

# William and Mary Review of Virginia Law

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Volume 2 (1954-1956)  
Issue 2

Article 7

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May 1955

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### Repository Citation

John Lee Darst, *Weston v. Commonwealth - One Year Later*, 2 Wm. & Mary Rev. Va. L. 126 (1955), <https://scholarship.law.wm.edu/wmrval/vol2/iss2/7>

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## Weston v. Commonwealth—One Year Later

In its May, 1954 issue the *William and Mary Review of Virginia Law* carried a case comment entitled "Constitutional Law—Contempt Proceedings to Punish for Criticism of Judicial Decision" by G. Duane Holloway.<sup>1</sup> This comment dealt with the highly publicized case of *Weston v. Commonwealth*.<sup>2</sup> Because of the continued diversity of opinion over the wisdom of retaining in the Virginia Code that portion of Section 18-255 relating to contempt of court with reference to past proceedings, upon which the *Weston* case was based, it was decided to poll the Virginia judges as to their personal opinions on the matter.

The background of the case is necessary for an understanding of the survey. In a sermon delivered on May 18, 1952, in the Arlington Unitarian Church, the Reverend Ross Allen Weston, pastor, criticized a recent decision of the Honorable Walter T. McCarthy, Judge of the Circuit Court of Arlington County. A Washington newspaper published and circulated Weston's remarks in the Arlington area. Contempt proceedings were brought and the Circuit Court found Weston guilty of contempt and fined him \$100 and costs. The Supreme Court of Appeals reversed and dismissed the decision with dicta indicating approval of the Statute involved in the case.

The pertinent portion of the Statute reads:

The courts and judges may issue attachments for contempt, and punish them summarily, only in the cases following:

• • • • •

(3) Obscene, contemptuous or insulting language addressed to or published of a judge for or in respect of any act or proceeding had or to be had in such court . . .<sup>3</sup>

A very simple survey sheet entitled "Contempt of Court With Reference to Past Proceedings" was sent with an explanatory cover letter to eighty Virginia judges. This number in-

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<sup>1</sup> 2 W. & M. Rev. Va. L. 29 (1954).

<sup>2</sup> 195 Va. 175, 77 S.E.2d 405 (1953).

<sup>3</sup> Va. Code §18-255 (1950).

cluded federal judges sitting within Virginia's borders as well as all of the Virginia state judges. Enclosed with each letter and survey sheet was a complete copy of Mr. Holloway's case comment mentioned above. In addition a statement by D. W. Woodbridge, Dean of the Marshall-Wythe School of Law, was enclosed. This statement was published in the same issue of the *William and Mary Review of Virginia Law* as the Holloway piece and took the form of a counterargument to it.<sup>4</sup>

After pointing out that Virginia holds a definitely minority viewpoint on contempt proceedings Mr. Holloway said:

The law in Virginia seems quite liberal when viewed as it is and not as it appears, because the contempt must be proved beyond a reasonable doubt and appeal is permitted from any order of contempt. Also, it must be shown, when the criticism concerns a past case, that the statement presents a "clear and present danger to the administration of justice." There are situations in which the individual's right to a fair trial may be prejudiced as much because of comments on a past case as by comments on the pending case. The Supreme Court of Appeals has refused to ignore this and will not close the door on its power to prevent it.<sup>5</sup>

Dean Woodbridge's viewpoint is as follows:

. . . the author of any criticism of a court for a past decision must act at his peril as to whether or not someone in authority may think it proper or improper. Courts have the power to decide and the power to decide includes the power to decide wrongly. . . . To publish what those in authority think is fair or proper is not freedom of speech but freedom to praise.<sup>6</sup>

With these two viewpoints in front of them the Virginia judges were asked the following question:

In the light of your experience on the Bench do you feel that that portion of Virginia Code Section 18-255 relating to past proceedings is:

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<sup>4</sup> 2 W. & M. Rev. Va. L. 37 (1954).

<sup>5</sup> *Id.* at 36.

<sup>6</sup> *Id.* at 38.

- (1) a much needed statute?
- (2) a relatively unimportant statute?
- (3) an inadvisable statute?
- (4) a statute which should be repealed?

Of the eighty judges questioned, twenty-three responded to the request to fill in and return the questionnaire. However, three of the twenty-three declined to take part in the survey, merely acknowledging the request and stating their reasons for non-participation. That means that twenty out of eighty judges actually participated in the survey—exactly 25% of the total group. All of the inferences to be drawn from the results of the survey must be balanced with this factor in mind.

To the primary question stated above the answers were as follows:

	number of responses
(1) much needed .....	6
needed <sup>7</sup> .....	6
(2) unimportant .....	5
(3) inadvisable .....	0
(4) should be repealed .....	3

In summation: twelve judges, or 60% of the respondents, considered the statute desirable, three, or 15%, considered the statute undesirable, the remainder of the group taking a middle of the road viewpoint on the issue.

The second question asked was:

Have you ever cited anyone for contempt on the basis of that portion of the statute relating to *past* proceedings?

- (1) Yes
- (2) No

One judge said "Yes"; another said "Yes" and qualified it with "only one time"; one declined to answer the question, and the

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<sup>7</sup> The judges formed this answer by striking through the "much" of No. 1.

remaining seventeen said "No." One might conclude that although the majority of the group favored the statute, they had had little occasion to make use of it, or were reluctant to do so.

The third portion of the questionnaire provided space for general comments. Sixteen of the twenty made use of the space to express their philosophy concerning the statute. The fourth portion of the questionnaire provided a check space as to whether or not permission was given to use the name of the respondent in connection with his answers to the survey. Seven declined permission, thirteen granted it.

Judge Abbott (19th Circuit) classified the statute as much needed and gave pragmatic justification for his viewpoint by saying:

It's better to have it and not need it than to need it and not have it. It is a protection to the courts, and so long as it is an existing statute it will act as a deterrent.

Judge Martin (Corporation Court, Lynchburg) took the firmest stand in positive support of the statute as being much needed although he himself has never used it. His comment is as follows:

To publish that a judge has been paid \$5,000 to make his rulings on admissibility of evidence in favor of a certain prisoner or his instructions favorable to the prisoner, whether the publication occurs in advance of or during or after the trial of the prisoner is a contempt and the statute should not be changed.

The right of a citizen to properly criticize judicial decisions or acts is not involved. And freedom of speech or press is not an unlimited right.

Another judge termed the existence of the statute as "a power necessary for the proper administration of justice."

Judge Waddell (18th Circuit) after classifying the statute as falling between (1) and (2) on the questionnaire ("needed"), goes on to say: "I think the power is one to be sparingly used,—

never in a case of bona fide criticism of the judge's decision, even though this might involve a suggestion of bias or prejudice." He concludes his discussion of the statute by pertinently saying: ". . . such criticism [bona fide] would seem to me no more scandalous than comment on the judge's education."

Representing the middle group who classified the statute as relatively unimportant, Judge Paul (U. S. District Court, Western) said: ". . . in this day of a growing tendency to intemperate abuse of all agencies of Government it should not be repealed."

Judge H. G. Smith, (Corporation Court, Newport News) fell in the middle group also. His general comment is quoted in full:

I am sure no criticism of past proceedings would in any way affect my judgment in future cases. It is absurd to me to say that such criticisms would affect the administration of justice in any way or would influence the Court in his decisions.

The Supreme Court of Appeals felt otherwise in the *Weston* case, for it said:

While such an attack may not affect the particular litigation which has been terminated, it may very well affect the course of justice in future litigation and impair, if not destroy, the judicial efficiency of the court or judge subjected to attack.<sup>8</sup>

To the above dictum Dean Woodbridge made reply by saying:

Surely judges are made of sterner stuff than that. Can it be that judges who decide the most important questions of our time do not have the fortitude and integrity of professional baseball umpires!<sup>9</sup>

Of the three judges who felt the statute should be repealed one said: "I feel that the statute in question is very inadvisable and it would therefore be best to repeal same."

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<sup>8</sup> 195 Va. 175, 184, 77 S.E.2d 405, 409 (1953).

<sup>9</sup> 2 W.&M.Rev.Va.L. 38 (1954).

Judge Barksdale (U. S. District Court, Western), who was another judge in the repeal group, said:

I am in accord with the views expressed so ably by Dean Woodbridge in the addendum to the previous article in your Law Review.

Judge Lamb (Chancery Court, Richmond) was the third judge who definitely favored repeal of the statute as it relates to past proceedings. Although he has never cited anyone for contempt under the statute he has had experience involving the statute: "But I sat by designation in King George County in such a case, the judge concerned having (as he of course should) disqualified himself." From his experiences Judge Lamb made the following suggestion as to the "proper" method to use in place of the present method.

My judgment is that the proceeding should not be *summary*. In the rare case in which such proceeding is imperatively demanded it should be like any other criminal libel—heard by another judge *with a jury* in a plenary proceeding properly instituted for the purpose.

One is to be cautioned again against making unwarranted inferences from the above statistics, for they lend themselves to various speculative interpretations. One can correctly state only those facts which can be positively proven by the data at hand. The following facts were established by the survey:

- (1) Exactly 25% of the eighty judges questioned chose to participate in the survey.
- (2) The majority of the participants, 60%, considered that portion of Virginia Code Section 18-255 involved in the *Weston* case concerning contempt of court with reference to past proceedings as being a desirable, needed, or much needed statute. This means that twelve Virginia judges, or 15% of the total number of eighty, have definitely expressed themselves as favoring the statute.
- (3) A minority of the participants, 15%, felt the statute should be repealed.

(4) Three Virginia judges, or 3.75% of the total number of eighty, have definitely expressed themselves as opposing the statute.

(5) The judges participating in the survey have not made wide use of contempt proceedings based on the statute.

(6) The majority of Virginia judges, 75%, have not chosen to take a public stand at this time on the over-all issues involved in the *Weston* case.

John Lee Darst