A REVIEW

RELATIVE TO

THE

COURT OF APPEALS OF MARYLAND

By

CHARLES CLAGETT

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FOREWORD

This review has been written from a more comprehensive point of view than solely the immediate emergency of the Court of Appeals, in order to bring into clear perspective, condensed within a comparatively few pages:

1. Maryland's historic basic principles of government with respect to its judiciary;
2. how those principles developed;
3. a full appreciation of the necessity, whenever any measures are proposed affecting its judiciary, to subject them to the test of whether they comply with those principles.

NOTATION

The bill with respect to amending Article IV of Maryland's Constitution, which the special committee of the State Bar Association proposed, contained in its report dated October 22, 1958, and which was approved by the Association at its mid-winter meeting on December 5, 1958, in addition to the other features criticized in this review, contained the vices in the proposed Section 3 and also in violation of proper regional representation on the Court of Appeals, as noted. The bill as submitted to the Legislature on January 29, 1959 made correction of Section 3 in conformity with the criticism, and it also made alterations as to regional representation of the nature of the criticism. As to the latter, however, for the purpose of facilitating the proposed intermediate appellate court, it still is featured by the vice of continuing the two different regions of the two northern counties and the five Southern Maryland counties in one appellate judicial circuit instead of separate circuits as the other regions of the State have.

As this review was going to be published in the first few days in February, and was on the press, it was not possible to call attention, in it, to the changes - of which the writer of this review had no knowledge until the printed bill was published.

It has become apparent that, contrary to confident predictions at the time of the adoption of the "Bond Amendment" of Maryland's Constitution in 1944, a five membership Court of Appeals, on its present basis of appellate jurisdiction, will in the near future be unable adequately to dispose of the case load of the court.

Now, in the short space of fourteen years, it is proposed, in order to remedy the situation, that Maryland involve itself with another, supplemental and intermediate, appellate court, which, despite optimistic wishful thinking, will inevitably result in heavy additional and expanding expense to the people of Maryland, the prospect, looking behind forms and in realistic terms, of double appeals and consequent increased expense to litigants, and double reports burdening the members of the judiciary and the legal profession, and, if the judges of the Court of Appeals perform the inquisitorial function contemplated in the proposal, a most onerous burden upon them.

It is not possible for human beings to look beyond the veil which separates them from the future and see what future developments may require, and consequently no one is in a position to say that developments may not arise in the future which would make it advisable, at such a time, to resort to various courses, including the possible inauguration of a tiered super-structure of appellate judiciary embodying an intermediate appellate court. It should, however, be clear beyond argument, that Maryland should assume no such burdensome involvement unless and until it becomes absolutely essential.

Therefore, with respect to the present condition, in considering the proposal which has been advanced, the most careful consideration should be given to other possible practical alternatives.

In the course of this review, comment naturally is evoked as to measures proposed or supported in the past or at present by various individuals, and critical consideration of such measures may occur, but no reflection on such individuals is intended — implied or otherwise. They — as has also been the case of those maintaining the opposite positions — have given generously of their valuable time and services to what they believed to be for the public interest, and many of them have been friends of long standing of the writer of these pages. They all have been and are men who are entitled to be held in high regard, and, in order to guard against any erroneous impression, documentation references will be cited without personal connections as far as possible.[1] *

This review has been compiled, not with the intention of engaging in any organizing movement, but, from the detached point of view of

* Numbers refer to accompanying notes, *infra,* pages 33 to 55.

a lawyer in retirement, in order that the herein presented aspects of the questions involved may not be lost sight of, and receive the thoughtful consideration of the judiciary of the State, the members of the Bar, and, naturally as most important, the Chief Executive, other public officials and members of the General Assembly as the representatives of the people and the people themselves, in arriving at an intelligent solution of matters which can so vitally affect the general public.

The attainment of such a solution can not be accomplished, unless there be a full recognition of fundamentals, and one of the primary fundamental facts is that litigation and matters which come before courts do not arise out of thin air. They are occasioned by the relations and activities of people. Consequently they follow, and increase with, the populations, and in Maryland the heavy increase, present and prospective, of the population, and the well established trend of its distribution within the State, are going to make necessary an adjustment of the membership of the Court of Appeals itself, and also a practical treatment of the methods of review, and thus have the result of providing the essential approach to dealing with the problem of the Court of Appeals.

Before discussing what should be the adjustment, and what methods of review should be considered, it is most important that there be a thorough understanding of the fundamentals of the State of Maryland itself as to its judiciary, because those fundamentals have vital bearing on both of the questions just cited.

MARYLAND'S BASIC PRINCIPLES OF GOVERNMENT WITH RESPECT TO ITS JUDICIARY, AS DEEPLY ROOTED IN ITS HISTORIC BACKGROUND.

These basic public principles, are inherently bedded in the distinction between the Federal Courts intended to deal with federal questions, and the State Courts dealing with local matters which generally, in one way or another, come close to the fireside.

Therefore, Maryland, after first trying out a different course, which it discarded, developed two basic principles with respect to its judiciary, to which, while insistent that its judges must always be independent, it has since steadfastly adhered over a long period.

A. That its judges, as public officials administering judicial affairs so intimately affecting its people, are to be elected by the people.

B. That its Court of Appeals is to be composed of judges coming from, and elected by the people of, different sections of the State, so that they will be familiar with the conditions in and the problems of the people of those regions, thereby bringing to the entire court a close familiarity with the conditions and affairs of the whole State.

It is necessary that there be a clear comprehension of how these principles have evolved through the various constitutions of the State; and at the same time there will be a like clear comprehension of the sound basis of, and reason for, certain subsidiary features. The pertinent constitutional provisions will accordingly be stated.

The Declaration Of Rights

AND

The Constitution And Form Of Government.

(Maryland's first Constitution, adopted at the Constitutional Convention of 1776.)

The Declaration of Rights.

"That all government of right originates from the people, . . ."[2]

"That all persons invested with the legislative or executive powers of government, are the trustees of the public, . . ."[3]

"That the right of the people to participate in the legislature is the best security of liberty, and the foundation of all free government; for this purpose elections ought to be free and frequent, . . ."[4]

"That the independency and uprightness of judges are essential to the impartial administration of justice, and a great security to the rights and liberties of the people; wherefore, the chancellor, and all judges, ought to hold commissions during good behaviour, and the said chancellor and judges shall be removed for misbehaviour, on conviction in a court of law, and may be removed by the governor, upon the address of the General Assembly, provided that two-thirds of all the members of each house concur in such address."[5]

The Constitution And Form Of Government.

That various public officials, including the chancellor and all judges, "shall hold their commissions during good behaviour, removable only for misbehaviour, on conviction in a court of law."[6]

That the governor, with the advice and consent of the council, should appoint sundry officials including the chancellor and the judges.[7]

That there should be a Court of Appeals, but without stating the number of its members or whence they should come.[8]

The Constitutional Amendment, Acts of 1804, Ch. 55, November Session, confirmed by the Acts of 1805, Ch. 16, November Session, established regional representation on the Court of Appeals.

The State had previously been divided into judicial districts with respect to the local courts, and Sections 1 and 5 of this Constitutional Amendment re-arranged those districts into six, each composed of a group of counties — Baltimore City being still a part of Baltimore County — and provided that the Court of Appeals was to be composed of the six Chief Judges of those districts.

In so doing the requirement was made that the judges of the districts were to be residents of the respective districts for which they were appointed, and that "each judge shall hold his commission during good behaviour, removable for misbehaviour on conviction in a court of law, or shall be removed by the governor, upon the address of the General Assembly, provided that two-thirds of all the members of each house concur in such address; . . . ."[9]

THE CONSTITUTION OF 1851.

After the question was fully and powerfully debated and fought out in the Constitutional Convention, and the position taken, of widespread objection to the experience of the appointive system, and also that the election of judges would not have any greater effect of involving the courts in politics than the appointive basis, and the assertion of the opposition of not as much, the continuance of that basis

was overwhelmingly repudiated, and it was determined that thenceforth the judges of the State were to be elected by the people.[10]

While dividing the State into eight local judicial circuits, it further divided it into four appellate judicial districts — three being composed of groups of counties and one of Baltimore City — each to be represented by one judge on the Court of Appeals, which was to be so constituted. The appellate judges, not being part of the local circuit judiciary and therefore not having local circuit duty, were to be residents of, and elected by the people of their respective appellate judicial districts, and to serve for ten years unless previously attaining the age of seventy, and within that age limitation, but not thereafter, with the right of re-eligibility.[11]

The local circuit judges were likewise to be from and elected by the people of their local circuits, for a term of ten years.[12]

Vacancies in judgeships were to be filled by the Governor with the advice and consent of the Senate, until the next general election of Delegates.[13]

The Constitution Of 1864.

(The Civil War Constitution, disfranchising many of the people, especially in the sections where the sentiment was most affirmatively in favor of the South; and with Maryland under Federal domination.)

While dividing the State into thirteen local judicial circuits, it further divided it into five appellate judicial districts (thereby increasing them by one), each to be represented by one judge on the Court of Appeals, consequently so constituting it. Three of the districts were composed of groups of counties, and, as to the other two, one — the "Second" — was composed of Harford and Baltimore Counties and the first seven wards of Baltimore City, and the other — the "Third" — of the rest of Baltimore City. The judges of the Court of Appeals were to be elected from their respective appellate judicial districts, but, accordingly differing from the 1851 Constitution, by the voters of the entire State. The judges of the local circuits were elected from and by the voters of their respective circuits. As was the case under the 1851 Constitution, the judges of the appellate judicial districts, not being part of the local circuit judiciary, had no local circuit duty. All terms were to be fifteen years unless previous attainment of the age of seventy, but not thereafter, with right of re-eligibility within that limitation.[14]

Vacancies were to be filled by the Governor, with the advice and consent of the Senate, until the next applicable general election.[15]

THE CONSTITUTION OF 1867.

(The principal occasion for which being to correct the effects of Federal domination. This, of course, is the present Constitution.)

Divided the State into eight judicial circuits, seven thereof being composed of groups of counties, and the eighth of Baltimore City. The Court of Appeals was to be composed of the seven Chief Judges of the county judicial circuits and a special judge from the Baltimore City judicial circuit. All the eight judges were to be residents of, and elected by the people of, their respective judicial circuits.

The other, i.e., local judges of all these judicial circuits, were likewise to be residents of, and elected by the people of, their respective judicial circuits.

The term of all the judges was to be fifteen years unless they previously attained the age of seventy, and within that age limitation, but not thereafter, with the right of re-eligibility; but, under this constitution as originally adopted, with provision that the General Assembly might extend the tenure beyond that age but not beyond the term of election. (This extension provision was subsequently removed. Const. Amend's. Act of 1931, Ch. 479, rat. Nov. 8, 1932, Act of 1953, Ch. 607, rat. Nov. 2, 1954.)

Vacancies were to be filled by the Governor until the next applicable general election. (However, the designation of the Chief Judge of the Court of Appeals by the Governor with the consent of the Senate, continued, as previously, until the "Bond Amendment" eliminated the Senate consent requirement.)

The county judges on the Court of Appeals participated in local circuit duties. The judge from Baltimore City actually did not, although he was subject to such additional duties, if any, as the general assembly might prescribe.[16]

The jurisdiction of the Court of Appeals was stipulated to be "such as now is or may hereafter be prescribed by law" (and which, as noted in Hendrick v. State, 115 Md. 552, has been construed to mean appellate jurisdiction only).[17]

The "Bond Constitutional Amendment", in 1944,[18] was the subject of intense controversy arising from great conflict of views as to the wisdom and advisability of its features; certain of which will be considered later herein since they are directly involved in the subject of this review. The comment here will be limited to noting the respects in which the amendment changed the previous provisions of the Constitution.

After making temporary arrangements for the additional judges then on the Court of Appeals, it reduced the number of the judges from eight to five.

It divided the State into four appellate judicial circuits, and recognizing the nine Eastern Shore Counties as one region, allotted it one judge, the Western Maryland counties, i.e., Garrett, Allegany, Washington, Frederick, Montgomery, with Carroll and Howard included, as another region, allotted it one judge, combined the two northern counties, Harford and Baltimore and the five Southern Maryland counties, Prince George's, Anne Arundel, Charles, Calvert and St. Mary's, into a single region, and allotted it one judge, and allotted Baltimore City two.

The judges were stipulated to come from and be elected by the voters of those respective appellate judicial circuits.

The existing geographical divisions of the State into the eight local circuits was not changed. However, the connection of the judges of the Court of Appeals with them was. Although, as already shown, of the previous eight judge membership of the court, the one from Baltimore City did not participate in local circuit trials, the other seven, then being Chief Judges of the seven county circuits, did from time to time. The amendment disassociated the judges of the Court of Appeals from their local circuit court connection.[19]

In case of vacancy in the office of any judge of the State, including, as well as otherwise, the expiration of the term of fifteen years, or the creation of a new judgeship,[20] the Governor fills the vacancy. The appointment runs, in case of the expiration of a fifteen year term, until the first biennial election of Representatives in Congress after such expiration, or, in case of any other vacancy, until the first such general election after one year subsequent to the arising of the vacancy, and, of course, in either case until the qualification of the elected judge.[21]

Supplemental to the constitutional provisions, reference should be made to the following legislative enactments.

Candidates for nomination, for the office of judge, are excepted from the requirement that candidates in primary elections must be affiliated on the registration records of their county or the City of Baltimore with the political party whose nomination they seek. This enables a candidate for a judgeship to be entered in the primaries of both political parties, and if he is nominated by either party his name goes on the ballot in the election.[22]

When only one candidate qualifies, within the proper time, for any office in a party primary election, a certificate of nomination is

issued to him, and his name will not appear on the ballot in that party's primary, but will, of course, go on the ballot in the election.[23]

A candidate, who has not been a candidate for nomination by a political party at the primary election preceding a general election, may be nominated, independently, by a petition signed by a certain number of properly qualified voters, for an office to be filled at such general election.[24]

In the elections, the names of candidates for the office of judge, are to be placed on the ballot or voting machine without any party label or other designating mark or location, which might directly or indirectly indicate the party affiliation of any such candidate.[25]

Maryland's system of selecting its judges, under its constitutional provisions, the statutes just cited, and the practice pursued, is inherently sound. There is no legitimate reason why it should be changed or modified in any respect.

When a vacancy occurs, the State Bar Association and the applicable local Bar Associations, as a matter of practice and not of law, submit to the Governor lists of persons whom they recommend, which may vary. He then, in the performance of his constitutional duty, determines whether he considers that the best selections can be made from those lists or otherwise. Usually he does make his selections from those lists. After the appointment, the judge will have been in office from one to two years, (and if, having previously been elected, for a much longer period) before he must come up for approval by the people, who have in the meantime had the opportunity to know something about him.[26]

As already shown, the appointee has full and favorable opportunity of being retained. His name can be entered in both party primaries, and if nominated in either, goes on the ballot in the election. If his nomination in either is uncontested, his name does not appear on that party's primary ballot, but automatically goes on the election ballot. If he does not want to have his name entered in the primaries, he can be nominated by petition, and accordingly go on the election ballot. In whichever way nominated, he submits himself, free of the handicap of party label, in the election, for the people's approval.

In earlier times the means of informing the public of the qualifications of candidates were of course inadequate, but today, through the press, radio and printed data, and as to judicial candidates particularly the service rendered by Bar Associations, the channels of communication efficiently perform that public obligation, so that the people are thoroughly informed.

Thus, having had experience with the judicial appointee, and with full information as to him and all other candidates, the people exercise their sovereign right of passing judgment and determining whom they want as their judges, i.e. the public officials administering the judicial branch of their government.[27]

There are elements to be found in the legal profession, both the judiciary and the bar, which have experienced difficulty in adjusting themselves to a recognition of the right of the people to select their judicial officials, just as they have that right with respect to the other important officials of their government. It has been apparent that they would like to see judges in Maryland placed on a strictly appointive basis, and, if they could, would take away from the people their right to select them. Since they realize that any measure of such direct nature would have no chance whatever, there has been evinced a disposition to endeavor to accomplish the same result, in effect, indirectly. All of such attitudes have, of course, been rejected, and under the Declaration of Rights, it is the duty of the members of the General Assembly, as trustees of the people, to be ever alert and watchful to guard against any sapping of their rights.[28]

It is impossible to consider the provisions of its successive Constitutions, meaning by that term also to include its Declarations of Rights, since Maryland first became a State, without having forcefully brought home to the mind its deeply rooted conviction of how its judges generally, and within that general principle the judges of its Court of Appeals, should hold their office.

From the very beginning it has laid down the principle that the determination of who shall be their judges must come from the people. At first it did this on the basis of the previously mentioned provisions in the Declaration of Rights, as to the rights of the people, i.e. that all government of right originates from the people, their right to participate in the Legislature, and the members of the Legislature and those entrusted with executive authority being trustees of the people. Coupled with the provisions in the Declaration of Rights, were the provisions in the Constitution proper, that the Governor and the Council with which he conjointly was to act, were to be elected by the Legislature and were to appoint the judges, who were to be removable, however, upon action by the Legislature. Then from 1837, subsequent to which time the Governor was to be elected by the people direct and there was to be no Council, the appointments were to be by the Governor and the Senate by requiring the consent of the Senate, with the Legislature retaining the removal authority. Thence, after having had the experience of the above mentioned indirect selection of the judges which had proved unsatisfactory, the further continuance of which it rejected, from 1851, i.e., for more than one

hundred years, the State has been insistent that its judges must not only hold their office from the people through their trustees, but, apart from the temporary filling of vacancies, from direct election by the people themselves. Moreover, it had found from the experience of seventy-five years, i.e., from 1776 to 1851, with life tenure even on a basis of good behaviour, that such tenure was utterly unsatisfactory, and therefore has since limited the tenure of judges to a fixed term, at the expiration of which they must again come up for election by the people, and with the retention, in the meantime, of the people's right of removal through their representatives.[29]

In connection with such elected limited tenure, it contemporaneously also established the age limitation of seventy years; and, when subsequently it tried out extension of that age limitation, but not beyond the elected term, in case the Legislature in special cases decided to do so, it found from an experience of sixty-four years, i.e., from 1867 to 1931, that it, too, was most unsatisfactory, and, consequently, abolished the exception, thereby adhering to the age limitation and also strictly within the elected term.[30]

Likewise as to regional representation on its Court of Appeals. It is to be borne in mind that at the time of the adoption of Maryland's first Constitution of 1776 and the succeeding period, the colonies were struggling for their independence, and their affairs were in an unsettled and organizing state. Although the colonies' Declaration of Independent was approved by their Continental Congress on July 4, 1776, it was not until early in 1781 that their Articles of Confederation creating the United States of America became effective, thereby initially bringing the country into existence. Maryland had withheld ratification, for the purpose of obtaining cession, to the Confederation, of western lands claimed by colonies, and, upon Virginia's agreement to cede, Maryland felt that satisfactory results would follow and ratified the Articles in February, signing March 1, 1781, consequently causing them to go into effect. However, England did not agree to the colonies' independence in the preliminary Treaty of Paris until the last part of 1782, and in final treaty form until the latter part of 1783. The colonies still continued to function as a confederation under the very general terms of the Articles of Confederation, until the adoption of the Constitution of 1787, which, although ratified by Maryland in the spring of 1788, did not receive the necessary ratifications until the middle of that year. Washington became President early in 1789, but the national Bill of Rights did not become part of the Constitution until the latter part of 1791. It, therefore, can be easily understood, how, in this unsettled and crystalizing period, Maryland's Court of Appeals was in a formative state, as herein previously shown, and the number of its members was not even fixed by law until 1801,

and by constitutional provision until 1805, with the establishment, when so fixed, of the court on a constitutional regional basis. Since that time, for more than one hundred and fifty years, Maryland has unwaveringly held fast to that principle, requiring throughout the entire period that its members be residents of the respective regions, and since establishing the elective basis in 1851, with the exception of the brief three year life of the Civil War Constitution of 1864 adopted when Maryland was under Federal control and many of its people disfranchised, that they also be elected by the people of those regions.

By its whole history, Maryland has shown that it wants and intends to have an independent judiciary; but, likewise, also, with equal determination, that it neither wants nor intends to have a judicial oligarchy or a judicial autocracy, not originating from and accountable to the people, nor to set a stage which might make it possible for such a condition to arise. In the same manner, its history could not be more conclusive, that, in accord with, and in pursuance of those positions, and moreover, as already stated, with the desire that the members of its highest judicial tribunal be in touch with the people and familiar with their problems, it wants and with like determination intends to have the members of its Court of Appeals come from, and be elected by the people of, dispersed regions of the State.[31]

With Maryland's basic principles of government with respect to its judiciary clearly in mind, it is possible to turn to thoughtful consideration of the present problem of the Court of Appeals, which should be done free from the pressure and propaganda which are usually employed when there is a desire to have accepted an advocated proposal, and only too often lead to hasty and unwise action. The consideration of this problem will be approached from the two-fold point of view, referred to earlier in this review, i.e. first, the essential adjustment of the membership of the court, dealt with under the first caption below, and, second, methods of review.

The Number And Distribution Of Judges.

The two features here considered are interrelating and call for a practical solution of both.

As to the most advisable number of judges of the Court of Appeals, there has been and is wide difference of opinions. They fall, however, into two groups, i.e. those who think that the Court has been unwisely reduced in size, and those who have and do advocate a small court on the theory that it operates more efficiently. It is therefore in order, to endeavor to ascertain what light facts impart.

Previous to the Constitution of 1867 there was a smaller court,[32] which, for the immediately preceding sixteen years (as also had been the case for its first thirty years), had no local circuit duties. It did not keep its dockets current, and there was a heavy accumulation of undisposed cases. With the Constitution of 1867, the Court was enlarged from five to eight, the seven county members of which having also local circuit obligations. Within a comparatively short time they had cleared up all the accumulation, and thereafter always kept the docket, which, of course, was smaller than it is today, current, and moreover took care of their circuit duties.[33] Probably the most responsible appraisal of the functioning of that court, is that of one who had constant familiarity with it, and who spoke with the voice of great authority. John Prentiss Poe, in his Pleading And Practice, 1880 Edition (and which he repeated in those following), Volume I, page 8, in emphasizing that the Court regularly disposed of its docket every term, said: ". . . while in many of the States of the Union, and even in the Supreme Court of the United States, the delays incident to appeals are so serious as oftentimes to amount to almost, if not quite, a denial of justice."

Further: "No reference to the organization of the present Court of Appeals of Maryland would be complete which, while recognizing the eminent high judicial character and learning of the Court itself, omitted to mention the promptness with which all appeals are heard and decided, and to contrast that with the unfortunate delays only too prevalent in many other similar tribunals."[34]

This is the record of actual facts relative to the efficient functioning of an eight membership Court, and the unsuccessful accomplishment of a small membership in taking care of the requirements of the Court, in Maryland, up to the time of the 1944 "Bond Amendment."

As to a seven membership Court, the committee of the Maryland State Bar Association which recently, among other recommendations (all approved by the Association) which will be discussed later in this review, recommended an increase in the membership of the Court to six, earlier in its interim report to the Association at its January 1958 mid-winter meeting, in commenting on appellate courts of various sizes, said:

> ". . . no State, other than Maryland, in which the highest Court delivers 200 or more opinions a year, has so few judges on that Court as five. Three smaller States have three, fifteen have five and three have six. Twenty-one have seven, one has eight and five have nine. Of the twenty-one States having seven judges are such strong appellate Courts as those of Illinois, Massachusetts,

New York, Pennsylvania, Ohio and Wisconsin. These examples, show, at least, that these twenty-one States conduct their appellate work with seven judges." (Int. Rep. p. 17)

In the face of these facts, it can not logically be concluded that a court of reasonably larger size than the present five membership Court of Appeals lacks efficiency.

Turning to the previously mentioned theory of the small court, which has had its practical application in the "Bond Amendment", it is pertinent to ascertain how the theory was implemented into the appellate judicial structure of Maryland, and how it has worked out. It was, of course, not based on Maryland's previous experience with such a court, which was directly to the contrary. It has been stated and repeatedly reiterated that it was the result of a movement originating in 1908, but that is evidently a mistake.[35] It was the majority view of a closely divided committee in 1924, which, however, received no support.[36] Its real advocacy seems to have arisen in 1941, and resulted in a divided committee report, which when transformed into proposed action for the General Assembly failed to receive, from it, the essential constitutional proposal authorization.[37] This was the war period when there was a general falling off of litigation and the consequent case load of courts.[38] Therefore, the condition, although it later proved to be temporary, lent itself to an argument for a reduction in the number of members of the Court of Appeals, which, following up the 1941 effort, was accomplished in the 1944 "Bond Amendment."[39]

Since that amendment there has been keen interest in observing how the Court on the reduced basis would work out. Maryland has in the past and in the present had a satisfactory judiciary. Certainly, that is true as to its Court of Appeals, and, with a few exceptions, is likewise true as to its lower courts of the circuit level. There is not the slightest question that — as was the case with its predecessor — the Court of Appeals on its present basis has functioned efficiently. The Country, however, is not standing still, nor is Maryland, and, naturally, in young and developing countries, populations and attendant activities increase, until they strike a more or less levelling off condition. Therefore, under such circumstances, it is imposing an abnormal load on a court, to reduce its membership to practically a minimum and expect it to fulfill its undertaking. That is, unless that undertaking is to be changed, and if the manner in which Maryland is developing, is inevitably going to make necessary an adjustment of the membership of the Court, which is the case, that is the first thing to be done, and any supplemental measures should be resorted

to, only if and to the extent necessary. Consequently attention becomes focused on what adjustment is going to be necessary.

That, as statistics later supplied herein will show, should be approached from the following threefold aspects:

> The five membership basis as it is today.
>
> The basis of six judges, being that which has been recommended by the current committee of the Maryland State Bar Association and endorsed by it.
>
> The basis of seven judges, since experience proves that courts so constituted function efficiently, and conditions in Maryland, subsequently described, indicate that it would be wise to give it proper consideration.[40]

It is not possible to intelligently consider what the adjustment should be without having a clear understanding of what, appertaining to it, took place in connection with the adoption of the "Bond Amendment." Baltimore City's population, facilitated by measures later cited, had been substantially increasing, and, according to the national census of 1940, was a slight fraction over forty-seven per cent of the entire population of the State. Moreover, a study of the case load of the Court of Appeals for the five-year period, 1935-1939, had shown that of the opinions filed the proportion was approximately 61.7% from the city and 38.3% from the counties.[41] Consequently, it was generally agreed that Baltimore City was entitled to a larger regional representation on the Court of Appeals. However, although the recited facts as to population and case load are correct, the trend of the people's settling in the county areas adjacent to the National Capital and to Baltimore City, was already well under way and had been publicly noted.[42] This portended changed conditions in the future.

The proponents of the "Bond Plan", nevertheless, emphasizing the existing population and case load ratios, advocated both that the Court of Appeals be reduced from eight to five, and also that two of the judges come from the city, where they would, of course, be elected, and the other three from the counties at large and thus elected.

As has been previously stated, there was great division of views as to the wisdom and advisability of the features generally of the "Bond Plan", and only the portions mentioned earlier in this review survived the Legislature. Here, attention is directed solely to the two above-mentioned features, which were the subjects of a bitter and protracted fight in the General Assembly. The metropolitan press of Baltimore City conducted a continuous propaganda campaign in support of the proposal, and the Governor, who at the time was from

Baltimore, afforded his active cooperation and support. The pressure became so severe that in the end certain members of the Legislature, who had been taking a leading part in preventing the proposal from being adopted, reversed their position, and the two features, one changed as below stated, survived.

As, is apparent, the proposal attempted to break down Maryland's principle of regional representation and election of the members of the Court of Appeals, by the proposed provision that the county members be elected from and by the counties at large. This the General Assembly inflexibly refused to countenance, and in the process of adhering to that position, provided that, as heretofore mentioned in this review, the judges were to come from and be elected by districts as follows. The Eastern Shore insisted that it have one judge, which it obtained. Western Maryland insisted that it have one, which it obtained. In order for Baltimore City to get two, the five counties of Southern Maryland, i.e. Prince George's, Anne Arundel, Charles, Calvert and St. Mary's, and the two northern Maryland counties, i.e. Harford and Baltimore, were gerrymandered into a single district, getting one judge, instead of Southern Maryland getting one, the northern counties getting one, and Baltimore City getting one, if the basis were to be a five member court. That, on such a basis, subsequent developments and the future which they portend, indicate would have been an appropriate regional distribution of the judges.

The result of combining the two different regions of Southern Maryland and northern Maryland into one district, has been the constant source of irritation and resentment ever since. The present representative of those two regions on the Court of Appeals, Judge Hall Hammond, has unique qualifications to do so. He lives in Baltimore County, but his background, early and immediate, is deeply rooted in Southern Maryland. It is, however, recognized that no such unique qualifications are likely ever to occur again.

Subsequent developments and their direct bearing on the situation created by thus combining those two regions, have served to emphasize the abnormal condition.

The Constitution of Maryland provided that the Legislature could not alter the dividing lines between counties, without the consent of a majority of the voters in the area which would be changed from one county to another.[43] This has had a very salutary two-fold effect. It has protected the people from being forcibly so transferred, against their will, from their home government to one which they did not desire, and it also has constituted a potent break on power expansion of the various political and governmental divisions. Although Baltimore City under and from the Constitution of 1851 has been regarded

on a basis similar to that of the counties, and so referred to repeatedly by the Court of Appeals,[44] that court, in construing this constitutional provision, held that Baltimore City was not comprehended within its terms.[45]

Baltimore had, in the past, by various legislative enactments, greatly expanded its area and population, sometimes with and at others irrespective of what might be the wishes of the people in the affected areas.[46] The inhabitants of the sections outside the City limits objected to being exposed to such a contingency, and, as the City had reached a point where, if the course continued, it might dominate the whole state, an amendment of the Constitution was adopted in 1948, making the constitutional provision applicable to Baltimore City as well as to the counties.[47]

Moreover, the already mentioned trend of the people to settle in the county areas outside of Washington and Baltimore City, has continued with ever accelerating pace. This has naturally been followed by community centers and other facilities, bringing business and commerce to them, and industries seeking space for their development, and, in view of motor vehicle advancement more convenient operation, have followed the same pattern.

Comparison of the previously mentioned situation at the approximate time of the adoption of the "Bond Amendment", and that of the present time conveys its own meaning. As of April 1, 1940, of the State's entire population, Baltimore City had 47.2% and the counties 52.8%. As of July 1, 1958, the City had 33.1% and the counties 66.9%. From April 1, 1950 to July 1, 1958 their respective increases, and their increases based on percentages of their own populations were, Baltimore City 1950 — 949,708, 1958 — 984,000, i.e. 3.6%, the counties 1950 — 1,393,293, 1958 — 1,992,800, i.e., 43.0%.

Also as to manufacturers operations, the percentage proportions of the whole have been, in 1947, Baltimore City 58.7%, the counties 41.3%; in 1954, the city 48%, the counties 52%.

With respect to retail trade, the percentage proportions of the whole have been, in 1948, Baltimore City 54%, the counties 46%; in 1954, the city 46%, the counties 54%.

As to building permits, excluding public buildings which were not computed, the difference in favor of the counties has been so great as not to be comparable.[48]

Turning to the case load of the Court of Appeals — the comparative percentages have been as follows. The already mentioned average for the five year period, 1935-1939, was, from Baltimore City 61.7%,

from the counties 38.3%. That, however, was of *opinions written,* without including applications for leave to appeal in habeas corpus cases (appellate review of such nature having developed from and through 1945, Ch. 702, Sec. 3C, 1947, Ch. 625, Sec. 3C and 1957, Ch. 399, Sec. 24). According to the Third Annual Report of The Administrative Office of The Courts, i.e., for the period between September 1, 1957 and August 31, 1958, the proportion was 35.5% from the City and 64.5% from the counties. This is of *appeals taken,* not including applications for leave to appeal in habeas corpus cases. There is consequently that difference in the bases, but they both give their respective comparisons.

With respect to lawyers. It has been noted that normally their greater number will necessarily be found where the population is more numerous and the law practice more prolific. Therefore, it is pertinent to consider what has been the effect on them. About the time of the "Bond Amendment" there were 3,000 lawyers in Maryland, of whom 2,350, i.e. 78.33% were in Baltimore City, and 650, i.e. 21.67% in the counties. As of the present time there are 4,224 in the State of whom 2,846, i.e. 67.38% are in the City, and 1,336, i.e. 32.62% in the counties. The trend to the counties apparently has also reacted on them.[49]

Since it is clear how all these criteria are being affected by the population trend, it is pertinent to call attention to the further facts as to the populations of the four counties adjacent to the two cities, Washington and Baltimore as follows:

	April 1, 1950	*July 1, 1958*	*Percentage Increase 4/1/50 to 7/1/58*
Baltimore	270,273	444,000	64.3%
Anne Arundel	117,392	188,000	60.1%
Montgomery	164,401	291,000	77.0%
Prince George's	194,182	335,000	72.5%

In order that there be available comprehensive information relative to population, in arriving at a conclusion as to what is the proper adjustment of the membership of the Court of Appeals, there are appended hereto three tables compiled by the writer of this review. These tables show, as grouped therein, the national census populations of the various counties and Baltimore City, as of April 1, 1930, 1940 and 1950, and the estimates, by the Maryland State Department of Health, Division of Vital Records and Statistics, of those populations

as of July 1, 1958 and of the changes as percentages of their April 1, 1950 populations, from that date to July 1, 1958, as contained in its release communication of August 18, 1958.*

Table I gives the situation of the appellate circuits as they are constituted at present, on the basis of four appellate circuits and five judges, with the following result:

	Populations as of July 1, 1958	*Judges*
The Eastern Shore	239,800	1
Western Maryland with Carroll and Howard Counties	635,000	1
The two northern Maryland Counties, i.e., Harford and Baltimore, and the five Southern Maryland Counties, i.e., Prince George's, Anne Arundel, Charles, Calvert and St. Mary's	1,118,000	1
Baltimore City	984,000	2

Table II gives the situation as it would be with five appellate circuits, on a basis of six judges, with the two northern Maryland counties and the five Southern Maryland counties in two separate appellate circuits, with the following result:

	Populations as of July 1, 1958	*Judges*
The Eastern Shore	239,800	1
Western Maryland with Carroll and Howard Counties	635,000	1
The two northern Maryland Counties, Harford and Baltimore	511,000	1
The five Southern Maryland Counties, Prince George's, Anne Arundel, Charles, Calvert and St. Mary's	607,000	1
Baltimore City	984,000	2

Table III gives the situation as it would be with six appellate circuits, on a basis of seven judges, with Carroll and Howard detached from the Western Maryland Counties, and with those two counties, the five Southern Maryland Counties and the two northern Maryland

* For these tables, see pages 56 to 58.

counties grouped in three separate appellate circuits which would be in accord with the three local circuits, with the following result:

	Populations as of July 1, 1958	*Judges*
The Eastern Shore	239,800	1
Western Maryland	550,000	1
Harford and Baltimore Counties	511,000	1
Carroll, Howard and Anne Arundel Counties	273,000	1
Prince George's, Charles, Calvert and St. Mary's Counties	419,000	1
Baltimore City	984,000	2

Table I shows how the arrangement under the "Bond Amendment" has worked out. If the five membership court be continued, it is evident that they will have to be adjusted according to the natural regional representation, and when the first vacancy occurs in the present Baltimore City members, the consequent result would be that it would not be filled, and that the membership would be allotted to one of two separate districts into which the present gerrymandered district combining the two northern Maryland counties and the five Southern Maryland counties would be divided. The Table II arrangement would correct the error made when the two northern counties and the five Southern Maryland counties were so gerrymandered, and which as already shown is absolutely essential, and will become continually more so as time goes on. The Table III arrangement has the merit of a long range view, by putting the four large and rapidly growing counties adjacent to Washington and Baltimore City in different appellate judicial circuits. In that connection it is to be noted that, although the district which would be constituted by Anne Arundel, Howard and Carroll Counties would have a smaller population than some of the others, in addition to the heavy growth of the Anne Arundel County population, Howard's percentage increase is 31.9% and Carroll's is 21.4%.

Methods Of Review.

Now it is in order to take up the second of the two features, previously mentioned, to be considered in connection with the present problem of the Court of Appeals, i.e., a practical treatment of methods of review.

This should be done keeping in mind what has previously been set forth herein, and, realizing that government is merely an organization of the people and that courts are an instrumentality of government, the dominant consideration should ever be — what best serves their interest.

Since there is current a proposal of a special committee of the Maryland State Bar Association, which has received its endorsement, that in the process of review there be introduced into Maryland an intermediate appellate court system, that proposal should receive preliminary consideration. Before considering whether the installing of such a system in the State is advisable, the specific terms of the present proposal should be examined.

It will be found that it is featured by certain vices violating Maryland's basic principles with respect to its judiciary.

First. Although it recognizes that the situation in the appellate circuit in which the two counties of northern Maryland and the five Southern Maryland Counties were thrown together, requires an adjustment of the membership of the Court of Appeals, and it proposes that the membership be increased to six so as to allow another judge to those counties, it actually compounds the violation of regional representation which took place, against their will, when they were originally so gerrymandered for purposes hereinbefore set forth. It does not separate those two different regions into two separate appellate judicial circuits, and give each its proper separate regional representative on the Court of Appeals — to which they are respectively entitled — as the other different regions of the State have. Instead it proposes to leave them thrown together, and attempts to obtain acceptance of the continuance of that condition by providing that no two judges may be residents of the same county. The result would be that a population preponderance or development in one area, aided by an organized press propaganda campaign, could not only elect the representative whom it would have anyhow, but could also dictate the selection of the other, whether residing in the same or the other region. It is not meant to provide separate regional representation, but actually to make possible the contrary.

The original 1941 proposal suggested much the same kind of thing. It proposed that the State be divided into four appellate circuits, with a regional representative from each of three county appellate circuits and two from Baltimore City, but to be elected by the entire State. One of the proposed circuits was to include the Eastern Shore counties and four of the Southern Maryland counties. The Eastern Shore and Southern Maryland mutually appreciated the complement, but did not consider that proper regional representation. The then special

committee of the State Bar Association found that it would be advisable to change the arrangement radically (even though as changed, it did not get through the legislature). It proposed that there be five appellate judicial circuits as follows: The Eastern Shore — Southern Maryland and Howard County, it being associated with that section — Western Maryland — Carroll, Harford and Baltimore Counties — and Baltimore City. There were to be six judges to come from and be elected by the separate appellate circuits, one from each of the county appellate circuits and two from Baltimore City. The grouping of the Eastern Shore and Southern Maryland was thus abandoned, and the State-wide election also as it was recognized that, with its then population, Baltimore City would in practical effect have the power to select not only its own judges but those of the four county circuits as well.

The original "Bond Plan" likewise made a similar proposal. As already noted, it proposed that of the five judges, of that plan, two were to come from and be elected by Baltimore City, and three were to come from and be elected by the counties at large. The General Assembly would not contemplate the county arrangement, and the counties were divided into the present three appellate circuits with a separate judge coming from and elected by each.[50]

It is therefore clear that this is just another attempt to break down proper regional representation on the Court of Appeals, and should be rejected.

Second. It provides that when a vacancy exists in the office of Judge of the Court of Appeals, the Governor may appoint a judge from the intermediate appellate court to fill the vacancy, who shall hold office as Judge of the Court of Appeals for the residue of the term for which he was elected or appointed to the intermediate court. This provision is patterned after the provision in the Constitution which authorizes the Governor, in case of vacancy in the office of Chief Judge of the Supreme Bench of Baltimore City to appoint as his successor, one of the Associate Judges of that Court, and provides that he may serve as such Chief Judge for the remainder of the term for which he was elected Associate Judge thereof. That, however, is a very different thing. The Associate Judge was elected by the people to that very same court, and he is merely designated as its Chief Judge. The proposal would enable a person to be installed in a court to which the people were not electing him, and that the highest court in the State, which wields powers, judicial and rule making, of far reaching nature affecting their interests. The people have the absolute right to decide whom they want on their Court of Appeals, and to have that right unimpaired, just as they have and should have

that right with respect to all their courts. If such a thing can be done in this instance, the next step logically would be to apply it to the courts generally, and gradually undermine the right of the people to elect their judges, resulting in the resurrection of the repudiated appointive system in this State. It is one of those indirect attacks on Maryland's basic principle of an elected judiciary, previously referred to in this review, and should likewise be rejected.[51]

Third. Section 3 of Article IV of the State's Constitution, at present applies to the judges of the courts of Maryland generally. It provides for their tenure of fifteen years, the seventy years age limitation, and the right of the General Assembly, two-thirds of the members of each House concurring, with the approval of the Governor, to retire any judge in case of his inability to discharge "his duties with efficiency, by reason of continued sickness, or of physical or mental infirmity." The proposal would lift the judges of the Court of Appeals and of the intermediate appellate court out of the provisions of that section. It provides in Section 14 how the Court of Appeals would be constituted, and in Section 17A how the intermediate appellate court would be constituted. In neither section, however, does it include the above mentioned provisions of Section 3. Consequently, unless the courts placed a forced construction on the language of the last mentioned section, the judges of those two courts would be free of those provisions. It is assumed that this was not intended, but in no event should there be any such possibility.

These features are vital because they involve fundamentals. There is another, not of such fundamental nature, which involves a matter of policy and is important. The proposal states that it is contemplated, in order to make it work out in an attempt to avoid the burden of double appeals, that in cases appealed to the intermediate court, a litigant might apply for a review by the Court of Appeals in its discretion, before as well as after a decision by the intermediate appellate court. This calls for little comment because, although it might be harassed with such double applications, for obvious reasons of a practical nature it is inconceivable that the Court of Appeals would load itself down with reviewing cases before they had gone through the intermediate court, and it had thus been determined whether there was anything left for it to review. The proposal, however, went further than that, it expressly stated that it was contemplated that, in order to make the plan work out, the Chief Judge of the Court of Appeals would be constantly investigating the cases in the intermediate appellate court to determine when there should be a review by the Court of Appeals. It was further emphasized, that the arrangement has as one of its reasons the object of affording the Chief Judge ample time to perform administrative duties which, having been deposited

on him, it is prophesied will heavily increase as time goes on. It, of course, would tax human power of credulity to believe that after first blush, and as the intermediate court and its ramifications expanded, which they undoubtedly would, the Chief Judge would perform, adequately or otherwise, any such onerous investigating task. If he did, and if he performs the other administrative duties, of which he is to be the repository, what becomes of his functions as a judge? At the time the "Bond Plan" was being advocated, one of the claims was that it would bring to the Court of Appeals such caliber that it would take its place with the foremost state courts in the country. Is transforming its Chief Judge into a departmental administrator such an accomplishment? Judges are elected to decide problems of law and equity, and because they are believed to have the qualifications to do so. That has certainly always been Maryland's concept. Are not theorists leading Maryland into strange fields with respect to its judiciary? From a practical point of view it is evident that Maryland has gone far enough along those lines, and all further extensions of such activities should be prevented, so that its judges will perform their normal functions as judges, without being diverted. Otherwise, apart from the effect on the quality of its judges, inevitably, Maryland is going to have the unnecessary expense of a more numerous judiciary than it would ordinarily need.

Moreover, of even greater importance, will arranging the State's judiciary on a basis which contemplates, that the Chief Judge of the Court of Appeals will be more and more clothed with powers outside of and beyond his normal functions as a judge, ultimately bring about conditions in Maryland's judiciary which it has not had in the past, and which it certainly does not want, against which a now deceased prominent former member of the judiciary of ability and comprehensive understanding of human nature and human affairs advised and warned?[52]

With respect to the feature in the current proposal, that, in an attempt to avoid double appeals, the Chief Judge would be constantly investigating cases in the intermediate appellate court to determine when there should be a review by the Court of Appeals, when the proposal came up for consideration at the mid-winter meeting of the State Bar Association on December 5, 1958, the Chief Judge protested that feature. He stated that neither he nor any other member of the Court was willing to assume any such undertaking. The proponents therefore altered the plan, by proposing that the Court, i.e. the Judges alternately, perform that task. This would merely transfer the onerous imposition from the Chief Judge individually to the members of the Court generally, with all of its impractical and inadvisable implication and involvement as stated above.

Passing from specific features of the particular proposal which has been presented, to the broader question of whether Maryland should assume the burden — because burden it undoubtedly will be — of an intermediate appellate court structure, that expedient should be weighed in the scale of whether, if ever it will be advisable, it is advisable at the present time, and further what alternatives should be considered.

As already shown, it is going to be necessary to increase the membership of the Court of Appeals, and consequently any other measures adopted will be supplemental thereto, and should be considered from that point of view. There are various supplemental methods which could be employed to the extent called for, but it is deemed advisable to confine the consideration, in this review, to three, which will be briefly discussed.

First. The intermediate appellate court, which is the expedient that has been proposed, provides, in the class of cases coming within the jurisdiction of that court, the litigant with a right to have his case reviewed by it. If, however, he desires to reach the Court of Appeals, he can do so only by first carrying his case to the intermediate court, and then, if the Court of Appeals grants him permission, he can reach that court. Consequently, to find out whether or not the Court of Appeals considers that his case has merits justifying its hearing and consideration, he must, looking at things realistically and in a practical way, do so through the intermediate court. Therefore, the way it usually works out, and when put into operation, as time goes on, it is only reasonable to believe that it will work out, the litigant goes through a double appeal with all the expense incident thereto, which, in view of the cost of litigation, becomes wellnigh backbreaking to the ordinary litigant. As to members of the legal profession, judiciary or bar, those who have had occasion to examine authorities in jurisdictions where there are intermediate appellate courts, with reports of both the intermediate court and the highest court, well know the experience. When they bring it into their home state they do not have to debate the result. The profession is already loaded with reports of one kind or another of which its members are compelled to keep informed.

Dean Roscoe Pound, of the Harvard Law School, in an address to the Maryland State Bar Association, on the subject "Improving The Administration Of Justice", said:

> "You in Maryland have been spared the intermediate appellate court and double appeal."[53]

Chief Judge Carroll T. Bond, of the Court of Appeals of Maryland, in addressing the State Bar Association in connection with the

"Bond Plan", referred to "the evil of excessive publication of opinions, which is filling shelves with too many books, and almost making our judicial machinery unworkable", but he said that no satisfactory remedy had been found.[54] It is clear what even the normal double reports would mean.

Apart from the involvement with respect to litigants and members of the legal profession, the establishment of the intermediate appellate court system is to be considered from the point of view of the taxpayers. The Committee of the Bar Association does not claim to be able to say what the annual cost would be. It thinks that it would be about $150,000.00. Human experience, however, shows, only too well, how preliminary estimates of costs of various projects of one kind or another turn out. There is little doubt that such a system once started will become more and more expansive and expensive and on no small scale.[55]

Confronted with these facts, the inadvisability of establishing the intermediate appellate court system in Maryland, unless and until, if ever, it becomes absolutely necessary, is apparent.

Second. In Maryland's sister state, Virginia, in almost all cases, review by its highest court is obtained by filing with that court a petition showing, to its satisfaction, that the case justifies its consideration. This does not afford the litigant the absolute right of review of a lower court's decision. It does, however, enable him to apply to the highest court, direct, and thus find out whether that court considers that there is anything in his case which might cause it to reverse the lower court's decision. In this direct manner he does not have to first go to an intermediate court, and then, if he wishes to reach the highest court, go through the same kind of procedure. Therefore, he is not subjected to the double appeal, and the abnormal and practically prohibitive expense resulting therefrom. Furthermore, if the highest court considers that there is no probable basis for a reversal, he is spared the expense of what, in most cases, would be a futile appeal. This supplemental method, with a certain amplification, might well be considered in Maryland in a limited class of litigation. In cases up to five hundred or a thousand dollars, mechanics liens, divorce and alimony cases, provision could be made by statute, for a litigant to thus apply to the Court of Appeals, and with the amplification that the lower court itself, if it felt that the case was one which should receive the highest court's determination, also might certify it to the Court of Appeals for its hearing and decision.

In this manner, the litigant, without going to an intervening court, has two opportunities to show that he should be permitted to go to the highest court direct, either by such showing to the lower court itself — or indeed on that court's own initiative — or through his petition filed with the Court of Appeals.

Apart from the saving of expense to the litigant, and the avoidance of the burdensome double reports infliction on the members of the legal profession, the taxpayers would not have saddled on them the heavy financial burden which would result from the intermediate appellate court system.

There is another and very important advantage in this supplemental method. It would not be wrapped up in the Constitution as the intermediate appellate court system would be. It could be done and abolished by legislative enactment. Consequently the Legislature could see how it worked out, and, if it did so satisfactorily, could extend it to other cases of the same general class, and, if it did not, could abolish it at any time.[56]

Third. If there be the feeling that each litigant, even in cases involving no substantial or novel legal question, should have the mandatory right to a review of the trial court result, by some judicial tribunal, careful consideration should be given to the court in banc, in the class of cases referred to in paragraph "Second".[57] By that supplemental method the judges of each of the eight local circuits would sit as a court in banc, and review the trial court decision. Of course, the trial judge would not be included in the court in banc, which would be composed of not less than three judges of the same circuit. If there should not be as many as three such judges available, the Chief Judge of the Court of Appeals would make assignment from other circuits, or possibly from the Court of Appeals if any judge thereof were at the time available.

The litigant would merely make his application to the trial court for a review of that court's decision by the court in banc, which would automatically follow. From the decision of the court in banc, there would be the same method of reaching the Court of Appeals as referred to in paragraph "Second", except that the certification, of course, would be by the court in banc. There would probably from time to time have to be additional judges in various circuits, but they would be available for trial duty, and could be assigned from one to another of the circuits. Therefore they would serve a duplex function which would make for economy in the whole structure.

This method, of the court in banc, involves no superstructure of appellate judiciary, and avoids the abnormal expense to litigants of the double appeal, because it is administered, simply, in the lower court organizations. Likewise, as they would be merely local rulings, they would not be reported, and consequently there would not be the double reports burdening the legal profession. Moreover, it would be in accord with the process which has taken place with respect to Maryland's judiciary. Under the Constitution of 1776, Maryland in the

beginning had, in addition to its local courts of the kind then existing, the Court of Appeals, the General Court, the Admiralty Court and the Chancery Court and Chancellor, as well as the Orphans' Courts. Over the years it has followed a course of simplification, by eliminating courts and combining and simplifying judicial functions. In so doing it expanded its local courts and brought its court functions closer to the people. This method, in contrast to the intermediate appellate court, keeps the review closer to the home environment and administered by judges who through their trial duties are in daily contact with the matters and relations involved in cases of this class.[58]

Having considered these supplemental methods of review, there are two features of the proposal of the State Bar Association's Committee which have received the endorsement of the Association, which should briefly be referred to, because they are to be taken into account in determining what necessity there is for installing a super structure of appellate judiciary in Maryland.

It is recommended that it be provided that no more than five judges sit in any case unless the Chief Judge shall otherwise direct. This would have the effect of making it possible for a sixth judge, *i.e.,* one judge (or if the court were composed of seven judges, a sixth and a seventh judge, *i.e.,* two judges) not sitting in a particular case, to devote his (or their) time to writing opinions. It would greatly reduce the difficulties of the court in disposing of the case load, as will appear by referring to Note 40. The difference which that provision would make in the present situation is that, in stating it as a constitutional policy, it would have the practical effect of bringing about that result. The court has it in its power to do the same thing at the present time, on its basis of five judges, because Section 14 of Article IV of the Constitution provides that three judges shall constitute a quorum, and also that the concurrence of a majority of a quorum shall be sufficient for the decision of any cause. Therefore, at present the court may sit as a court of five or four or three judges, which would leave those not sitting, free to devote their time to writing opinions.

The other feature would implement a position taken by the majority report of another and previous committee of the State Bar Association in 1951. The majority report, apparently of all the members of the committee but one, called attention to the provision in Section 18A of Article IV of the Constitution authorizing the assignment of judges from the trial courts to sit temporarily on the Court of Appeals in case "of a vacancy or of illness, disqualification or other absence", of a member of that court, and expressed the view that the words "other absence" were properly susceptible of a liberal construction. It strongly commended the practice of assigning nisi prius judges to sit on the Court of Appeals, from the dual point of view of relieving

members of an appellate court of some of their burdens, and of adding to the judicial experience of the nisi prius judges. The chairman of the committee stated that the majority view was that the words above mentioned could be construed to authorize the assignment of a nisi prius judge to sit on the Court of Appeals while a regular judge was absent writing opinions.

That view was supported by a prominent member of the judiciary. The position of another prominent member of the judiciary was that the language of the constitutional provision was not intended to be so construed, but was confined to an absence from judicial duties altogether. No action was taken by the Association on that question.[59]

The present proposal is of course intended to dissipate the uncertainty as to constitutional construction by adding the following words to the constitutional provision "or for the purpose of relieving an accumulation of business".

The advantages of a liberal approach to the use of judges from the local courts on the Court of Appeals, are, as far as the judges themselves are concerned, that naturally, the lower court judges appreciate being selected to sit on that court, and they in turn bring with them to it closer contact with the every-day operations of the trial courts. It thus serves to enhance the tone of the trial judges, and at the same time aids in keeping the judges of the Court of Appeals in a practical, realistic atmosphere.

The criticism of the practice, unless kept within reasonable limits, has been that it tends to weaken the continuity of the Court of Appeals.

As far as the case load of the court is concerned, it is apparent on its face how this materially increases the reserve of manpower of the Court of Appeals.

It should now be possible to arrive at a sound conclusion as to what is the practical and common sense solution of the problem of the Court of Appeals, with the consideration ever dominant — what is in the best interest of the people of Maryland.

Wishful thinking and hopes on the part of advocates of any proposal are natural and understandable, but unfortunately they have to be weighed in the scale of stern realities, and, entirely apart from the fundamental vices in the specific proposal which has been submitted, it is, and undoubtedly will be as it will practically work out, inherently an intermediate appellate court which is proposed.

As has been clearly brought out, inevitably, the result would be to visit on litigants in Maryland the today backbreaking, prohibitive costs of double appeals, on the members of the legal profession,

judiciary and bar, in their own State, the harrassing burden of double appellate reports, with the profession already almost swamped with legal material which has to be read, and on the taxpayers of the State a heavy and ever mounting financial obligation. With other remedies available, Maryland should assume no such burden.

The solution, which evolves in the process of this review, and which recommends itself in an intelligent approach to the questions involved, combines certain other features recommended by the Committee of the Bar Association, in altered form, utilizing conditions which at present exist, and putting into practical operation simple and in comparison economical supplemental remedy in the following manner:

First. For reasons already set forth, the membership of the Court of Appeals should be increased, either on the basis of six judges coming from and elected by the people of five different and separate regions, represented by five separate appellate judicial circuits, in accord with Table II; or seven judges coming from and elected by the people of six different and separate regions, represented by six separate appellate judicial circuits, in accord with Table III. As previously shown, the Table II arrangement will correct the grave mistake made in the "Bond Amendment" in combining the two northern Maryland counties and the five Southern Maryland counties in a single district, and the Table III arrangement has the merit of the long range view.

Second. The provision should be effected, that no more than five judges shall sit in any case, but the proviso "unless the Chief Judge shall otherwise direct", should be changed to read, "except in instances or circumstances as may be prescribed by the rules and regulations of the Court of Appeals, adopted subject to the Laws of Maryland".[60]

Third. It is proper to amend section 18A of Article IV of the Constitution so as to add to the provision for assignment of judges of the trial courts to sit on the Court of Appeals, the words "or for the purpose of relieving accumulation of business", since all assignments of judges are controllable by rules and regulations which may be made by the Court of Appeals, and it is consequently left to the Court to determine whether, and, if so, when the power should be exercised. However, wherever in that section it is provided that the assignment of judges is, to sit "in any case or for a specified period", the language should be changed to read "in any case or for a temporary specified period".

Fourth. The abandonment by the Court of its former practice of writing lengthy opinions in practically all cases, and the adoption by it, as it has recently begun to do, of the practice of rendering short opinions

merely stating the conclusions of the Court, in cases in which it deems full opinions unnecessary.

Fifth. The Acts of 1958 Ch. 44, and Ch. 45, were enacted in connection with the Post-Conviction Procedure Act and accompanying legislation, applicable to habeas corpus cases. One of the purposes thereof was an expected reduction of the previous case load of the Court of Appeals arising from such litigation. It has yet to be determined how this is going to work out.

These measures alone should enable the Court of Appeals to deal with its present problem. Looking to and preparing for the future, it would be wise for the Legislature to make provision for a supplemental measure, and to select the one of the methods of review which is most practical at this time.

Regarded from that point of view, it is difficult to escape the conclusion, that the common sense course would be to first try out the "Second" measure referred to herein under the caption "Methods Of Review", *i.e.,* the petition for leave to appeal, or certification by the lower court, in the limited class of cases, there mentioned. As previously stated it could be done by legislative enactment, and, if it proved successful, it could be extended to other cases of the same class, if it did not, it could be abolished by the Legislature upon its determination that it was advisable to do so.

If for any reason, the Legislature determined not to so proceed, the "Third" measure, *i.e.,* the court in banc would be the logical one to employ.

It is unnecessary to say anything further about the advantages of these measures, than has already been set forth.

Passing from the consideration of the present emergency of the Court of Appeals to the broad field of jurisprudence, it would be difficult for anyone in an unbiased state of mental balance, to follow the course of legal developments in Maryland without being impressed with its philosophy toward its laws and its instrumentality, *i.e.,* its courts, to construe and apply those laws. It has been fundamentally one of simplicity and striving for greater simplicity, adhering to the grass roots of the origin of and reason for government, *i.e.,* to serve the people, and keep in touch with them, and, in implementation thereof, the preservation of its basic principles of government with respect to its judiciary.

It has shown its recognition of the desirability of keeping pace with the progress of times, and yet generally has been able to resist the agitations which have arisen in the name of reform garbing merely the nostrums of individual groups. While it has been willing to con-

sider theories which have been written into the laws of other jurisdictions, and adopt them when they were found to be sound, it has not been readily swayed by arguments that it should fall in with alleged patterns, and it has steadfastly rejected them when they would undermine its tried and tested fundamentals.

This has been the course of wisdom and common sense, and that which would naturally be expected.

Maryland is one of the thirteen original states which brought this nation into being, and it would be a tragic development were it ever to fall to a condition of intellectual poverty or enfeebled purpose where it could only ape and have no basic principles and policies of its own.

NOTES

1. The names of Chief Judge Carroll T. Bond, of the Court of Appeals of Maryland, and Chief Judge Samuel K. Dennis, of the Supreme Bench of Baltimore City, will inevitably occur, because they figured so prominently in connection with the "Bond Plan", which, in part, as modified by the General Assembly, provided the basis for the present organization of the Court of Appeals.

They were both men of ability and fine character and integrity, which naturally brought them the high esteem in which they were held.

Chief Judge Bond's career was purely in the legal field. From the practice of law he became an Associate Judge of the Supreme Bench of Baltimore City, and thence the Chief Judge of the Court of Appeals, and possessed to an eminent degree the judicial poise and temperament which are so admirable in a judge. Although he was not its originator, when a proposal was made that the Governor appoint a committee to consider possible reorganization of the judiciary of the State, he was designated its chairman, and the recommendations, which evolved, consequently bore his name and were known as the "Bond Plan." As recommendations by committees are usually a composit constituting adjustments of views by their members, except where his individual views were clearly brought out in connection with that plan, citations of his views will be from his earlier history of the Court of Appeals.

Chief Judge Samuel K. Dennis had, in addition to his general practice of law, been United States District Attorney for the District of Maryland, and consequently was thoroughly experienced in both fields. He was a vigorous and formidable figure in the public and political life of the State, and there were few people in it of any prominence, whether major or minor, who did not personally know, and were not personally known by him. His name was repeatedly mentioned as possible Governor of, or United States Senator from, Maryland, before he determined to become Chief Judge of the Supreme Bench of Baltimore City. After that, all previous activities ceased and he devoted himself strictly to his judicial functions. He disapproved of the Bond Plan, and, in response to requests in legal circles, set forth his views in two articles in the Daily Record, respectively on February 15, 1943, p. 3, and March 13, 1944, p. 3. Because of his position, he engaged in no activities in respect to it, but his views of course were potent. None of the plan except that with respect to the Court of Appeals, got through the General Assembly, and the provisions relative to the appellate court were modified, in

part, in accordance with certain of his criticisms, although he continued to disapprove of those which still survived in the Constitutional Amendment known as the "Bond Amendment."

That amendment will, of necessity, adduce consideration in the course of this treatise, but every effort will be made to discuss it subjectively.

2. 1776 Decl., Art. I, and continued through the three subsequent Decl's., being in Art. II of the 1864 Decl.

3. 1776 Decl., Art. IV; and continued through the three subsequent Decl's., being in Art. VI of the 1864 and 1867 Decl's.

4. 1776 Decl., Art. V; and continued through the three subsequent Decl's., being in Art. VII of the 1864 and 1867 Decl's.

5. 1776 Decl., Art. XXX. The provision for tenure during good behavior had its roots in 12 and 13 Wm. III, Chap. 2, Sec. 3. Previous to that enactment judges in England held office during the pleasure of the King. In Maryland, due to the nature of the proprietary government, the tenure of judges previous to the Revolution was during the pleasure of the Governor. The Court of Appeals of Maryland, a History, p. 55, by Carroll T. Bond, (1928). The quoted portion of 1776 Decl., Art. XXX, to which this note applies, was continued in the three subsequent Decl's. down to the semi-colon after the word "people". The rest was changed in view of the abolition, in the 1851 Constitution, of the office of Chancellor, and the substitution by that and the two subsequent constitutions of a term of years instead of "during good behaviour" as the tenure of judges. The right of removal of judges, by the Governor and the General Assembly, and on conviction on certain grounds, provided in the 1776 Decl., Art. XXX, and as stated in that Constitution, Sec. 40, and further provided in the Const. Amend. 1804, Ch. 55, conf'd by 1805, Ch. 16, was continued, somewhat amplified, and the right of impeachment also stated, by the 1851 Decl., Art. XXX, Const., Art. III, Sec. 41, Art. IV, Sec's 4 and 9 (these sections not expressly alluding to impeachment), 1864 Decl., Art. XXXIII, Const., Art. III, Sec. 25, Art. IV, Sec. 4, and 1867 Decl., Art. XXXIII, Const., Art. III, Sec. 26, Art. IV, Sec's 3 and 4.

6. 1776 Const., Sec. 40.

7. 1776 Const., Sec. 48; see also Const. Amend. 1817, Ch. 189, conf'd by 1818, Ch. 159. 1776 Const., Sec. 25, provided for the election of the Governor by the General Assembly, and Sec. 26 provided for the election, by the General Assembly, of a Council to the Governor. Certain of the important powers of the Governor were exercisable only "with the advice and consent of the Council." By Const. Amend. 1836, Ch. 197, conf'd by 1837, Ch. 84, the Council was abolished, and

thereafter the Governor was to be elected by the people. His general appointive power thenceforth was to be with the advice and consent of the Senate, except for an interim until a Senate session. See also Const. Amend. 1840, Ch. 230, conf'd by 1841, Ch. 62 — December Session.

8. 1776 Const., Sec. 56. Although the publications containing the 1776 Constitution usually do not make reference to a section 61, The Laws Of Maryland, by William Kilty, in the beginning of his Volume I, after setting forth the Constitution, separately adds at the end of it after Section 60, a notation of such a section. This section, it is evident by its terms, was intended to initially bring about the organization of the state government under that constitution. The section noted, provided in part, "That to introduce the new government, ". . ."; and for filling, in the first instance only, all offices in the disposition of the Governor, with the advice of the Council," the General Assembly, in the manner therein stipulated, might recommend the persons to be appointed, and such persons were to be commissioned by the Governor.

No such recommendations for judges of the Court of Appeals were immediately forthcoming, and the State had no judges of that court from the time of the adoption of the Constitution until the end of 1778. In the meantime, the General Assembly enacted the Act of 1777, Ch. 5 — February Session, specifying the forms of commissions to various public officials, which referred to the commissions to the judges of the Court of Appeals as for "three or more". Without further enactment, but by an exchange of messages, the two houses agreed on five as the number of judges, and on December 12, 1778 made their recommendation of those to be commissioned. Votes and Proceedings of The House of Delegates, and likewise of the Senate: the House, Feb. 27 and March 4, 1777; the Senate, March 29, 1777; and both, March 28, 31, April 1, 1777 and December 1, 9, 12, 1778. A joint commission was issued to them by the Governor and Council under date of December 22, 1778, and on January 11, 1779, they were notified by a letter from the Council. Md. Arch., Vol. 21 — Journal and Correspondence of Council, 1778 to 1779, p. 277.

The Act of 1801, Ch. 74 — November Session, after stating in Sec. 41: "Whereas the constitution and form of government hath not prescribed the number of judges of which the court of appeals shall be constituted, and the same ought hereafter to be fixed by law:" provided by Sections 41, 42 and 43 that, after vacancy had reduced the membership of the court to three, thenceforth its membership was to be fixed at that number.

From the time of the adoption of the Constitution of 1776 to 1806, the number of the judges of the Court of Appeals, at the different

periods, was as follows: from the time of the adoption to the latter part of December 1778, none; from that time to 1784, five; from that date to 1792, four; from the last mentioned date to 1801, three; and from 1801 to 1806, five. Two judges were appointed just before the enactment of 1801, Ch. 74. The Court of Appeals of Maryland, A History, p. 63 and appendix, (1928) by Carroll T. Bond, Chief Judge of the Court of Appeals. See also Chapter III of that publication for fuller information as to how that first court functioned. Chief Judge Bond seemed to be uncertain as to whether the practice of appointing the judges on recommendation of the Legislature, ceased with the first judges, because, at page 60, he said that they were at least in the first instance so appointed. Chief Judge Samuel K. Dennis, of the Supreme Bench of Baltimore City, was evidently of the opinion that it did not, since his position was that they were thus in effect elected by the Legislature, and, apparently, until the Const. Amend. of 1804, Ch. 55, conf'd by 1805, Ch. 16. Daily Record, February 15, 1943, p. 3. The later Legislative Journals of Votes and Proceedings, have not been examined, in connection with this review, to ascertain the fact in that respect.

9. Chief Judge Samuel K. Dennis, of the Supreme Bench of Baltimore City, in emphasizing the wisdom of regional representation on the Court of Appeals, said:

> "In the abstract, it would make no difference in what part of the State a judge of the Court of Appeals lives. Practically, it makes a distinct difference. There are concrete ends to be served by courts. Practical experience is needed to make many statutes understandable. A working knowledge, first hand, of economic, social and other sectional conditions throughout the State is needed by a balanced court; hence, a geographical distribution of the appellate court judges is desirable."

Continued a little later in speaking of:

> ". . . the geographical location of judges, a system followed since the judges of the first court of appeals, paid $533.33 per year and sat only at long intervals, were elected by the Legislature from the State at large. Even when under no pressure, they were distributed. In 1805 the Constitution was amended to make distribution sure and systematic; judicial districts were set up; a judge should be appointed from each district. In 1851 the judges were elected by the voters of each section or district from their respective districts." Daily Record, February 15, 1943, p. 3.

10. Chief Judge Carroll T. Bond, of the Court of Appeals, in his history "The Court of Appeals of Maryland", after alluding to attempts,

which had been made, to appraise comparatively the ability of various judges, said at pages 195 and 196 as follows:

> "It is commonly assumed by thoughtful men that under a system of choosing judges by popular election there must be a falling off in quality of those chosen, and consequently in respect for the courts and the law which the judges administer; but whatever variation in ability there may have been, there seems to have been in general no perceptible change in the character of the men chosen for the Court of Appeals since the inauguration of the system of election in this State. And, in this, the testimony of older members of the Bar is given. The judicial ability of one judge and another is debated, of course, but no instance is known of reproach for deficiency in judicial or personal character."

He then continued, by applying the same statement to the local judges, and said that the two or three instances where there had been complaints as to them involved no such features.

Proceeding further, pp. 196-197, he said that any possible bad effects of choosing judges by election had not been realized in Maryland. He pointed out, in that connection, that judges were usually appointed first, and in most instances it had been followed through by election by the people. He proceeded as follows:

> "And apart from these facts, no lawyer in Maryland would feel able to say that there has been a difference in quality between the judges who have come on the bench in the State by one method or the other. Some of the best have come to the court originally by election."

Chief Judge Samuel K. Dennis, of the Supreme Bench of Baltimore City, vigorously maintained the wisdom and advisability of electing judges, and the judges of the Court of Appeals from and by the people of their separate respective areas, and not by the State at large, or the county members by the counties generally. As to instances in which judges who had been initially appointed had been replaced by the people at election, his position was that no generalization could be made between the judges so appointed and those elected by the people in their stead. He said:

> ". . . the question whether the Governor's appointees from the Bar when made under the check of success at judicial election, or the people's selections are the better, so far as can be seen, admits of no solution as the following tends to show:
>
> In recent years the following appointees have been defeated at the ensuing elections:

Governor's Choice	vs.	*People's Choice*
Daniel R. Randall	by	Frederick Stone
George M. Russem	by	James Alfred Pearce
James A. C. Bond	by	I. Thomas Jones
John G. Rogers	by	Wm. H. Thomas
Glenn H. Worthington	by	Hammond Urner
W. Laird Henry	by	John R. Pattison
W. C. Walsh	by	D. Lindley Sloan"

Daily Record, February 15, 1943, p. 3.

11. 1851 Const., Art. IV, Sec's 2 and 4.

12. 1851 Const., Art. IV, Sec's 8, 9, 10, 11, 12 and 13.

The provisions of the 1851 Constitution relative to the local courts, i.e., Art. IV, Sec's 8 and 9 in final form, did not contain an express age limitation of seventy years, or an express authorization of re-eligibility after the ten-year term, as to the judges of said courts. The provision as originally drafted by the Convention's Judiciary Committee, in stipulating the ten-year term, contained the age limitation and also the authorization of re-eligibility, within that limitation, but not thereafter. A minority substitute, for that provision, as offered, provided "for the term of ten years, or until they shall have attained the age of seventy years", without a re-eligibility provision. Debates and Proceedings of the Maryland Reform Convention To Revise The State Constitution, printed by William M'Neir, Official Printer, 1851, Vol. 1, p. 240, Feb. 11, 1851; Vol. 2, pp. 559 and 560, April 23, 1851. The substitute, with various minor amendments, was adopted. The discussions were so lengthy, and conducted in such frequent piecemeal re-discussions, and the Constitution was acted on in such a fragmentary manner, that it is difficult to say how the age limitation disappeared; and an examination which has been made of the debates and proceedings has been unsuccessful in discovering such an amendment. The Committee on Revision of the Convention, was constituted to review the draft of the Constitution and all amendments, and see that they complied with the actions taken. The Convention, however, wound up in a state of confusion very late at night. Many of the members were anxious to go home, and so insistent on immediate termination of the Convention, that it was claimed by certain of them that the Revision Committee had not been able properly to perform its undertaking. The attitude of the Convention, repeatedly demonstrated, does not justify the conclusion that it intended any such difference in tenure between the judges of the Court of Appeals and those of the lower courts.

13. 1851 Const., Art. IV, Sec. 25; and as to Senate recess, Art. II, Sec. 12.

14. 1864 Const., Art. IV, Sec's 2, 3, 17, 24, 26, 31 and 41.

15. 1864 Const., Art. IV, Sec. 5; and, as to Senate recess, Art. II, Sec. 14.

16. 1867 Const., Art. IV, Sec's 2, 3, 5 (and 5 as amended by 1880, Ch. 417, rat. Nov. 1881), 14, 19 (and 19 as amended by 1956, Ch. 99, rat. Nov. 6, 1956), 21, 31, 39 (and 39 as amended by 1892, Ch. 313, rat. Nov. 7, 1893). Section 21, and amendments thereof, had made provisions, as to the judges elected by the county circuits, being distributed as to residence in said circuits; and Const. Amend., Act 1953, Ch. 607, rat. Nov. 2, 1954, amending Art. IV, Sec's 3 and 21, further provided that the local judges of the various counties were to be residents of and elected by the people of their respective counties — and leaving likewise as before as to Baltimore City — except that, as to the First and Second local judicial circuits, i.e., the Eastern Shore circuits, the judges of those circuits (as previously the case) were to be residents (on the distributed basis of course) of, and elected by the people of, those respective circuits.

17. 1867 Const., Art. IV, Sec. 14. See 1864 Const., Art. IV, Sec. 19, and 1851 Const., Art. IV, Sec. 2, for previous forms of jurisdictional authority.

18. Act of 1943, Ch. 772, rat. Nov. 7, 1944, amending Sec's 5, 14 (and 14 as subsequently amended by 1956, Ch. 99, rat. Nov. 6, 1956, to remove obsolete language), and 21 of, and adding Sec. 18A to, Art. IV of the 1867 Const.

19. It contained certain additional provisions clothing the Court of Appeals with the following powers relative to the local courts and their judges.

It made the Chief Judge of the Court of Appeals the administrative head of the judicial system of the State. Furthermore, it empowered him, in case of vacancy, illness, disqualification or other absence of one or more judges of that court, to designate, to sit temporarily in the appellate court in his or their absence, a judge or judges of the local circuits, including of the Supreme Bench of Baltimore City. It also empowered him to designate, to sit temporarily in any of the local circuit courts, including the courts of Baltimore City, any judge of the Court of Appeals or of any other of the local Circuit Courts, including of the Supreme Bench of Baltimore City. All such powers are subject to such rules and regulations, if any, as the Court of Appeals may make. (Also Const. Amend. 1943, Ch. 796, rat. Nov.

7, 1944, added Sec. 13A to Art. IV, authorizing the Legislature to empower the Court of Appeals to assign judges, including the Baltimore City judges, temporarily from one judicial circuit to another).

It authorized the Court of Appeals to make rules of practice and procedure in the courts throughout the State, which have the force of law until rescinded, changed or modified by the Court of Appeals or the General Assembly. This constitutional provision substantially extended the previous constitutional provision with respect to the authority of the Court of Appeals to make rules of practice and procedure for the lower courts. 1867 Const., Art. IV, Sec. 18 (and such section as amended, by Act of 1956, Ch. 99, rat. Nov. 6, 1956, to remove obsolete language). The Court of Appeals had previously been clothed, by statute, with somewhat similar general rule making authority. 1939 Md. Ann. Code Art. 26, Sec. 35.

Chief Judge Samuel K. Dennis, of the Supreme Bench of Baltimore City, was critical of the power vested in the Chief Judge of the Court of Appeals by the "Bond Amendment." His position being as follows:

> "If the Chief Judge is unreasonable, meddlesome, blundering, or disposed to evil, he can make judges subservient, plague and pack the courts, put judges of the Court of Appeals, nisi prius judges and the bar to irritating inconvenience and loss" Daily Record, March 13, 1944, p. 3.

The power of Chief Judge Dennis' criticism makes the mind immediately turn to the question of what safeguard exists against such an abuse of power. That the authority granted, if properly exercised, is advantageous, is clear, and in such circumstances safeguards do not occur to people's thoughts. Their importance only arises in case of abuse, and then they become vitally essential. There is, of course, the right of removal of the judge, but see Thomas Jefferson's views as to the practical difficulty to be encountered in that connection. Note 31. There is, however, another and inherent safeguard to be found in the basis on which the Court of Appeals is constituted and the judges thereof hold their office. They are all elected officials, and from and by different regions of the State, for limited terms, and are responsible to the people. The authority to the Chief Judge is controllable by rules and regulations which the Court of Appeals, i.e. judges of the court, may make, and, if abuses be indulged in, they are all responsible, and can expect to be held accountable.

Since the "Bond Amendment", there have cropped up, from time to time, suggestions to cloth the Chief Judge of the Court of Appeals with further additional and extraordinary powers; as an example, one

being to make it dependent on him, if and when there should be decreases or increases in judges of the seven local county circuits, or an increase up to a certain limit in those of the Court of Appeals, which was not regarded with favor. Trans. Md. St. Bar Ass'n, meeting, June 30, 1950, pp. 269 to 273, 275; meeting, January 27, 1951, pp. 32 to 48; meeting, June 22, 1951, pp. 168 to 200.

All such suggestions, vesting the Chief Judge of the Court of Appeals with powers beyond his normal functions as a member of the court, bring directly into operation the admonition of Chief Judge Dennis.

20. As to vacancy arising from creation of a new judgeship, previous to this amendment, see Reed v. McKeldin, Governor, 207 Md. 553.

21. Const. Amend. 1945 Ch. 703, rat. Nov. 5, 1946, further amended Section 5, by adding a special provision that an Associate Judge of the Supreme Bench of Baltimore City, designated to fill a vacancy in the office of Chief Judge thereof, might serve in that capacity during the remainder of his elected term as Associate Judge.

22. Act of 1957, Ch. 739, Sec. 60. Originally provided by Acts of 1943, Ch. 334, and Ch. 754.

23. Act of 1957, Ch. 739, Sec. 64.

24. Act of 1957, Ch. 739, Sec. 67.

25. Act of 1957, Ch. 739, Sec. 94(e). Originally provided by Act of 1941, Ch. 703.

26. The 1-2 year probationary period, for the purpose stated, is reasonable, but for a longer time would not be warranted. Maryland having firmly established its basic principle of an elected judiciary, the Court of Appeals, in Cantwell v. Owens, 14 Md. 227 (1859), speaking of appointments to fill vacancies arising among those on that basis, discharging functions of a judicial nature, said in its opinion:

> "They derive their powers originally from the people. When provision is made for filling vacancies in another mode, it results from the necessity of the case, and is allowed for convenience; the question being remitted to the people at the earliest practicable time."

27. In recent years, certain members of the legal profession, *i.e.*, of the judiciary and of the bar, and also certain elements of the press, have placed great emphasis on what they term the "sitting judge" theory. The extent to which that emphasis has been placed, if acceded to, would have the people continue in office wellnigh any judge once installed, whether by appointment or previous election, as a general

policy. The theory, within reasonable limits, is sound, and the people usually do retain incumbent judges, but it can be carried too far, and further than the people should permit. It could keep in office those who should not be so retained, and discourage those of superior qualifications.

28. Although at times such attitudes have been easily recognizable, at others they have been reflected in piecemeal features not calculated to attract attention. See Thomas Jefferson's views on the subject of the effect of such whittling process, if accomplished, in undermining the rights of the people. Note 31.

Chief Judge Samuel K. Dennis, of the Supreme Bench of Baltimore City, opposed a provision in the "Bond Plan", that the Governor's appointee, when he came up for election, should have the right to have his name go on the election ballot automatically, and to be unopposed unless the opposing candidate were nominated by a petition signed by a substantial number of voters. This proposal was a revival of a similar view of the majority of a greatly divided committee in 1924, which never reached the stage of any legislative consideration. "Report of Judiciary Commission, January, 1924." Also, 8 Md. Law Rev. 97 and 98. With respect to the provision in the "Bond Plan", Chief Judge Dennis' position was that its purpose was, in effect, to resurrect the repudiated appointive system in Maryland. He said:

> "The Bond Report does not quite solicit the full appointive power for the Governor. It does attempt to promote indirectly but in substance the like result by putting what was designed to be a back-breaking handicap upon candidates competing with the Governor's 1-2 year probationary appointee."

He then further emphasized his position that the plan, in effect, would put the judges on an appointive basis, ". . . the actual if not the completely expressed hope of the Commission, as the Report necessarily implies." The provision was rejected by the General Assembly. Daily Record, Feb. 15, 1943, p. 3, March 13, 1944, p. 3.

In 1957 an agitation arose, to have Maryland inaugurate some such system as the Missouri System, which according to a former President of the American Bar Association, from Missouri, was occasioned by unfortunate political conditions in that State. 1951 Trans. Md. St. Bar Ass'n pp. 43 and 236. Under that system a commission, a majority of whose members are judges and lawyers, submits a list of names to the Governor from which he must make judicial appointments. The appointee then is entitled to have his name go on the election ballot, with no opposition, and the people can only vote for or against him. They have no freedom to select those whom they might desire as their judges.

Despite the earlier statement of Chief Judge Carroll T. Bond, of the Court of Appeals, that Maryland had not experienced bad effects from the election of judges by the people — see Note 10 — and subsequent admission by the committee itself of no comparable conditions, a committee was appointed by the Maryland State Bar Association and recommended a modified form of that system, whereby commissions would be constituted in the State, respectively having the majority of their members composed of judges and lawyers, who would propose lists of names to the Governor from which he would have to make judicial appointments. There likewise would be no primaries and the appointees' names would automatically go on the election ballot. There could be opposition, but an opposing candidate was required to be nominated by a petition signed by not less than 1% of the registered voters entitled to vote in the election, and which number would have to include, at least 10% of the lawyers of the particular area where the election would be held. It was stated on behalf of the committee that it was felt that there could not be a provision that the judicial appointee, should run on his record, alone, *i.e.*, without opposition as in Missouri, because it was not believed that the Legislature would accept it. Among those who opposed the proposal was Judge Joseph Sherbow, formerly of the Supreme Bench of Baltimore City, and his following remarks reflect the reaction which it aroused, (p. 253):

> "And I would like to read to you from the opinion of Judge Delaplaine, in the case of Smith v. Higinbothom, President of the Bar Association of Baltimore City, published in the Daily Record, September 11, 1946. And not one of these words is mine.
>
> > 'In California, first State to adopt the new plan, the Judges of the Supreme Court and of the intermediate appellate courts are appointed by the Governor with the consent of a Commission composed of the Chief Justice or Acting Chief Justice, the Attorney General, and the Presiding Justice of one of the District Courts of Appeal. According to the American Judicature Society this system, which has been adopted by Missouri, has been a disappointment because it has not succeeded in removing politics from judicial selection.
> >
> > 28 Journal American Judicature Society, at p. 91."

Continuing his address just a little further on (p. 254):

> "Keep what you have, guard it well, but fight for it when the time comes in the elections, don't sit back supinely and then when you find that conditions have changed seek to uproot the whole system because the Bar did not make the kind of fight it had theretofore always made."

The proposal would, in effect, have taken away from the people their right to select their own judicial officials, and transferred that right, from a practical point of view, to one segment of the body politic, *i.e.*, the judges and lawyers.

In that connection it is pertinent to note, that in the Constitutional Convention of 1851, which repudiated the continuance of the appointive basis, and carried the right to select their judges direct to election by the people themselves, it was asserted by certain prominent members of the Convention — although it was apparent that they felt embarrassed by the presence as members of the Convention of a number of prominent members of the judiciary including judges of the Court of Appeals — that in the past there had been too close relations between certain influential lawyers, judges and appointing power.

The above referred to proposal never reached the General Assembly, because it was rejected by the Maryland State Bar Association. 1957 Trans. Md. St. Bar Ass'n, Jan. 26, pp. 42 to 62; June 21, pp. 235 to 264.

The instances cited, suffice to show how all such proposals are aimed at taking away the rights of the people.

29. While firmly maintaining its principles of government with respect to its judiciary, Maryland, in keeping with those principles, has also afforded its judges security in office so as to insure their independence. Its fifteen-year tenure is the longest judicial term tenure in the nation as to trial judges, and, with one exception, *i.e.*, Pennsylvania, the longest such tenure in the nation as to judges of the highest courts. As to salaries, the trial judges of only Illinois, Massachusetts, New Jersey, New York, Pennsylvania, Connecticut, Delaware and Rhode Island, exceed the trial judges of Maryland, and the judges of the highest courts in the first five of those states are the only ones who exceed the judges of Maryland's Court of Appeals. (This was as of the years 1950 and 1951. Since then there have been substantial increases in salaries of Maryland's judges.) The Courts Of Last Resort Of The Forty-Eight States: A Report to the conference of Chief Justices, by The Council Of State Governments, Sept. 1950, pp. 4-5, Table 5 between pp. 22 and 23. The Courts Of General Jurisdiction In The Forty-Eight States, a similar report by the same Council, Sept. 1951, pp. 35, 36 and 39. These reports are cited because they are the most recent of their kind in the Pratt Library, of Baltimore City.

30. Recently, despite the previous adverse experience of the State, there have been suggestions that the age limitation be abolished or relaxed. These suggestions usually are based on a citation of instances where federal judges have been able to continue favorably beyond the seventy year age, or else they have been used as an argument to enable

judges to continue after that time on full salary. One of the arguments advanced is that, conceding that it would be unwise as a general policy, a provision could be made to have the Chief Judge of the Court of Appeals determine which judges and when to call back to the bench after the age limitation has been reached. This is all, however, in utter disregard of Maryland's conception of the basis on which it wants to maintain its judiciary as totally differing from that of the federal system, and could lead to a gradual breakdown of that difference. As to vesting any member of the judiciary with any such authority, Thomas Jefferson's view of the undesirable condition inherent in clothing the judiciary with authority to perpetuate itself is pertinent. See his letters to John Taylor, May 28, 1816 and Samuel Kercheval, July 12, 1816. Note 31.

31. The history of Maryland's judiciary conclusively shows, that from both points of view, *i.e.*, safeguarding the independence of and maintaining proper personnel of the judiciary, and eliminating those of its members guilty of abuses, the people can be relied on, even in the most extreme circumstances, if conditions be properly presented to them. See accounts of the new judgeship fight in Baltimore City (1882). The Story Of Maryland Politics, Chap. XI, p. 104, by Frank R. Kent, 1911. The Sun Papers Of Baltimore, Chap. VII, p. 142, by Gerald W. Johnson, Frank R. Kent, H. L. Mencken and Hamilton Owens, 1937, written from the point of view of presenting the Sun Papers' position in that and certain other contests.

In contrast is to be noted the widespread grave anxiety over the course of development of the entrenched federal court, which, created as one of the three co-ordinate branches of the federal government, and on a contemplated basis of different state and federal functions, has, going beyond the sphere of a court so created, by ever expanding assertions of overreaching authority, in the respects in which it has gone beyond that sphere, in effect, undertaken to constitute itself a super all powerful government in the nation and in the states.

Thomas Jefferson was thoroughly opposed to what he clearly considered to be the oligarchical and autocratic development of the entrenched federal court, holding office for life, and accountable to no authority. Impeachment he regarded as no safeguard, his position being that actual experience had shown it to be impractical and unavailable, emphasizing that in America, going even beyond the provision for a majority of each House of Parliament obtaining in England, the stipulation is two-thirds.

It is not possible here to present his many statements of that position, but they are reflected in the following brief quotations and references from The Writings of Thomas Jefferson, edited by Andrew A. Lipscomb and Albert Ellery Bergh, 1903, as are also the accompanying

citations, except one noted as coming from the edition of Paul Leicester Ford, 1899.

> "We already see the power, installed for life, responsible to no authority, (for impeachment is not even a scarecrow,) advancing with a noiseless and steady pace to the great object of consolidation. The foundations are already deeply laid by their decisions, for the annihilation of constitutional State rights, and the removal of every check, every counterpoise to the ingulfing power of which themselves are to make a sovereign part."

Letter to William T. Barry, July 2, 1822, Vol. XV, 388-390, at 388-389.

> "But it is not by the consolidation, or concentration of powers, but by their distribution, that good government is effected."

Protests, ". . . one of the great coordinate branches of government, setting itself in opposition to the other two, . . ."

Asserts, the necessity to restrain it from undertaking to exercise legislative powers: furthermore, his general repudiation of its encroachments on the other two coordinate branches.

Autobiography, Vol. 1, 120-122, at 122.

Letter to William B. Giles, April 20, 1807, Vol. XI, 190-191, at 191.

Letter to Edward Livingston, March 25, 1825, Vol. XVI, 113-114, at 113.

Letter to Caesar A. Rodney, September 25, 1810, Vol. XII, 425.

Letter to Judge Spencer Roane, September 6, 1819, Vol. XV, 212-215.

Declares his opposition to life tenure, approval of limited term tenure, and the salutary effect of having members of the judiciary come up for retention or rejection periodically.

Letter to Samuel Kercheval, July 12, 1816, Vol. XV, 34, 36-37, 39.

Letter to James Pleasants, December 26, 1821, Vol. X (Ford Edition), 198-199.

Letter to Monsieur A. Coray, October 31, 1823, Vol. XV, 486-487.

> "That there should be public functionaries independent of the nation, whatever may be their demerit, is a solecism in a republic of the first order of absurdity and inconsistency."

In similar vein: ". . . in a government founded on public will, this principle operates in an opposite direction, and is against that will."

Barry letter, supra, at 389-390.

Kercheval letter, supra, at 34.

Letter to Thomas Ritchie, December 25, 1820, Vol. XV, 297-298, at 298.

On this general subject further see letters to Judge Spencer Roane, March 9, 1821, Vol. XV, 326, and Charles Hammond, August 18, 1821, Vol. XV, 331-332.

Also see the report of the Committee on Federal-State Relationships as affected by Judicial Decisions, to the Conference of Chief Justices of the State Courts at Pasadena, California, August 20, 1958, approved and adopted by that Conference, of which Committee Chief Judge Frederick W. Brune of the Court of Appeals of Maryland, attending the Conference as the representative of that Court, was Chairman and presented the report. The Committee's findings, in protesting the course undertaken by the federal court as to, state and federal constitutional division of functions, and as to what in reality amounts to legislating, contain the following statements:

> "We are not alone in our view that the Court in many cases arising under the Fourteenth Amendment, has assumed what seem to us primarily legislative powers. See Judge Learned Hand on the Bill of Rights. We do not believe that either the framers of the original Constitution or possibly somewhat less gifted draftsmen of the Fourteenth Amendment ever contemplated that the Supreme Court would, or should, have the almost unlimited policy-making powers which it now exercises."
>
> "It is strange, indeed, to reflect that, under a Constitution which provides for a system of checks and balances and of distribution of power between national and state governments, one branch of one government — the Supreme Court — should attain the immense, and in many respects, dominant power which it now wields."

Further:

> "We believe that the great principle of distribution of powers among the various branches of government and between the levels of government has vitality today and is the crucial base of our democracy."

Again:

> "It has been an American boast that we have a government of laws and not of men. We believe that any study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of that boast."
>
> United States News and World Report, August 29, 1958, pp. 63 and 64.

32. Since it became a state, Maryland has had the following numbers of judges of its Court of Appeals, at different times; not taking into consideration holdover additional membership during the short adjustment period following adoption of the "Bond Amendment".

2	Years —	none —	1776-1778
9	"	3	1792-1801
21	"	4	1784-1792, 1851-1864
28	"	5	1778-1784, 1801-1806, 1864-1867, 1944-1958
45	"	6	1806-1851
77	"	8	1867-1944

Accordingly an odd number 37 years, and an even number 145 years.

33. Address of Chief Judge Carroll T. Bond, of the Court of Appeals; Trans. Md. St. Bar Ass'n, June 26, 1942, pp. 214, 215, 216.

34. A former member of the judiciary, after his retirement, who is now deceased, in speaking of the eminence at the Maryland Bar and the astounding capacity of John Prentiss Poe, without undertaking to cover many of his offices and activities, cited the following features of his career. That he:

> was engaged in an active and varied practice, both office and trial, which in itself was sufficient to tax the ability and take up the time of any lawyer in the practice of his profession; the range of that practice being indicated by his appearance, as attorney, in litigations in the Court of Appeals in every volume, but one, of the Maryland Reports from 13 Md. previous to 112 Md., or almost 100 Volumes;
>
> was Attorney General of Maryland, City Counsellor of Baltimore City, and a member and the leader of the Maryland Senate;
>
> wrote his "Pleading And Practice" in 1880, which immediately became and continued to be the revered authority on those subjects in Maryland, and which he carried through three subsequent revisions in 1884, 1897 and 1906 respectively (it being carried through

a fourth revision in 1925, after his death in 1909, by Herbert T. Tiffany);

codified the Public General Laws of Maryland, 1888, and their 1898 Supplement, recodified them in 1903, and, because the bulk of that edition was destroyed in the Baltimore fire of 1904, again recodified them including the laws of that year;

codified the Public Local Laws of Maryland, 1888; having codified the 1885 Supplement to the existing Baltimore City Code, thereafter codified the Public Local Laws of Baltimore City, 1890, and the Baltimore City Code of 1893;

was one of the Regents of the University of Maryland, and Dean of the Faculty of its Law School, and a Professor of Law and regularly lectured there;

was President of the Maryland State Bar Association and also of the Baltimore City Bar Association;

was one of the leaders of and the counsel for the Democratic Party of Maryland, drafted its sponsored constitutional amendments and laws and party platforms, and, when occasion arose, was its representative in important proceedings of National Conventions, and he and his likewise eminent contemporary Bernard Carter (both featured in "Seven Great Baltimore Lawyers", by William Cabell Bruce, 1931) were its powerful champions in upholding its cause and presenting its positions to the public;

and with it all had the responsibilities of a large family.

35. These statements are to the effect that the 1908 Committee on Laws of the Maryland State Bar Association, in its report to the Association at its annual July meeting of that year, recommended that the membership of the Court of Appeals be reduced from eight to five. 6 Md. L. Rev. 120, 8 Md. L. Rev. 96: 1942 Trans. Md. St. Bar Ass'n, 216, 222, 223; 1943 Trans. Md. St. Bar Ass'n, 4; 1957 Trans. Md. St. Bar Ass'n, 278.

The Bar Library, of Baltimore, and the Pratt Library, both advise that they have no copy of that report, apart from that which is contained in the 1908 Trans. Md. St. Bar Ass'n. That volume does set forth the report, which recommended certain changes as to the Court of Appeals, but not as to any reduction in its members. Moreover, later, representatives of the Committee said that on the morning of the meeting when action was to be taken, all of the members of the committee had met and decided to recommend that the portions of the report not previously acted on, which included the portion relative to the Court of Appeals, be not acted on at that meeting, but be referred to the new

Committee on Laws for its consideration and report at the next annual meeting of the Association, and it was so referred. The new committee, in its report at the 1909 July annual meeting, stated that it had carefully considered the matter, and had no recommendation to make in reference to it. Therefore, it asked to be dismissed from its further consideration, which accordingly, apparently without opposition, the meeting did.

1908 Trans. Md. St. Bar Ass'n, 62, 109, 110, 111, 115, 122, 178; 1909 Trans. Md. St. Bar Ass'n, 57, 58, 359.

36. Report of Judiciary Commission, January, 1924. This report, at page 8, said that the majority recommendation to reduce the membership of the Court of Appeals from 8 to 5 was new. As to the majority recommendations not receiving any legislative consideration, see 8 Md. L. Rev., 98.

37. For the original five membership proposal, the proposal as changed by the committee of the Bar Association to six in an attempt to reduce opposition, and the failure to receive the General Assembly authorization, see 1941 Trans., Md. St. Bar Ass'n, 18-22, 29, 63, 64, 81, 82, 83-87, 142; the interim "Report Of The Committee On Reorganization Of The Court of Appeals", February 26, 1941.

38. 1943 Trans., Md. St. Bar Ass'n, 7, 17; 1951 Trans., Md. St. Bar Ass'n, 35.

39. For the original, "Bond Plan", see 1943 Trans. Md. St. Bar Ass'n, 3-14, 15-29, 110-111. For the portion authorized by the General Assembly, as changed by it, which became the "Bond Amendment", see Act of 1943, Ch. 772, rat. Nov. 7, 1944.

Chief Judge Carroll T. Bond, of the Court of Appeals, was in favor of a five membership court, with the members free of any local circuit court obligations. On that basis, in view of the then case load of the court, he was of the opinion that the five members would be sufficient. 1941 Trans. Md. St. Bar Ass'n, 25, 26. For other views to that effect, see the same Trans., 18 and 6 Md. Law Rev. 143, 144; the same Bar Ass'n's 1942 Trans., 224, 247; 8 Md. Law Rev. 111, 112.

Chief Judge Samuel K. Dennis, of the Supreme Bench of Baltimore City, said, with respect to the reduction in the membership of the Court of Appeals:

> "A Court of Appeals of five men is not equal to the task, especially if the Chief Judge is partially preoccupied with fresh administrative duties."

His further position was, that the members of that court should engage in only such local circuit court activities, if any, as they felt they could without interferring with their duties on the Court of Appeals; moreover, that, if on that basis the court became overworked, the membership should be increased to nine, with the additional judge coming from Baltimore City. As to the local courts, he had previously taken the position that Baltimore City was, under the then conditions, over-supplied with judges, but he stated that if, as suggested, further duties were to be visited on them, he was opposed to any reduction in their number. As to the county judges, he was opposed to any drastic reduction of them. As to the judicial structure of the State, his position was likewise, his approach being that it was against the trend of the State's conditions.

Daily Record, February 15, 1943, p. 3, March 13, 1944, p. 3.

Judges F. Neal Parke and Hammond Urner had recently retired from the Court of Appeals, and had been appointed members of the "Bond Commission." Judge Parke was not in favor of a reduction in membership, and predicted that the case load of the court would increase. He dissented from the Commission's reports, and his objections are attached to them as referenced in this note. See also 1942 Trans. Md. St. Bar Ass'n, 230. Judge Urner had previouly stated that he had been unable to decide whether the number of judges should be five or seven, but that he would defer to Chief Judge Bond's view, 1941 Trans. Md. St. Bar Ass'n, 28. He therefore did not offer any objection as to the number as recommended by the Commission.

40. It is pertinent to note that, in its earlier interim report to the 1958 mid-winter meeting of the State Bar Association, the previously mentioned committee of the Association stated that it had intended to recommend an increase in the membership of the Court from five to seven with the stipulation that only five judges sit at a time, and refrained from doing so because the present members of the court prefer five to seven judges. (Int. Rep. p. 18). However, the Committee, in the course of discussing a possible increase of the judges from five to seven, while taking note of the argument that it would make a more cumbersome court, made the following comments. It made the statement, already quoted in this review, about the highest courts of twenty-one states being composed of seven judges. It stated further that of the twelve judges who had served on the Court of Appeals since the "Bond Amendment" became effective, the views of two had not been obtained, and the remaining ten had divided, four in favor of a seven rather than a five member court, and six taking the opposite view. In analyzing this difference of views it commented: "It should also be observed that three of the judges who favored the

proposal had served successively on a court of eight, seven, six and five members, and the other on a court of eight, seven and six members and that one of those opposed had served successively on a court of eight, seven, six and five, one had served on a court of seven, six and five, and the other four had served only on a five man court. Three of the five judges who had served on both a seven and a five man court favor a seven man court, and the other two favor a five man court." (Int. Rep. pp. 16 and 17.)

Furthermore, it stated that an increase in the number of judges from five to seven with the requirement that only five sit at a time, would clearly help to relieve the present burden on the judges. In explanation it said:

> "This proposal would reduce by nearly one-third the number of opinions per judge without increasing the time expended in conference and in circulating opinions. It would leave two judges free to work on opinions while the other five were hearing arguments, thus giving each judge two or three days per month additional time for opinions and yet continuity in personnel of the court would still be maintained." (Int. Rep. pp. 18 and 19.)

By the reference to continuity of the court, the committee meant to distinguish this remedy from a proposal to have a larger court than seven functioning in separate panels which the committee disapproved. The committee did not feel that, from a practical point of view, there should be any difficulty as to continuity in a court of seven with the requirement that only five sit at a time. (Int. Rep. p. 18.)

41. The Court Of Appeals Of Maryland, A Five Year Case Study, by Herbert M. Brune, Jr. and John S. Strahorn, Jr., 4 Md. L. Rev. 350, 351, 366.

42. An article published in the Daily Record, May 25, 1942, p. 4, cited the following facts: that, subsequent to the annexation of territory by Baltimore City in 1918, the City's percentage of the State's total population had thus declined between 1920 and 1940, i.e., it was in 1920 — 50.6%, in 1930 — 49.3%, in 1940 — 47.2%; also, that between 1910 and 1940 Baltimore City's percentage increase of its own population was 54%, and the similar percentage increases in certain counties, being the ones in which such largest county increases had occurred, were as follows: Baltimore County 27%, which did not accurately reflect the growth of that county percentagewise because of the territory withdrawn from it and added to Baltimore City by the 1918 annexation Act; Anne Arundel County 74%; Prince George's County 150%; Montgomery County 162%.

43. 1867 Const., Art. XIII, Sec. 1. See also 1864 Const., Art. X, Sec. 1.

44. Wright v. Hamner, 5 Md. 370, 376, State of Maryland v. Shillinger, 6 Md. 449, 451, Mayor and City Council of Baltimore v. State ex rel. of Board of Police, 15 Md. 491, Baltimore City v. Gorter, 93 Md. 6, Pressman v. D'Alesandro, Mayor of Baltimore City, et al., 211 Md. 57. Maryland Rules — 5, h.

45. Daily v. Morgan, 69 Md. 460, 464-466. McGraw v. Merryman, 133 Md. 247, 249-261, in which case the court implied that it did not agree with the previous ruling but felt bound by it.

46. The following are certain laws in that connection:

1729, Ch. 12 (July), 1732, Ch. 14 (July), 1745, Ch. 9 (August), 1747, Ch. 21 (May), 1750, Ch. 11 (May), 1753, Ch. 20 (October), 1765, Ch. 2 (November), 1766, Ch. 22 (November, as altered by 1768, Ch. 22, 1770, Ch. 7, 1779, Ch. 20), 1773, Ch. 4 (June), 1773, Ch. 21 (November), 1781, Ch. 24 (November), 1782, Ch. 2 (April), 1782, Ch. 8 (November, see also 1805, Ch. 42 November), 1796, Ch. 68 (November), 1797, Ch. 54 (November); Baltimore City Ordinances, February, 1799, pp. 24-26, printed by Thomas Dobbin; 1816, Ch. 209, 1888, Ch. 98, 1918, Ch. 82.

47. Const. Amend., Act of 1947, Ch. 618, rat. November 2, 1948.

48. The statements as to manufacturers operations, retail trade and building permits, are based on information obtained at the office of the Maryland State Planning Commission. As to manufacturers operations the information is based on that Commission's "News Letter, September 1956", Vol. 9, No. 9, and it is as to Value Added By Manufacturers. That office advises that the reports on which the News Letter is based, only come out every seven years. Therefore, the years, 1947 and 1954, are given. As to retail trade the information supplied by the above mentioned office, is based on "Bulletin R-1-20, Retail Trade, Maryland", "1954 Census of Business", published by the United States Department of Commerce, Bureau Of The Census, Washington, 1956. That publication says that there cannot be an accurate comparison between the 1948 and 1954 figures because there are slight variations between the bases on which they were compiled. Therefore, the percentage computations supplied by the writer of this review, must be understood with that reservation. The office of the Planning Commission advises, that such reports only come out periodically, and that this is the latest available for the specific purpose. The statement as to building permits is founded on information, which is not complete as to certain counties, but supplying sufficient data to justify the statement.

49. 1957, Trans., Md. St. Bar Ass'n, p. 280. These figures as to lawyers are probably approximate. Furthermore, it has been noted that many lawyers in Baltimore City do not actually practice law. 4 Md. L. Rev. 154, 155.

50. See notes 37 and 39 for the citations for the 1941, and "Bond Plan", proposals.

51. See note 28 and the paragraph of this review to which it applies.

52. See position of Chief Judge Samuel K. Dennis, of the Supreme Bench of Baltimore City, in note 19.

53. Trans. Md. St. Bar Ass'n, June 26, 1943, p. 176.

54. Trans. Md. St. Bar Ass'n, June 26, 1942, p. 219.

55. In some of the states which have installed the intermediate appellate court system, the number of judges of that system has run up as high as 33. See the Report Of Committee To Study Case Load Of The Court Of Appeals, Annex E, October 22, 1958.

56. The Virginia lawyers have found their system of review satisfactory. See page 6 of the Report cited in Note 55.

57. 1867 Const., Art. IV, Sec. 22, makes certain provisions for a court in banc in the county circuits, but they are very inadequate, and in effect, by compelling a litigant, who might contemplate resorting to the court in banc, to choose between the court in banc and the Court of Appeals, channel cases to the latter court. Sec. 33 of that Article also makes certain provisions for court in banc operations by the Supreme Bench of Baltimore City, but they have not been practical, and were made further impractical by the Act of 1870, Ch. 177, enacted under Section 39 of the same Article empowering the General Assembly to make changes in the jurisdiction of the Baltimore City courts. Consequently, to have successful courts in banc in Maryland, it would be necessary to make proper and adequate provisions therefor. Although Section 39 above mentioned gives authority to the General Assembly to make changes, as already stated, in Baltimore City, and Section 22 of the Constitution states that it is "subject to such provisions as may hereafter be made by law", it may be that adequate provisions would call for a constitutional amendment, which question, due to pressure of time, has not received the necessary investigation in connection with this review.

The present broad rule-making power of the Court of Appeals, and its power to assign judges, would go a long way toward insuring the successful operation of the courts in banc.

58. As to changes in the early courts and the county courts bringing court proceedings closer to the people, see The Court Of Appeals Of Maryland, pp. 58 to 62, 87 to 97, by Chief Judge Carroll T. Bond, 1928.

59. 1951 Trans., Md. St. Bar Ass'n, January 27, pp. 35, 36, 44, 45, 48; 1951 Trans., same Ass'n, June 27, pp. 186, 187, 195, 198 to 200, and 208.

60. 1867 Const., Art. IV, Sec's 18 and 18A, confer on the Court of Appeals the power to make rules and regulations. The latter section, in conferring on the Chief Judge the power to assign judges, specifically provides that such power is to be subject to the rules and regulations which the Court may make. The power proposed in this instance should be brought into line with the other two. The office of Chief Judge should not be clothed with independent powers over the other members of the Court of Appeals, or indeed over the judges generally of the State. It might have very detrimental consequences. To guard against any erroneous impression on the part of readers, it is simply stated that the present Chief Judge and the writer of this review are old friends, and there could be no reflection intended. The remarks refer to the office held from time to time by numerous persons. As previously noted, in 1950-51, a suggestion was made to the State Bar Association that the office of Chief Judge be, in effect, given control over an increase in the membership of the Court of Appeals, and certain increases and decreases in the membership of the local courts. While intending no reflection on the then Chief Judge, the suggestion was vigorously opposed and was rejected. 1950 Trans., Md. St. Bar Ass'n, June 22, pp. 269 to 275; 1951 Trans., same Ass'n, January 27, pp. 32 to 48; 1951 Trans., same Ass'n, June 22, pp. 168, 187, 191, 208.

At the time of the enactment of the "Bond Amendment", the ground on which the prominent member of the judiciary whom the proponents of that amendment selected as their spokesman, justified vesting in the Chief Judge the powers specified therein, was that they were subject to the control of the other members of the Court of Appeals. 8, Md. L. Rev. 17 and 19.

TABLE I.

	1930	1940	1950	July 1, 1958	Percentage Change from April 1, 1950 to July 1, 1958
Garrett	19,908	21,981	21,259	19,000	—6.3
Allegany	79,098	86,973	89,556	83,000	—7.3
Washington	65,882	68,838	78,886	87,500	10.9
Frederick	54,440	57,312	62,287	69,500	11.6
Montgomery	49,206	83,912	164,401	291,000	77.0
Carroll	35,978	39,054	44,907	54,500	21.4
Howard	16,169	17,175	23,119	30,500	31.9
	320,681	375,245	484,415	635,000	
Harford	31,603	35,060	51,782	67,000	29.4
Baltimore	124,565	155,825	270,273	444,000	64.3
Prince George's	60,095	89,490	194,182	335,000	72.5
Anne Arundel	55,167	68,375	117,392	188,000	60.1
Charles	16,166	17,612	23,415	30,000	28.1
Calvert	9,528	10,484	12,100	15,000	24.0
St. Mary's	15,189	14,626	29,111	39,000	34.0
	312,313	391,472	698,255	1,118,000	
Baltimore City	804,874	859,100	949,708	984,000	3.6
Cecil	25,827	26,407	33,356	48,000	43.9
Kent	14,242	13,465	13,677	15,500	13.3
Queen Anne's	14,571	14,476	14,579	15,200	4.3
Talbot	18,583	18,784	19,428	20,500	5.5
Caroline	17,387	17,549	18,234	18,800	3.1
Dorchester	26,813	28,006	27,815	28,800	3.5
Wicomico	31,229	34,530	39,641	48,500	22.3
Somerset	23,382	20,965	20,745	19,500	—6.0
Worcester	21,624	21,245	23,148	25,000	8.0
	193,658	195,427	210,623	239,800	

NOTE: The 1930, 1940 and 1950 figures are as of April 1, and from the National Censuses. The July 1, 1958 figures and the percentage changes are estimates by the Maryland State Department Of Health, Division of Vital Records and Statistics, in its release of August 18, 1958.

The groupings and totals are by the author of this review.

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Baltimore	124,565	155,825	270,273	444,000	64.3
	156,168	190,885	322,055	511,000	
Prince George's	60,095	89,490	194,182	335,000	72.5
Anne Arundel	55,167	68,375	117,392	188,000	60.1
Charles	16,166	17,612	23,415	30,000	28.1
Calvert	9,528	10,484	12,100	15,000	24.0
St. Mary's	15,189	14,626	29,111	39,000	34.0
	156,145	200,587	376,200	607,000	
Baltimore City	804,874	859,100	949,708	984,000	3.6
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Montgomery	49,206	83,912	164,401	291,000	77.0
	268,534	319,016	416,389	550,000	
Prince George's	60,095	89,490	194,182	335,000	72.5
Charles	16,166	17,612	23,415	30,000	28.1
Calvert	9,528	10,484	12,100	15,000	24.0
St. Mary's	15,189	14,626	29,111	39,000	34.0
	100,978	132,212	258,808	419,000	
Anne Arundel	55,167	68,375	117,392	188,000	60.1
Howard	16,169	17,175	23,119	30,500	31.9
Carroll	35,978	39,054	44,907	54,500	21.4
	107,314	124,604	185,418	273,000	
Baltimore City	804,874	859,100	949,708	984,000	3.6
Baltimore	124,565	155,825	270,273	444,000	64.3
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