unpopular. The best safeguard against judicial arrogance is tenure for a fixed term rather than for life.

Lastly, I object to the recommendation that cost of living adjustments be made in the compensation of all personnel in the judicial system. For years, local political subdivisions were permitted to supplement judicial salaries at the trial court level. Many did so, giving rise to inevitable conflicts of interest when decisions of the local governing bodies were challenged in court. It took years for the General Assembly to eliminate what was widely criticized as an unwise policy. Since then judicial salaries have been uniform throughout Virginia, although it is apparent that the purchasing power of the salary continues to vary from place to place.

Undoubtedly, acceptance of a judicial position may require financial sacrifice. There will always be some qualified persons who are unable or unwilling to serve. Judicial service does not now and never will offer an attractive career for one who seeks wealth. For those motivated to pursue such careers, however, in Virginia, where the traditions of public service are strong, there are incomparable intangible rewards.

George M. Cochran

NOTE: Joining in Justice Cochran's separate statement were Judge Persin and Mr. Parkerson. Judges Daffron and Trabue concur with Justice Cochran's opposition to the recommendation calling for an appeal of right to the Court of Appeals. Judges Daffron, Kent, Trabue and Mr. Roberts concur with Justice Cochran's opposition to the establishment of a consumer research and service development program and the creation of an ombudsman as proposed in Recommendation 8.3.

II.

I take exception to Recommendation 3.5 which would give judges authority to order mandatory participation by litigants in arbitration, mediation or other alternative dispute resolution mechanisms (ADR). Let me hasten to say, I fully support the use of ADR. Having served on the Task Force on Alternative Paths to Justice, I am firmly convinced that, in appropriate cases, such mechanisms can and should be used to resolve many conflicts. However, I am equally convinced that litigants and their respective counsel are the parties best suited to determine what cases are appropriate, not judges aided by computers (See Recommendation 3:6).

Compulsory authority would be a fertile ground for abuse. It is neither necessary nor desirable. Abuse would lead to another layer of expense and bureaucratic delay. Mandatory ADR would threaten the right to trial by jury. It would undermine matters best left to the discretion of counsel and their clients. In many

court administrators but they will have no voice as to how the system works or a voice of one of their own to explain how the system works.

The proposal to eliminate the clerk and to split off the judicial duties from administrative duties leaves more questions than it answers. For example, in small or rural areas where case filings are not numerous and the court only meets a few days per month, what will the court administrator do during these "slow times"? What salary will be necessary to attract a professional manager and how will it be paid? The court functions of the current elected clerk show in all courts the only constant negative financial operation of the offices. The fees charged are so low and the collection of fines and costs such a failure that the non-judicial or administrative fees collected by clerks of court fund the court operation of every court in the Commonwealth.

Other questions raised with the split of offices and duties also pose interesting financial questions. Will local governments be required to build buildings for the non-judicial functions now performed by clerks? Will state recording standards be eliminated and each locality allowed to impose fees and costs and set different recording standards? Will the courts and the localities be required to buy, equip and operate the records storage methods now done by a single clerk?

The clerk of court, being elected and performing both judicial duties and administrative duties, has provided service to the Commonwealth and to the local governing bodies and to the judiciary. These services have enabled these agencies not just to survive in an age of increased and, at times, overwhelming demands, but has enabled them to prevail. This has been accomplished despite erratic and insufficient staffing and funding. (Compare the staffing of the offices of Commissioner of the Revenue, the Treasurer and the Sheriff with each respective court clerk.) An elected clerk can preserve an element of democracy within a professional judiciary that ought to remain apart from politics but which must be answerable to those they serve. With modest increases in revenue with the funds earmarked for education of clerks and their personnel, the judiciary of the Twenty-First Century will be able to meet its mandate of quality justice for all, backed by a qualified and competent administrative arm headed by an elected clerk of court.

Michael M. Foreman

IV.

We disagree with the majority's recommendation that full civil jurisdiction be given to the Court of Appeals (Recommendation 4:2). Instead, we believe that the present division of jurisdictional responsibility provides a unique and preferable structure for the development of the law. The legislature has assigned each appellate court given areas of primary responsibility. This affords each court the opportunity to develop an expertise in those areas, thereby helping insure the development of cohesive and internally consistent bodies of case law. Further, this system achieves these goals at a minimum cost to the public.

The benefits which the present appellate structure provides must not be overlooked. We believe that the present structure has resulted in an equitable and manageable division between the two appellate courts. Between 1985 and 1988 an average of 1,239 cases per year were filed in the Supreme Court (mostly civil), while an average of 1,123 cases were filed in the Court of Appeals. More significantly, under the current model the appellate capacity expanded dramatically with minimal duplication. Between 1981 and 1985 the Supreme Court acted upon an average of 1,995 cases per year; between 1986 and 1988 the two courts combined acted upon an average of 2,703 cases per year. Additionally, the body of law available to provide guidance to the bench, bar, administrative agencies, municipalities and the public dramatically increased. An average of 176 opinions per year were

issued by the Supreme Court between 1981 and 1985; since the two courts have been in existence, an average of 408 opinions per year have been issued.

Before more costly measures are taken to restructure the entire appellate system, we believe that both the Supreme Court and the Court of Appeals should strive to meet the ABA time standards for disposition of appellate cases. Only if the appellate courts are unable to meet these standards, and access to the appellate process has not been materially increased by the reduction of delay, should consideration be given to restructuring the jurisdiction of the appellate system.

Lawrence L. Koontz, Jr.
Barbara M.. Keenan

NOTE: Joining in the separate statement filed by Judges Koontz and Keenan was Judge Trabue.

V.

We believe that providing an appeal of right from all cases in the trial courts will result in greater delay and restrict the ability of the appellate system to do quality work in a timely manner (Recomendation 4:3). Based on projections from the Director of Judicial Planning for the Supreme Court, a system providing an appeal of right with full civil jurisdiction in the Court of Appeals would probably result in a 28% increase in civil cases filed. Since the Supreme Court has experienced difficulty in timely disposing of the civil cases filed there, it is unrealistic to assume that transfer of all of these cases plus the estimated 28% increase in filings would not result in additional delay and backlog in th Court of Appeals. We also believe that providing an appeal of right in criminal cases would produce similar burden of backlog and delay.

Increased access to the appellate system can be achieved without placing the equilibrium of the entire system at risk. Delay reduction is the key predicate to increasing the appellate courts' capacity. Until that goal is achieved, no responsible construct for change can be devised. Further, we agree with Justice Cochran's statement that the petition procedure used in the Virginia appellate courts provides a merits review of cases which is effectively the same as an appeal of right. Changing this procedure before analyzing the beneficial impact of delay reduction could result in an actual restriction of access through additional delay, as well as a reduction in the quality of attention now given each case during the petition process.

Other states which provide appeals of right to their intermediate appellate courts have often found it necessary to have a large amount of case screening and recommendations made by non-judicial personnel. Further, the right to oral argument is often drastically limited in these courts to minimize case processing time. We strongly believe that implementation of the appellate system envisioned by the majority report would result in similar unavoidable problems. Unfortunately, experience has shown that the reality of limited resources actually increases the problems sought to be solved when theoretically pure systems, such as the one proposed in the majority report, are implemented. We believe that Virginians deserve a quality oriented system, rather than a numbers-driven structure of appellate review. For this reason, we dissent from the implementation of an appeal of right with full civil and criminal jurisdiction in the Court of Appeals.

Lawrence L. Koontz, Jr.
Barbara M. Keenan

NOTE: Joining in the separate statement filed by Judges Koontz and Keenan was Judge Trabue.

LD2704127

SENATE BILL NO. 5
AMENDMENT IN THE NATURE OF A SUBSTITUTE
(Proposed by the Senate Committee on Finance
on February 23, 1988)
(Patron Prior to Substitute–Senator Mitchell)

A BILL to amend and reenact §§ 17-116.01, 17-116.05 and 17-116.07 of the Code of Virginia, relating to appellate jurisdiction of the Court of Appeals.

Be it enacted by the General Assembly of Virginia:

1. That §§ 17-116.01, 17-116.05 and 17-116.07 of the Code of Virginia are amended and reenacted as follows:

§ 17-116.01. Creation and organization; election and terms of judges; oath; vacancies; qualifications; incompatible activities prohibited; chief judge.–A. The Court of Appeals of Virginia is hereby established effective January 1, 1985. It shall consist of ~~ten~~ *thirteen* judges who shall be elected for terms of eight years by the majority of the members elected to each house of the General Assembly. The first such election shall be held during 1984 at a regular or special session of the General Assembly. Before entering upon the duties of the office, a judge of the Court of Appeals shall take the oath of office required by law. The oath shall be taken before a justice of the Supreme Court of Virginia or before any officer authorized by law to administer an oath. When any vacancy exists while the General Assembly is not in session, the Governor may appoint a successor to serve until thirty days after the commencement of the next session of the General Assembly. Upon election by the General Assembly, the judge so elected shall begin service of a full term. All judges of the Court of Appeals shall be residents of the Commonwealth and shall, at least five years prior to the appointment or election, have been licensed to practice law in the Commonwealth. No judge of the Court of Appeals, during his continuance in office, shall engage in the practice of law within or without the Commonwealth or seek or accept any nonjudicial elective office, or hold any other office of public trust, or engage in any other incompatible activity. Upon the election and qualification of the judges, and the election of a chief judge, the Court is authorized to convene and organize, and on January 1, 1985, to begin the discharge of the judicial business assigned to the Court by law.

B. The chief judge shall be elected by majority vote of the judges of the Court of Appeals to serve a term of four years.

C. If a judge of the Court of Appeals is absent or unable through sickness, disability, or any other reason to perform or discharge any official duty or function authorized or required by law, a (i) retired chief justice or retired justice of the Supreme Court of Virginia, (ii) retired chief judge or retired judge of the Court of Appeals of Virginia, or (iii) retired judge of a circuit court of Virginia, with his or her prior consent, may be appointed by the chief judge of the Court of Appeals, acting upon his own initiative or upon a personal request from the absent or disabled judge, to perform or discharge the official duties or functions of the absent or disabled judge until that judge shall again be able to attend his duties. The chief judge of the Court of Appeals shall be notified forthwith at the time any absent or disabled judge is able to return to his duties.

D. The chief judge of the Court of Appeals may, upon his own initiative, designate a (i) retired chief justice or retired justice of the Supreme Court of Virginia, (ii) retired chief judge or retired judge of the Court of Appeals of Virginia, or (iii) retired judge of a circuit court of Virginia, with the prior consent of such justice or judge, to assist the Court of Appeals in reviewing petitions for appeal if there is a need to do so due to congestion in the work of the court.

E. Any retired chief justice, retired justice or retired judge sitting under any provision of this section shall receive from the state treasury actual expenses for the time he or she is actually engaged in holding court.

F. The powers and duties herein conferred or empowered upon the chief judge of the Court of Appeals may be exercised and performed by any judge or any committee of judges of the court designated by the chief judge for such purpose.

§ 17-116.05. Appellate jurisdiction – Administrative agency, Industrial Commission and domestic relations appeals.–Any aggrieved party may appeal to the Court of Appeals from:

1. Any final decision of a circuit court on appeal from a decision of an administrative agency; and

2. Any final decision of the Industrial Commission of Virginia; and

3. Any final judgment, order, or decree of a circuit court involving:

a. Affirmance or annulment of a marriage;

b. Divorce;

c. Custody;

d. Spousal or child support;

e. The control or disposition of a child;

f. Any other domestic relations matter arising under Title 16.1 or Title 20; or

g. Adoption under Chapter 11 (§ 63.1-220 et seq.) of Title 63.1; ~~and~~

4. Any final decision of a circuit court in a civil case; and

5. Any interlocutory decree or order entered in any of the cases listed in this section granting, dissolving, or denying an injunction.

§ 17-116.07. Disposition of appeals; finality of decisions.–A. Each appeal of right taken to the Court of Appeals and each appeal for which a petition for appeal has been granted shall be considered by a panel of the court.

When the Court of Appeals has (i) rejected a petition for appeal, (ii) dismissed an appeal in any case in accordance with the Rules of Court, or (iii) decided an appeal, its decision shall be final, without appeal to the Supreme Court, in:

1. Traffic infraction and misdemeanor cases where no incarceration is imposed;

2. Cases originating before any administrative agency or the Industrial Commission of Virginia; *and*

3. ~~Cases involving the affirmance or annulment of a marriage, divorce, custody, spousal or child support or the control or disposition of a juvenile and other domestic relations cases arising under Title 16.1 or Title 20, or involving adoption under Chapter 11 (§ 63.1-220 et seq.) of Title 63.1; and~~

4. Appeals in criminal cases pursuant to §§ 19.2-398 and 19.2-401. Such finality of the Court of Appeals' decision shall not preclude a defendant, if he is convicted, from requesting the Court of Appeals or Supreme Court on direct appeal to reconsider an issue which was the subject of the pretrial appeal.

B. Notwithstanding the provisions of subsection A, in any case other than an appeal pursuant to § 19.2-398, in which the Supreme Court determines on a petition for review that the decision of the Court of Appeals involves a substantial constitutional question as a determinative issue or matters of significant precedential value, review may be had in the Supreme Court in accordance with the provisions of § 17-116.08.

Official Use By Clerks	
Passed By The Senate	**Passed By The House of Delegates**
without amendment ☐	without amendment ☐
with amendment ☐	with amendment ☐
substitute ☐	substitute ☐
substitute w/amdt ☐	substitute w/amdt ☐
Date: _____	Date: _____
Clerk of the Senate	Clerk of the House of Delegates

Impact of Senate Bill #5 on the Court of Appeals

Senate Bill No. 5 was introduced during the 1988 General Assembly by Senator Wiley Mitchell. If enacted, the bill would transfer jurisdiction for civil cases from the Supreme Court of Virginia to the Court of Appeals. All appeals would be made as a matter of right. The measure was carried over in the Senate Finance Committee. In order to estimate the impact of the bill on the caseloads and costs of operation for the Court of Appeals, two projection methods were utilized. There have been no comparable, simultaneous transfers and expansions of jurisdiction for other Courts of Appeal in the United States in recent history. Thus, these methods present a range of potential results which might be expected due to the bill's implementation.

Number of Judges Needed

In order to estimate the number of judges needed, it was first necessary to determine what the projected caseload increase might be from the expansion of the Court of Appeals' jurisdiction in civil cases and making appeals a matter of right.

Method 1

Appellate filings per 100,000 persons were determined for states neighboring Virginia. The average ratio was calculated from these figures and applied to Virginia's population (per 100,000). As indicated below, this yields a projected appellate filing of 2,657 cases for the state. Using the 1987 average of 145 cases (petitions and cases) disposed per judge in the Virginia Court of Appeals, it appears that 18 judges would be required to handle this caseload.

	Cases per 100,000 Population
Kentucky	70
Maryland	37
North Carolina	21
Tennessee	43
Alabama	51
Georgia	55
	45

Virginia Population (1987 provisional)	5,903,700
Projected Court of Appeals Filings	2,657
Cases Per Judge	145
Court of Appeals Judges Required	18

Method 2

Experience with the transfer of criminal appeals from the Supreme Court to the Court of Appeals suggests that a sizable increase in civil case filings may occur with the transfer of civil jurisdiction to the Court of Appeals. The number of criminal appeals filed with the Court of Appeals in 1986 was 28 percent greater than the number filed in the Supreme Court in 1984, the year before jurisdiction for criminal cases (other than death penalty) was transferred to the Court of Appeals. Given that there was less than a five-percent increase in criminal cases disposed by Virginia trial courts in 1986, it would appear that this increase was due in large measure to the transfer of jurisdiction for criminal appeals.

Assuming a 28 percent civil caseload rise and a 10 percent increase due to the change to automatic right of appeal as well as a 10 percent increase in criminal cases resulting from the move from discretionary to appeals of right, 17 appeals court judges would be required to handle the volume.

Civil Filings in Supreme Court, 1987	577	
with 38 Percent Increase		796
Criminal Filings in Court of Appeals, 1987	1,189	
with 10 Percent Increase		1,308
Appeals of Right and Original Jurisdiction Cases Filed in the Court of Appeals, 1987		436
Total Projected Cases		2,540
Cases Per Judge		145
Number of Court of Appeals Judges Required		17

Impact of Virginia Bar Association Proposal on the Court of Appeals

The Virginia Bar has proposed giving full civil jurisdiction to the Court of Appeals with appeal as a matter of right. Criminal appeals would remain by petition.

Method A

Assuming no increase in the civil caseload due to the change in civil jurisdiction, a 10 percent increase as a result of the change to appeal of right, and using the 1987 average of 145 disposed cases per Court of Appeals judge, it appears that 16 judges would be needed to handle the increased workload.

Number of Civil Appeals to Supreme Court, 1987	577	
with 10 Percent Increase		635
Number of Filings in Court of Appeals, 1987		1,625
Total Filings		2,260
Cases Per Judge		145
Number of Court of Appeals Judges Required		16

Method B

If the number of civil filings were to increase by only 15 percent due to the transfer of jurisdiction and to the making of civil appeals as of right, approximately 16 Court of Appeals judges would be needed to handle the caseload.

Civil Filings in Supreme Court, 1987	577	
with 15 Percent Increase		664
Criminal Filings in Court of Appeals, 1987		1,189
Appeals of Right and Original Jurisdiction Cases		
Filed in Court of Appeals, 1987		436
Total Projected Cases		2,289
Cases Per Judge		145
Number of Court of Appeals Judges Required		16

Method C

As discussed previously, under SB #5 method 2, the transfer of civil jurisdiction to the Court of Appeals may result in a significant increase in civil filings. This method thus assumes a 28 percent civil caseload rise due to the change in jurisdiction from the Supreme Court to the Court of Appeals as well as a 10 percent increase resulting from the move from discretionary to appeals of right. Using this estimate, 17 appeals court judges would be required to handle the volume.

Civil Filings in Supreme Court, 1987	577	
with 38 Percent Increase		796
Criminal Filings in Court of Appeals, 1987	1,189	
Appeals of Right and Original Jurisdiction Cases		
Filed in the Court of Appeals, 1987		436
Total Projected Cases		2,421
Cases Per Judge		145
Number of Court of Appeals Judges Required		17

Annual and First-Year Costs of Adding One Court of Appeals Judge

Annual	
Judge Salary & Fringes	$125,758
Secretary Salary & Fringes	37,262
Law Clerk Salary & Fringes	46,200
Salaries	209,220
Average Travel	9,345
Books Subscriptions	4,495
Rent	18,900
Insurance	210
Supplies	735
Equipment Maintenance	2,100
Postage	70
Telephone	4,148
Memberships	263
ADP Expenses	2,940
Lexis Westlaw	3,413
Miscellaneous	1,050
Other Costs	47,669
Per Judge Cost	$256,889

Start-Up Costs	
Start-Up Costs Per Judge	$72,115
Total Per Judge Cost	$329,004

Costs of Additional Clerks for the Court of Appeals*

Annual Per Clerk Cost	$21,421
Start-Up Costs for Clerks	1,300
Ratio of Additional Clerks to Additional Judges	0.9

Total Cost of Additional Judges and Staff Needed to Handle Expected Caseload Increases

SB #5

	Method #1	Method #2
Additional Judges	8.00	7.00
Total Judge Costs	$2,623,032	$2,303,028
Start-Up Costs	576,920	504,805
Additional Clerks	7	6
Additional Clerk Cost	154,231	134,952
Start-Up Costs	9,360	8,190
Annual Costs	2,786,263	2,437,980
First Year Costs	$3,372,543	$2,950,975

Virginia Bar Association Proposal

	Method A	Method B	Method C
Additional Judges	6.00	6.00	7.00
Total Judge Costs	$1,974,024	$1,974,024	$2,303,028
Start-Up Costs	432,690	432,690	504,805
Additional Clerks	5	5	6
Additional Clerk Cost	107,105	107,105	128,526
Start-Up Costs	6,500	6,500	7,800
Annual Costs	2,081,129	2,081,129	2,431,554
First Year Costs	$2,520,319	$2,520,319	$2,944,159

CASES FILED
1985-1988

Court of Appeals of Virginia

	1985	1986	1987	1988	Pct Change 87-88
Criminal Filed	1,092	1,087	1,189	1,253	5.4%
Original Jurisdiction Filed	18	26	12	38	216.7%
Appeals of Right Filed	538	423	422	455	7.8%

Supreme Court of Virginia

	1985	1986	1987	1988	Pct Change 87-88
Civil Cases Filed	509	520	577	574	-0.5%

1990 RECONVENED SESSION

VIRGINIA ACTS OF ASSEMBLY - CHAPTER 897 **REENROLLED**

An Act to amend and reenact §§ 17-95.1 and 17-116.05 of the Code of Virginia, relating to senior justices of the Supreme Court; appellate jurisdiction.

[S 93]

Approved APR 18 1990

Be it enacted by the General Assembly of Virginia:

1. That §§ 17-95.1 and 17-116.05 of the Code of Virginia are amended and reenacted as follows:

§ 17-95.1. Senior justice.—A. Any Chief Justice or justice of the Supreme Court of Virginia who is eligible for retirement, other than for disability, with the consent of a majority of the members of the Court first obtained, may elect to retire and be known and designated as a senior justice.

B. Any Chief Justice or justice who has retired from active service, as provided in subsection A, may be designated and assigned by the Chief Justice of the Supreme Court of Virginia to perform the duties of a justice of the Court.

C. While serving in such status, a senior justice shall be deemed to be serving in a temporary capacity and, in addition to the retirement benefits received by such justice, shall receive as compensation a sum equal to one-fourth of the total compensation of an active justice of the Supreme Court of Virginia for a similar period of service. A retired justice, while performing the duties of a senior justice, shall be furnished office space, a secretary, a telephone, and ~~such other~~ supplies as are furnished a justice of the Court.

D. A justice may terminate his status as a senior justice, or such status may be terminated by a majority of the members of the Court. ~~No senior justice shall perform judicial duties after attaining the age of seventy-five years.~~ *Each justice designated a senior justice shall serve a one-year term unless the Court, by order or otherwise, extends the term for an additional year. There shall be no limit on the number of terms a senior justice may so serve.*

E. Only ~~two~~ *four* retired justices shall serve as senior justices at any one time.

F. Nothing in this section shall be construed to increase the number of justices of the Supreme Court provided for in § 2 of Article VI of the Constitution of Virginia and by § 17-93 pursuant thereto.

§ 17-116.05. Appellate jurisdiction—Administrative agency, Industrial Commission, and domestic relations appeals.—Any aggrieved party may appeal to the Court of Appeals from:

1. Any final decision of a circuit court on appeal from a decision of an administrative agency; ~~and~~

2. Any final decision of the Industrial Commission of Virginia; ~~and~~

3. Any final judgment, order, or decree of a circuit court involving:

a. Affirmance or annulment of a marriage;

b. Divorce;

c. Custody;

d. Spousal or child support;

e. The control or disposition of a child;

f. Any other domestic relations matter arising under Title 16.1 or Title 20; or

g. Adoption under Chapter 11 (§ 63.1-220 et seq.) of Title 63.1; ~~and~~

4. Any interlocutory decree or order entered in any of the cases listed in this section *(i)* granting, dissolving, or denying an injunction *or (ii) adjudicating the principles of a cause.*