September 15, 2015

The Honorable William J. Howell
Speaker of the House of Delegates
106 Carter Street
Fredericksburg, VA 22405

The Honorable Thomas K. Norment Jr.
Majority Leader of the Senate of Virginia
P.O. Box 6205
Williamsburg, VA 23188

Dear Speaker Howell and Majority Leader Norment:

I am writing to inform you of the Governor's conclusion that the General Assembly is currently not in session, and of his decision to reappoint Justice Jane Marum Roush to the Supreme Court of Virginia.

On August 17, 2015, the 2015 Special Session convened pursuant to Governor McAuliffe's proclamation of July 16, 2015. On August 17, 2015, the Senate of Virginia voted to adjourn *sine die*, while the House of Delegates has contended that the General Assembly remains in session.

The Constitution of Virginia does not specifically address how a special session is to be conducted or concluded—it addresses only how one is commenced. This issue is not nearly as "clear, unambiguous, and emphatic" as has been previously stated, and reasonable minds can have different interpretations while still being committed to upholding the Constitution. Having fully considered the positions expressed in your letter, the Governor respectfully disagrees.

<u>The General Assembly Is No Longer In Session</u>

In resolving the question of whether the General Assembly remains in session, a fundamental principle of the Virginia Constitution is that Virginia limits legislative power by requiring a part-time citizen legislature as opposed to a full-time legislature. That is the key structural distinction between the Virginia General Assembly and the United States Congress, as well as other states' full-time legislatures. Starting with the constitutional reforms in 1851, it has been a stalwart point of Virginia pride that the General Assembly meets in time-limited sessions

and is not permitted to be organized indefinitely to pass legislation.[1] *See* A.E. Dick Howard, *Commentaries on the Constitution of Virginia*, Vol. I, 491–92 (1974).

Following from this fundamental structural design of the Virginia Constitution, there are two specific reasons to conclude that the General Assembly is not currently in session: (1) the adjournment of the Senate of Virginia *sine die* on August 17, 2015, and (2) the lack of any continuous or even pending business before either body since the Senate's adjournment.

I. *The Senate of Virginia Adjourned Sine Die on August 17, 2015*

On August 17, 2015, the Senate of Virginia voted to adjourn *sine die*; however, it did not have the consent of the House of Delegates for this adjournment. Opponents of the Senate's action posit that this adjournment was not valid because the Virginia Constitution prohibits one house from adjourning without the other house's consent, citing Article IV, Section 6.

Looking at the text of Article IV, Section 6, the provision cited for requiring consent to adjourn does not clearly apply outside of the context of the regular session. The language requiring this consent for adjournment appears at the bottom of the first paragraph of the section addressing regular sessions; however, the section enabling special sessions of the General Assembly occurs after this paragraph, leaving open the question of whether the requirement for mutual consent is meant to also apply to special sessions.

The first paragraph of Art. IV, Section 6 provides:

> The General Assembly shall meet once each year on the second Wednesday in January. Except as herein provided for reconvened sessions, no regular session of the General Assembly convened in an even-numbered year shall continue longer than sixty days; no regular session of the General Assembly convened in an odd-numbered year shall continue longer than thirty days; but with the concurrence of two-thirds of the members elected to each house, any regular session may be extended for a period not exceeding thirty days. Neither house shall, without the consent of the other, adjourn to another place, nor for more than three days.

[1] Virginia's Constitution is very clear on the time periods during which the General Assembly should meet. Article IV, Section 6, in discussing the length of sessions of the General Assembly, states, in part, that "no regular session of the General Assembly convened in an even-numbered year shall continue longer than sixty days; no regular session of the General Assembly convened in an odd-numbered year shall continue longer than thirty days; but with the concurrence of two-thirds of the members elected to each house, any regular session may be extended for a period not exceeding thirty days." There are also limitations on the length of reconvened sessions.

This paragraph, which includes the adjournment clause referenced in your letter, addresses only *regular* sessions. The second paragraph of Article IV, Section 6, which only addresses *special* sessions, states:

> The Governor may convene a special session of the General Assembly when, in his opinion, the interest of the Commonwealth may require and shall convene a special session upon the application of two-thirds of the members elected to each house.

This paragraph contains no requirement for consent before adjournment. Moreover, the third paragraph of Section 6 addresses reconvening of both regular and special sessions. If there had been intent to include the adjournment clause of three days into the call for a special session, it would have been appropriately included in paragraph 2 or 3 of Article IV, Section 6. Familiar canons of construction support this view. As Justice Roberts noted in *NFIB v. Sebilius*, 132 S. Ct. 2566, 2577 (2012), "[t]he Constitution's express conferral of some powers makes clear that it does not grant others." *See also Marbury v. Madison*, 5 U.S. 137, 174 (1803) (Noting that nothing in the Constitution should be construed to be "entirely without meaning"); *Cohens v. Virginia*, 19 U.S. 264, 395 (1821) (Any construction of a constitutional provision that renders it "mere surplusage, [or] form without substance…cannot…be the true construction of the article."). The inclusion of a consent requirement in the paragraph dealing solely with regular sessions, but not in the following paragraph addressing special sessions, makes it clear that no such consent is required to adjourn a special session. As it stands, therefore, the adjournment language is only applicable to regular sessions.

The rationale for requiring consent to adjournment during a regular or reconvened session is quite compelling, as the Constitution itself provides a time limit for how long the General Assembly has to act during these sessions, so it makes sense to require both houses to be convened together at the same time and place.

This rationale becomes less applicable in a special session. The Virginia Constitution is *silent* on everything about a special session except for how one may be called. Thus, there is no clear guidance as to what the proper procedures should be for conducting and concluding a special session.[2]

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[2] Article IV, Section 7 of the Virginia Constitution, however, is instructive. It provides that *each house* may "settle its rules of procedure." Thus, we are faced with a situation in which the Constitution is, at least, unclear and specifically designates to each house the role of deciding its own procedures. Virginia law is clear that "[e]very law enacted by the General Assembly carries a strong presumption of validity." *Marshall v. NVTA*, 275 Va. 419, 427 (2008). This same presumption of validity generally applies to legislative determinations about the legislature's own proceedings and procedure. *See NLRB v. Canning*, 132 S.Ct. 2550, 2574–75 (2013) ("we must give great weight to the Senate's own determination of when it is and when it is not in session.").[2]

In the present situation, the Senate of Virginia has clearly taken a view that it has the authority to adjourn *sine die* without the House's consent when in special session. Without a clear and express prohibition on this procedural rule within the Constitution of Virginia, one must defer to the Senate's interpretation of its own procedures and conclude that the Senate of Virginia is properly adjourned. *See* Art. IV, Section 7 (providing power to each house to "settle its rules of procedures").

II. *The Lack of Any Continuous Activity or Pending Business Acts to Adjourn the Special Session*

In addition to the reasons set forth above, the lack of continuous activity or remaining business before the General Assembly argues against the body continuing to remain in session.

The 2015 Special Session was convened for a specific purpose, which was to enact a remedial Congressional redistricting plan in response to the June 5, 2015, Order of the United States District Court for the Eastern District of Virginia. In that Order, the Court required any remedial plan to be enacted by September 1, 2015. Since that deadline has passed, the General Assembly is no longer able to enact a remedial plan, and the District Court is already proceeding to redraw Virginia's Congressional map pursuant to the Court's previously issued Order. The Commonwealth is bound to comply with the federal order.

Since the Constitution of Virginia does not define what a "special session" is, any understanding of a "special session" must be understood by the term's plain meaning. *Black's Law Dictionary* defines a "special session" as "[a] legislative session, usually called by the executive, . . . to consider a *specific issue*" outside of a regular session. (emphasis added). Thus, the Constitution of Virginia imagines a special session to focus on a specific issue or set of issues. Principles of the Virginia Constitution, which place durational limits on legislative sessions, confirm this view. It simply cannot be the case that the General Assembly may remain in a special session indefinitely, especially when the specific business for the special session has been completed.

It is also informative to understand what is defined as a "session" in a parliamentary context. Here, *Black's Law Dictionary* provides a helpful explanation: a "session" is "a meeting or series of related meetings throughout which a court, legislature, or other deliberative assembly conducts business in a continuing sequence." Thus, for a "session" to continue to exist, there must be a meeting or series of related meetings to conduct business in a continuous sequence.[3] Since the Senate's adjournment, there have been no meetings conducted of any type which argue

[3] The General Assembly's procedural actions from last year admit as much—the use of *pro forma* meetings was thought to be a minimum requirement for maintaining a special session.

in favor of the Assembly remaining in session. Having concluded its work on the matters for which it was convened and having no further business before the body, the Senate adjourned. As the specific purpose for the special session is over, accordingly, the special session is over.[4]

The actions of members of the General Assembly seem to confirm this view. First, when the Virginia Senate adjourned, all of the objecting members there assembled adjourned. Upon learning that the Virginia Senate adjourned, the Chairman of the House of Delegates' Privileges and Elections Committee abruptly adjourned his own committee meeting, stating that the House was adjourned because of the Senate's adjournment. The members of the House of Delegates left the Capitol. No official actions have been taken by either body since August 17, 2015. The actions of the General Assembly speak clearly—the session is adjourned.

Conclusion

Governor McAuliffe believes strongly that there is much the executive and legislative branches can do together to improve the lives of Virginians. Both branches share a deep commitment to growing Virginia's economy, creating more jobs, improving education, and expanding access to quality health care. He looks forward to continuing to work with you in these efforts.

Sincerely,

Carlos L. Hopkins
Counsel to the Governor

[4] Through House Joint Resolution 5001, the Senate and House agreed to limit legislation during the session to the following: "(i) the redrawing of the districts of the members of the United States House of Representatives; (ii) the election of judges and other officials subject to election by the General Assembly; (iii) the rules of procedure or schedule of business of the General Assembly, either of its houses, or any of its committees; (iv) commending and memorial House resolutions that have been filed with the House Clerk's office no later than 9:00 a.m. on Monday, August 17, 2015; and (v) confirming appointments subject to the confirmation of the General Assembly." House Joint Resolution 5001.