ADVANCE SHEET– SEPTEMBER 18, 2020

Bar Library Membership: Now More Than Ever

Dear Members and Members To Be,

Perhaps at no time since the founding of the Library in 1840 has a Bar Library membership carried with it the significance that it does this year.

As a result of the current pandemic, all of us have had to make adjustments to the manner in which we do things, as old methods of thought and action have been cut off from us. The Library is no exception. Although we were closed to in person usage for a number of months, thanks to the leadership and actions of Chief and Administrative Judge Carrion, the Library was able to provide our members with material they literally could not get anywhere else, through utilization of e-mail and curbside pick-up. We were one of the few, perhaps the only, law library not to have ceased operations even for a day. If you, like many others are still hesitant to venture forward, we continue to use these methods to deliver material to our members. Although we like having you here, as they say on those school raffle tickets "need not be present to win," or as in our case, to get what you need.

Although nothing can compare to the loss of human life, the economic impact of what has transpired over the past months has been devastating. The legal profession has not been immune from what has transpired.

For many years I have spoken of the economic soundness of a Bar Library membership. This has never been truer than it is today. All of us are trying to find ways to cut expenses, to make up for a diminution of income. For $250.00, the cost of a Bar Library membership, your need to purchase anything in the way of legal materials has been significantly reduced or even eliminated. The Bar Library's collections circulate. Everything from the Maryland Code to a particular treatise can be borrowed and used in your office, or, even taken to court. Our collection of Westlaw databases is extensive. If you want to maintain a basic subscription in your office and then rely upon the Library for more thorough online research, the savings to you would be substantial. Access to our databases, while in the Library, through use of the Library's wi-fi, could be effectuated through your own laptops, allowing you to cut and paste material into

whatever file you might want to designate. It is all Free and it is Unlimited. If you cannot make it to the Library call or e-mail us your search, or whatever material you might want, and we will e-mail it to you.

While other law libraries around the state continue to downsize, the Library has maintained and expanded its collections and moves forward. Founded by the bar, for the bar, the Library continues to perform a vital role for those who would not have access to such a collection anywhere else.

For yourself, for others, I ask that you continue your membership with the Library, and that if you are not a member, to think about becoming one. A non-profit company, the Library was organized and has existed for the past 180 years for the sole purpose of meeting the informational needs of its members.

Be well, take care and we hope to see you soon.

Joseph W. Bennett

President's Letter

In this issue we include, in addition to our usual recurring features, two unconnected publications. The first is our board member John Connolly's definitive article on "Habeas Corpus in Maryland," illuminated by his experience as counsel for one of the Guantanamo detainees. The article is reprinted from the Library's 2017 monograph, *The Maryland Constitution at 150: a Symposium and Appraisal*. The second publication is a symposium on Maryland transportation policy conducted nearly twenty years ago which has not lost its pertinence. While there are now contactless toll gates and some use of time-of-day pricing, this is one area of policy where the technology is still far ahead of the politics.

George W. Liebmann

Advertising Opportunities

The Bar Library would like to first and foremost express its appreciation to the companies that have supported the Library and its efforts through the placement of advertisements in the *Advance Sheet*. Second, however we would like to advance the possibility to you of placing your own ad. With over 12,500 contacts and growing, consisting primarily of members of the Maryland Bar, and an average open rate for the *Advance Sheet* of twenty per cent, which is approximately twice the national average, the chance to have others hear what you have to say is quite good. If, say for example, you would like to have other members of the Bar know your specialty, or other facts of relevance, think about running an advertisement with us.

With social gatherings and bar functions on hold, normal avenues for seeking potential business closed, an ad in the *Advance Shee*t could be an easy, affordable and effective method of communicating what you have to say. If you would like to know more give me a call at 410-727-0280 or send an e-mail to jwbennett@barlib.org.

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Habeas Corpus in Maryland

by John J. Connolly[*]

The General Assembly shall pass no Law suspending the privilege of the Writ of Habeas Corpus.

— Maryland Constitution (1867) art. III, § 55.

On July 4, 1861, with the winds of rebellion circling Washington D.C., President Lincoln defended his suspension of the writ of habeas corpus in a long speech to Congress. "Are all the laws *but one* to go unexecuted, and the Government itself go to pieces lest that one be violated?"[1] On September 18, 1867, the people of Maryland responded: yes.

On that date Maryland ratified its fourth and present state constitution. The previous three did not treat habeas corpus as a constitutional right. By contrast, since 1789 the United States Constitution had preserved a federal right of habeas corpus through the Suspension Clause – a right so significant that some framers believed it obviated the need for a bill of rights. The so-called Great Writ was deemed flexible enough to rectify virtually any unlawful encroachment on liberty.[2] Yet even the federal framers permitted suspension of habeas corpus "when in cases of rebellion or invasion the public safety may require it."[3]

The comparable provision of the present Maryland Constitution has no exception. Section 55 of Article III provides simply that "the General Assembly shall pass no Law suspending the privilege of the Writ of *Habeas Corpus*." On its face that clause means no suspension of the writ during rebellion, invasion, riot, natural disaster, public health emergency, quarantine, or anything else. Nor may the governor or a judge or an administrative official do what the General Assembly cannot, for in Maryland "no power of suspending Laws or the execution of Laws, unless by, or derived from the Legislature, ought to be exercised, or allowed."[4]

The convention delegates never explained their unconditional ban on the suspension of habeas, but it never seemed like a difficult question given the political climate in post-war Maryland. By and large the men who wrote the 1867 Constitution bore a massive grudge against the federal government for imprisoning many Marylanders, including some of them, without permitting review by habeas corpus. This is the short and simple answer as to why Maryland exalts the writ of habeas corpus. The long answer, provided by this article, explores the evolution and significance of habeas corpus throughout Maryland's history, and what that history means for the legal status of the writ today.

I. HABEAS IN PRAETERITUM

A. Provincial Maryland (1632 to 1773)

A peculiarity of the legal profession is that the study of its history is often consequential rather than academic. A modern doctor treating a febrile patient has zero interest in what a

[*] The author thanks M. Abbott Bolte and William K. Meyer for helpful comments. All errors are the author's.

[1] Abraham Lincoln, Message to Special Session of Congress (July 4, 1861) (available at http://www.presidency.ucsb.edu/ws/?pid=69802).

[2] See Federalist No. 84 (Hamilton).

[3] U.S. Const. art. I, § 9, cl. 2.

[4] Md. Const., Decl. Rts. art. 9.

forebear would have done in 1789. An analogous question for a lawyer can make all the difference, at least in certain areas, including in particular the scope and effect of habeas corpus. The Supreme Court has held that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'"[5]

This has prompted a lot of swimming in the murky waters of common law habeas corpus.[6] Because federal courts had little use for habeas before the Civil War, the focus has often been on habeas in state and provincial courts, as well as the courts of England. These studies are complicated by the manifold forms of habeas corpus at common law, whose boundaries sometimes overlapped or disintegrated as the writ evolved. In general, the form of the common-law writ of most interest today is *habeas corpus ad subjiciendum*, which was directed to one person (such as a jailer) who had custody of another (such as a prisoner). The prisoner petitions a judge for a writ of habeas corpus. If the petition meets minimal standards, the judge issues the writ, which is simply an order to the jailer. The order requires the jailer to make a "return" – literally to return the writ to the court at a specified date and time, along with the body of the prisoner and an explanation of the grounds for detention. The judge reads the return and may or may not hear further explanation from the parties; these procedures varied and evolved over time. At the end of the hearing the judge issues one of three orders with respect to the body of the prisoner: discharge (release); remand (back to jail); or bail (release with conditions). A failure to make the return could bring punitive measures against the jailer. The procedure was designed to be rapid and nontechnical. The jailer did not even need a new piece of paper; the explanation for custody was often written on the back of the writ and tendered to the judge as the return.

Although this use of habeas is widely understood in the United States as the fundamental judicial restraint against arbitrary executive detention, the common-law basis for that principle is somewhat clouded by the English system, in which the writ theoretically issued for the king's benefit. As Sir William Blackstone explained, "the king is at all times entitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted."[7] Certain forms of the writ are more consistent with this principle than others, and perhaps for that reason they were much more common in provincial Maryland.

The Province of Maryland probably acquired whatever right to habeas corpus was embedded in the Magna Carta and thereafter developed through the English common law or the Habeas Corpus Act of 1679.[8] Certainly some forms of the writ were in frequent use in Maryland's provincial courts. Versions of the writ were used to transfer a prisoner confined by one court's process to face new allegations in a superior court; or to transfer a prisoner to face execution on a judgment; or to transfer a prisoner to provide testimony.[9] These appear to be the most common uses of the writ in Maryland's provincial courts.

The writ of *habeas corpus cum causa* (or sometimes *cum causa detentionis*) allowed a defendant in an inferior court "to remove the action into a superior court, commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer … to do and receive whatever the king's court shall consider in that

[5] INS v. St. Cyr, 533 U.S. 289, 301 (2001) (quoting Felker v. Turpin, 518 U.S. 651, 663-64 (1996)).

[6] See, e.g., Boumediene v. Bush, 553 U.S. 723, 746-52 (2008).

[7] III William Blackstone, Commentaries on the Laws of England 131 (1768) (footnotes omitted).

[8] See Charles A. Rees, Remarkable Evolution: The Early Constitutional History of Maryland, 36 U. Balt. L. Rev. 217, 226-27 (2007).

[9] See Ex parte Bollman, 8 U.S. (4 Cranch) 75, 96-99 (1807).

behalf."[10] Scholars have suggested that this is the form that evolved into the Great Writ that became a universal restraint on arbitrary detention.[11] In provincial Maryland, the writ *cum causa* "meant, in effect, that the cause would be tried" in the superior court in the first instance,[12] and therefore as a practical matter a case proceeding on what was effectively an interlocutory appeal through a writ *cum causa* could be hard to distinguish from a case proceeding on original jurisdiction through a writ *ad subjiciendum*.

Archival reports indicate that the provincial government of Maryland recognized habeas corpus as a remedy against unlawful incarceration, although which tribunal or government official could issue the writ, and whether the court had issued a writ *ad subjiciendum* or *cum causa*, was not always clear. A reported decision of the Provincial Court in 1692 made clear that the writ *cum causa* had force. The petitioner argued that the County Court of Anne Arundel had continued hearing a case after the Provincial Court issued a writ of habeas corpus *cum causa*. The Provincial Court ordered the judges of the County Court "be summoned to appear before this Court at the next term to answer their contempt in disobeying their Majesties' said writ of *Habeas Corpus* to them directed."[13]

In 1707, in a case that may have involved multiple forms of the writ, Thomas Macnemara was held in contempt of a decree of the provincial High Court of Chancery requiring him to "deliver his wife certain Necessarys and pay her 15 ls p annum by half yearly payments untill they should agree to Cohabitt."[14] Mr. Macnemara, held in custody by the Serjeant at Arms, apparently petitioned for a writ of habeas corpus with a common law court, which admitted him to bail. The Provincial Court reviewed the decision and unanimously decided that the bailing of Mr. Macnemara was "Extrajudiciall and illegall," apparently on the ground that the Habeas Corpus Act of 1679 only permitted release in criminal cases, and that a single common law judge had no authority to issue a writ of habeas corpus releasing a person held in contempt of decrees of a high court of chancery.[15] The arguments of the parties made clear that common law judges had authority to issue writs of habeas corpus in the province in other circumstances.

A 1768 case shows the difficulty of distinguishing between forms of the writ. A "Languishing Prisoner in [a] Charles County" jail named John Doncastle filed a petition with "the Honourable the Lower House of Assembly of the Province of Maryland."[16] A fellow prisoner filed a similar petition. The petitions set forth a tale of woeful conditions at a prison run by Richard Lee, sheriff of Charles County. As Doncastle wrote:

> The Cold Winds blowing through the House and the snow driving on us and our Beds, in this Deplorable Condition we Continued till the 24th day of December then the sheriff sent in a Kettle to make a fire in but as there was no Chimney to vent the smoak but a hole in the Door eight Inches wide and Twelve Inches deep it is impossible to describe what we

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[10] Id. at 98 (1807) (citations and quotations omitted).

[11] See Dallin Oaks, Habeas Corpus in the States: 1776-1865, 32 U. Chi. L. Rev. 253, 253 & n.3 (1965).

[12] Carroll T. Bond, Introduction, in Carroll T. Bond and Richard B. Morris eds., Proceedings of the Maryland Court of Appeals 1695-1729, at xxix (1933), reprinted in 77 Archives of Maryland.

[13] Taylor v. Llewellin, 1 H. & McH. 19 (Prov'l Ct. Md. 1692). The jurisdictional division and hierarchy between the county courts and the Provincial Court was not always clear, although the Provincial Court, "consisting of the governor sitting as chief judge with his council of associate justices, clearly had superior authority." John Carroll Byrnes, Commemorative Histories of the Bench and Bar: In Celebration of the Bicentennial of Baltimore City 1797-1997, 27 U. Balt. L. F. 5, 6 (1997).

[14] 25 Archives of Maryland, Proceedings of the Council of Maryland, 1698-1731, at 231 (1905).

[15] *See id.* at 232-33.

[16] 32 Archives of Maryland, Proceedings of the Council of Maryland, 1761-1770, at 337 (1912).

> suffered with the Smoak yet we were obliged to bear it or be froze to Death as some of us were frost bit and all sick with a disorder in our Heads and Eyes occasioned by the Smoak and hardship we had suffered with wet and cold and continued in this deplorable Condition till the 27th day of February 1769.[17]

Doncastle continues in this vein long enough for the reader to wonder whether he was a bit of an embellisher.[18] In the end Doncastle prayed that "your Honors … grant such Relief as you may in your Wisdom and goodness think just and reasonable," and he specifically requested an "Order of Habeas Corpus" to bring himself and several other prisoners, along with the sheriff, "to the Barr of your Honorable House."[19] The Lower House of Assembly ordered the Serjeant at Arms to take the sheriff into custody and "have him at the barr of this House" in part to answer the petitions against him complaining of misconduct toward prisoners at his jail. The Committee of Grievances and Courts of Justice commissioned depositions of witnesses, a procedure more suggestive of a civil trial than a habeas hearing.

Although it took several months for Lee to respond, when he did he proved to be Doncastle's equal in blarney. Lee assembled testimony from a number of witnesses who described his prison as a model of solicitude and his prisoners practically as adjunct members of his family. His housekeeper testified that the prisoners received conjugal visits for "two or Three Nights at a time" and spouses often dined in Lee's house.[20] Another sheriff testified that Doncastle was an incorrigible rabble-rouser who constantly urged prisoners to escape, and the "said John Doncastle during his Confinement in Portobacco was so very abusive and his Language so Gross that very few People chose to go near the Prison for fear of the Lash of his Abusive Tongue."[21] A co-prisoner was described as "a most impudent saucy Fellow and capable by Inclination to do any bad Act."[22] John Doncastle, as the housekeeper put it, "was continually abusing the whole Family without any occasion in such a Blackguard manner that it would not be decent to repeat."[23] The Council ultimately decided that there were "not sufficient Grounds arising from the behavior of the said Sheriff to inflict a further Punishment on him by removing him from his Office."[24]

So by the time of the American Revolution the inhabitants of the Province of Maryland had some familiarity with habeas corpus as a remedy for unlawful detention, although it is difficult to determine the frequency or importance of its use for that purpose.

B. War and Constitution (1774 to 1850)

Maryland's first state constitution, adopted (never ratified) in 1776, was the product of an assembly of delegates that had been meeting intermittently as the Convention of Maryland since 1774. The Convention sat as a form of provincial legislature outside the ambit of the British

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[17] Id.

[18] One of the leading histories of Maryland suggests Doncastle's and other prisoners' stories were believable. *See* Robert J. Brugger, Maryland, a Middle Temperament: 1634-1980, at 101 (1989).

[19] 32 Archives of Maryland at 339. Doncastle may not have been requesting a writ of *habeas corpus ad subjiciendum*, which is the form in use today that adjudicates the lawfulness of detention. Other forms of the writ were used for transporting prisoners to court or to testify, or for reviewing the decisions of lower courts. See infra.

[20] Id. at 354.

[21] Id. at 352.

[22] Id. at 353.

[23] Id. at 354.

[24] Id. at 368.

proprietary regime.[25] The eighth session of the Convention overlapped with the convention of delegates in Philadelphia that produced the Declaration of Independence.[26] The ninth and last session of the Convention met in the fall of 1776, and adopted a declaration of rights and constitution in November of that year.[27]

Although reports of the ninth Convention session are sparse, habeas apparently was not a significant concern. The topic was mentioned briefly in the instructions Anne Arundel County citizens gave to their Convention representatives; one of the many instructions stated "[t]hat the trial by jury be held and kept sacred and the *habeas corpus* preserved."[28] But the word *habeas* does not appear in the proceedings of the ninth session or in text of the 1776 constitution.

A few of the original colonies did recognize habeas or an equivalent right in their initial state constitutions,[29] but none of these constitutions preceded Maryland's and therefore the Convention delegates had no model provision to consider and perhaps copy.[30] Still, by 1780 Massachusetts had included a robust protection of habeas corpus in its constitution,[31] drafted by John Adams. The federal constitution followed in 1789 with the Suspension Clause. Some of the original 13 states then added habeas provisions to their constitutions in the first half of the 19th Century, and all of the states admitted after 1789 had constitutional provisions protecting habeas. But habeas does not seem to have risen to the level of a constitutional concern in Maryland during this period. Of the 34 states in existence at the start of the Civil War, only Maryland and South Carolina lacked a constitutional provision explicitly protecting the writ of habeas corpus.[32]

Some commentators have suggested that the omission of habeas from many pre-1789 state constitutions was a sign of the writ's ubiquity in the colonies rather than its insignificance.[33] One might argue that the drafters of Maryland's 1776 constitution protected the writ through other provisions and therefore a dedicated provision was unnecessary. The declaration of rights, for instance, prohibited suspension of the laws "unless by or derived from the Legislature,"[34] a

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[25] See Dan Friedman, The History, Development, and Interpretation of the Maryland Declaration of Rights, 71 Temple L. Rev. 637, 639-40 (1998).

[26] The Declaration of Independence was published by the *Maryland Gazette*, on page 3, between an extract of a letter reporting General Washington's request for troops from Maryland, and a new Convention law imposing the death penalty on inhabitants of Maryland who made war against the United Colonies. See Maryland Gazette, July 11, 1776, at 3.

[27] See id.; see also Maryland Gazette, Nov. 14, 1776, at 3 (printing new declaration of rights); Maryland Gazette, Nov. 21, 1776, at 1 (printing new constitution, part 1); Maryland Gazette, Nov. 28, 1776, at 1 (part 2).

[28] Maryland Gazette, Aug. 22, 1776, at 2.

[29] Oaks, supra n.11, at 247-49.

[30] North Carolina's constitution, adopted about a month after Maryland's 1776 constitution, appears to be the first to protect habeas, albeit without mentioning it by name. See N.C. Const. (1776), Decl. Rts. art. XIII ("That every freeman restrained of his liberty is entitled to a remedy, to inquire in to the lawfulness thereof, and to remove the same, if unlawful; and that such remedy ought not to be denied or delayed."). See also Ga. Const. (1777), art. LX ("The principles of the habeas corpus act shall be a part of this constitution."); Mass. Const., Part II, ch. VI, art. VII ("The privilege and benefit of the writ of *habeas corpus* shall be enjoyed in this Commonwealth in the most free, easy, cheap, expeditious and ample manner; and shall not be suspended by the Legislature, except upon the most urgent and pressing occasions, and for a limited time not exceeding twelve months.").

[31] See id. The Massachusetts provision is unchanged today.

[32] Oaks, supra n.11, at 249 & nn. 29-32.

[33] See Oaks, supra n.11, at 248 (citing Zechariah Chafee, The Most Important Human Right in the Constitution, 32 B.U. L. Rev. 143, 144 (1952)).

[34] Md. Const. (1776), Decl. Rts. art. VII ("That no power of suspending laws, or the execution of laws, unless by or derived from the Legislature, ought to be exercised or allowed.").

provision that survives to this day.[35] The declaration also provided that "the inhabitants of Maryland are entitled to the common law of England … and to the benefit of such of the English statutes, as existed at the time of their first emigration, and which, by experience, have been found applicable to their local and other circumstances, and of such others as have been since made in England, or Great Britain, and have been introduced, used and practiced by the courts of law or equity."[36] Some founding-era documents suggest that the framers might have understood this provision to protect habeas corpus, however indirectly.[37]

Finally, the 1776 declaration of rights included an early version of a due process clause: "That no freeman ought to be taken, or imprisoned, or disseised of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land."[38] Some 100 years later the Attorney General of Maryland would argue that this provision "was an absolute recognition of the perpetual right of the citizen to the privilege of the writ of *habeas corpus,* because the qualifying words in the Article, 'or by the law of the land,' which are found also in the clause cited from the Great Charter, are to be interpreted only as meaning, 'without due process of law.'"[39] He further argued that this constitutional right of habeas could not be suspended pursuant to the anti-suspension clause in the original declaration of rights. Thus he concluded that the habeas clause added in the 1867 constitution was merely "the re-assertion in another form of a constitutional right which had been secured by prior Constitutions."[40] But the Attorney General cited nothing in support of this theory, and the Court of Appeals did not address it in its opinion.

The Attorney General's argument that the original 1776 constitution prohibited suspension of habeas corpus was almost certainly wrong – or at least it was clearly inconsistent with the view of the State's first General Assembly. In 1777, the General Assembly enacted a general criminal law focused primarily on treason and other offenses likely to arise from war with Great Britain. Section 12 of that act expressly authorized suspension of the writ of habeas corpus during "any invasion of this state by the enemy."[41] It is not entirely clear how long this law stayed in force, but it might have been as late as 1860.[42] An unofficial compilation of Maryland laws published in 1840 still included § 12 of the 1777 Act, even as it observed that many other elements of the

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[35] Md. Const. (2017), Decl. Rts. art. 9.

[36] Md. Const. (1776), Decl. Rts. art. III.

[37] See Alan D. Watson, *The Regulation: Society in Upheaval* in The North Carolina Experience 123 (Lindsey S. Butler & Alan D. Watson eds. 1984) (instructions given to the Mecklenburg County delegation to the North Carolina provincial congress in November 1776, providing in part "You shall endeavour that so much of the *Habeas Corpus* Act and the Common and Statute law heretofore in force and use and favorable to the liberties of the people shall be continued in force in this State, excluding every idea of the kingly office and power.").

[38] Md. Const. (1776), Decl. Rts. art. 21.

[39] In re Glenn, 54 Md. 572, 578 (1880).

[40] Id.

[41] See 1777 Md. Laws ch. 20, § 12, which provides:

> That in case this state shall be invaded by the enemy, the governor for the time being, with the advice of the council, shall have full power and authority to arrest, or order to be arrested, all persons whose going at large the governor and council shall have good grounds to believe may be dangerous to the safety of this state, and the same persons to confine during such invasion, to such places as the governor and the council shall think proper, or to limit such persons to particular districts in this state, or in their discretion to discharge such persons on security; and that during any invasion of this state by the enemy, the habeas corpus act shall be suspended, as to all such persons arrested by the order of the governor and council.

[42] See Alan M. Wilner, *Blame it on Nero: Code Creation and Revision in Maryland* (1994), available at http://aomol.msa.maryland.gov/megafile/msa/speccol/ sc2900/sc2908/html/history.html (accessed June 27, 2017).

1777 Act were repealed or made obsolete by the ratification of the U.S. Constitution.[43] But the suspension provision does not appear in the official compilation of Maryland laws published in 1860[44] – the first Maryland Code – and if a law did not appear in that compendium it was not in force thereafter.[45]

The first Maryland statute conferring a positive right to habeas appeared in 1798, when the General Assembly gave county courts the power to issue writs of habeas corpus "to inquire into the cause of such confinement . . . in the same manner as is now practiced by the judges of the general court."[46] Thus the 1798 law acknowledged the writ was available at common law in Maryland and legislation was necessary only to extend it to the new county courts.

Further statutory development in the first half of the 19th Century focused on extending power to grant the writ to various other courts and to individual judges when courts were not in session, and on fortifying the return procedure with strict deadlines and punitive measures for failures to obey. An 1808 act extended habeas jurisdiction to the court of oyer and terminer and gaol delivery for Baltimore County (essentially, the criminal court) and its individual justices in certain circumstances.[47] In 1809 the General Assembly provided a right of habeas corpus that appeared to serve as a combination of a bail law and a speedy trial act.[48] Section I was a general provision that required respondents to make returns of the writ and produce the body of the petitioner within three days of service, plus one day for every 20 miles of travel distance. Section II provided – in a single 497-word sentence with 65 commas – that various judges could grant release or bail to prisoners detained during court vacations.[49] Section III provided that officers refusing to make return of the writ or to produce the body of the prisoner "shall forfeit to the prisoner five hundred dollars, to recover which the right of action shall not cease by the death of either or both of the parties."[50] And § VII provided that persons detained for treason or felony should be bailed if not indicted during the next term or session and discharged if not indicted during the second term or session.

A major procedural development came in an 1814 act that permitted a habeas petitioner complaining of illegal detention to "controvert by himself or his counsel the truth of [the] return."[51] A body of common law authority held that the petitioner could not controvert the return, although the authority was far from uniform.[52] The 1814 act also gave petitioners subpoena power to compel the attendance of witnesses and production of documents.[53]

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[43] See I Clement Dorsey, The general public statutory law and public local law of the state of Maryland : from the year 1692 to 1839 inclusive, with annotations thereto, and a copious index, at 136-38 (1840) (reprinted in 141 Archives of Maryland).

[44] See Md. Code ch. 43 (1860).

[45] Wilner, supra n.42 ("If the statute wasn't in the 1860 Code, it no longer existed.").

[46] 1798 Md. Laws ch. 106.

[47] 1808 Md. Laws ch. 113 (Dec. 25, 1808).

[48] 1809 Md. Laws ch. 125 (Jan. 6, 1810).

[49] Id.

[50] Id.

[51] 1813 Md. Laws Dec. Sess. ch. 175 (Jan. 31, 1814).

[52] See Boumediene v. Bush, 553 U.S. 723, 779-80 (2008); compare Ex parte Maulsby, 13 Md. 625, 637 (1859) (Bartol, C.J., in chambers) (observing that the 1813 act greatly expanded the powers of a judge adjudicating a habeas petition, because "[a]t common law the return to the writ imported absolute verity; it could not be traversed, its truth could not be denied or inquired into, nor could any matter repugnant thereto be alleged, or its effect be avoided by extrinsic proof; all these things are authorized to be done by the Act of 1813").

[53] 1813 Md. Laws Dec. Sess. ch. 175, § 2 (Jan. 31, 1814). In addition, in 1819 the General Assembly supplemented the 1809 Act with a provision allowing the sheriff to take immediate custody of any respondent who

These relatively frequent statutory developments suggest an effort to correct practical problems in adjudicating habeas petitions – problems one would expect to see reported in the appellate cases of the era. But appellate reports of habeas cases from the late 18th and early 19th centuries are sparse, and are probably not a reliable indicator of the significance of habeas during that period.[54] The Court of Appeals (as a court rather than as individual judges[55]) lacked authority to issue the writ, and appellate jurisdiction in habeas cases has always been limited in Maryland.[56] The earliest post-Revolutionary mention of habeas in the Court of Appeals arose in a matter that looked very much like the provincial use of the writ *cum causa* as a form of appellate jurisdiction. In *Norwood* v. *Martin*,[57] plaintiff Martin won a judgment against Norwood, who posted a bond but not in double the amount of the debt, as was required at the time for the bond to act as a supersedeas. Martin had Norwood arrested. Norwood apparently both appealed and sought a writ of habeas corpus from the Court of Appeals. The court issued an order to show cause why the writ should not issue to the sheriff to produce the body of Norwood. Martin argued that the bond was insufficient to stay execution of the judgment; that Norwood was not actually in custody at the time and therefore habeas would not issue; and that the Court of Appeals had no authority to issue the writ. The Court of Appeals discharged the rule to show cause without explaining the basis for its decision.[58] But the court later read *Norwood* to mean that the Court of Appeals (as opposed to individual judges of the Court) had no original jurisdiction over habeas.[59]

The trial courts were likely more active in habeas matters than the appellate reports reflect. An 1813 case reported in the *Maryland Gazette* considered the case of two masters who filed petitions on behalf of their apprentices. The apprentices, both over age 18 but under 21, were seized by Captain John Kennedy of the Maryland militia on orders of Maj. General Samuel Smith, the soon-to-be savior of Baltimore in the War of 1812.[60] The masters contended that they had a right to the service of their apprentices, while Kennedy's return indicated that the apprentices were duly drafted into military service in accordance with law. Kennedy may have botched the return by failing to attach the military orders, but "on account of the very great importance of the case" Judge Bland adjourned the proceeding until the next day. After a "few observations" from counsel, Judge Bland held that the apprentices were lawfully seized pursuant to Maryland law contemplating activation of the militia during invasion or threat of invasion, and he remanded them to the custody of Captain Kennedy. "At such a crisis, could any reasonable

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appeared likely to evade the writ. 1819 Md. Laws ch. 137 (Feb. 9, 1820); see also 1826 Md. Laws ch. 223 (extending habeas jurisdiction of Baltimore City judges).

[54] See Dallin Oaks, Habeas Corpus in the States: 1776-1865, 32 U. Chi. L. Rev. 253, 256 (1965).

[55] Compare Ex parte Maulsby, 13 Md. 625, 637 (1859) (Bartol, C.J., in chambers) (individual Court of Appeals judge had authority to issue writ at least during vacation of court below).

[56] See Bell v. State ex rel. Miller, 4 Gill 301 (1846) (Court of Appeals had no jurisdiction to review a denial of a petition for writ of habeas corpus filed by party held in jail for nonpayment of civil judgment, as the adjudication below was not final and conclusive because the petitioner "may prefer a similar application, to any other judge or court of the State"); compare Gluckstern v. Sutton, 319 Md. 634, 574 A.2d 898 (1988) (noting modern statutes that permit appellate jurisdiction in certain circumstances).

[57] 3 H. & J. 199 (1810).

[58] Id. at 200.

[59] Ex parte O'Neill, 8 Md. 227, 229-30 (1855); see also In re Coston, 23 Md. 271 (1865); Coston v. Coston, 25 Md. 500 (1866); Sevinskey v. Wagens, 76 Md. 335, 25 A. 468 (1892) (General Assembly had no authority to confer original jurisdiction on Court of Appeals as a whole); Mayor & City of Annapolis v. Howard, 80 Md. 244, 30 A. 910 (1894).

[60] Maryland Gazette, Sep. 2, 1813, at 1.

man suppose, that the Legislature intended that judges and Courts of Justice should be employed in uselessly issuing Writs of Habeas Corpus when the enemy might be at our doors?"[61]

From 1810 (when *Norwood* was issued) to 1867 (when the present constitution was ratified), the Court of Appeals issued very few decisions on habeas. Besides a handful of cases rejecting appellate jurisdiction in habeas cases[62] – one of which would become significant for other reasons – the only significant case came in 1859 in *Ex parte Maulsby*.[63]

In that case the Circuit Court for Frederick County held in contempt a lawyer named William P. Maulsby after he failed to produce documents in response to a grand jury subpoena. Maulsby apparently argued that the documents were privileged. The order of contempt committed Maulsby to confinement until he produced the documents to the grand jury. Maulsby petitioned for a writ of habeas corpus with Judge Bartol of the Court of Appeals. Judge Bartol issued an opinion concluding that he had jurisdiction to issue the writ, at least while the court below was out of session, but that ordinarily a single judge, including a judge of the state's highest court, had no authority to discharge a prisoner on habeas when the prisoner was held pursuant to a judgment of a court of competent jurisdiction. Thus Judge Bartol was reluctant to review the basis for Maulsby's contempt. Bartol distinguished between the order of contempt and the term of punishment, however, and concluded that habeas would lie to discharge a prisoner who, for instance, had served his term. In this case, Bartol found that the grand jury term had expired, and therefore Maulsby had no way to comply with the order of contempt. On that basis Bartol ordered Maulsby discharged.[64]

C. Constitution and Unrest (1851 to 1860)

The rapid industrialization of Maryland after the War of 1812, along with a shift in population from the southern and eastern counties to Baltimore and the north, impelled numerous amendments to the 1776 constitution.[65] The amendments were added without much thought to the document as a whole and the constitution evolved into a Rube Goldberg contraption that became difficult to understand and apply. The amendment process at the time required not a vote of the electorate but an act of one session of the General Assembly reviewed and approved by the next. The amendments were not numbered,[66] and their text was often convoluted. Amendments generally abrogated whatever else in the constitution was repugnant to the new provision, leaving lawyers and courts to figure out what it all meant. Thus, an amendment gave the right of suffrage to "every free white male citizen of this state, and no other," who was over 21 and had lived 12 months in the relevant county.[67] This amendment had the pernicious effect

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[61] Id. See also Maryland Gazette, May 7, 1812, at 2 (Anne Arundel County Court remanding petitioner to custody of U.S. army lieutenants notwithstanding petitioner's argument that enlistment documents had technical errors).

[62] See supra n.56.

[63] 13 Md. 625, 637 (1859) (Bartol, J., in chambers). Judge Bartol would later be imprisoned by federal authorities during the Civil War, probably for southern sympathies. See Carroll T. Bond, The Court of Appeals of Maryland, a History 151-52 (1928) (reason for arrest may have been suggestion that Judge Carmichael's arrest was unlawful); The Sun (Baltimore), July 1, 1862, at 1 (reason for arrest unknown). Maulsby fought for the Union and was a delegate at the 1867 constitutional convention.

[64] Id. at 642-43. Judge Bartol noted that in examining the case he had "been aided by consultation with my brother judges, a majority of whom agree with me in the conclusions stated." Id. at 642.

[65] See James Warner Harry, The Maryland Constitution of 1851, at 12-13 (1903).

[66] See id. at 9.

[67] 1801 Md. Laws Dec. Sess. ch 150 (Dec. 31, 1801).

of depriving at least some free blacks of the right to vote,[68] even as it expanded the right among white males by eliminating the property requirements in the original document. But the only way to understand that Maryland had taken a major step backward in the treatment of blacks was to recognize that "every free white male citizen" in the amendment to the constitution was inconsistent with, and therefore superseded, the original text that gave the right of suffrage to "all freemen" meeting certain property-holding qualifications.[69]

The document that emerged from the constitutional convention of 1850 had some advances. It was far more democratic than the initial constitution, providing for popular vote for most state offices. It eliminated debtor's prison.[70] It relaxed the religious test for office.[71] It added a peculiar clause declaring that all judges were conservators of the peace throughout the state. But it not only continued the State's endorsement of slavery, it elevated the practice to a constitutional imperative.[72] And notwithstanding numerous examples in other state constitutions and in the federal constitution, it made no mention of habeas corpus. Nor did the topic ever arise in the debates.

This is not to say that habeas was in disuse in Maryland state courts at the time. On the contrary, newspapers in the 1850s and early 1860s overflowed with reports of trial courts adjudicating petitions for a writ of habeas corpus.[73] The operative habeas statute at the time apparently gave courts broad jurisdiction to consider habeas petitions from any type of confinement.[74] During this era the writ flourished as an all-purpose, flexible remedy against unlawful custody of every nature, including private custodial relationships. Slaves filed petitions against slaveholders;[75] parents filed petitions for recovery of lost[76] and runaway[77] children;

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[68] Compare Md. Const. (1776) art. II (generally giving right to vote for House of Delegates to all "freemen, above twenty-one years of age, having a freehold of fifty acres of land" in the relevant county, or having property elsewhere in the State "above the value of thirty pounds current money").

[69] See id.

[70] Md. Const. (1851), art. III, § 44.

[71] See Md. Const. (1851), Decl. Rts. art. 34.

[72] Md. Const. (1851), art. III, § 43 ("The legislature shall not pass any law abolishing the relation of master and slave, as it now exists in the State.").

[73] See, e.g., The Sun (Baltimore), Sep. 16, 1856, at 1 (lengthy report on habeas petition of five persons incarcerated after Federal Hill riots of Sep. 12).

[74] See Md. Code (1860), art. 43, § 3 ("If any person be committed, detained, confined, or restrained for any crime, or under any color or pretence whatsoever, he may complain to any of the courts or judges mentioned in the first section of this article, (or any one in his behalf may so complain,) and the said court or judge shall forthwith grant a habeas corpus, directed restrained for any crime to the officer or other person in whose custody the party detained shall be, returnable immediately before the said court or judge granting the same."). Precisely when the General Assembly enacted this version of the habeas corpus law is not clear. The compiler of the 1860 Code provided no citation to a session law, although that was not unusual. I can find no pre-1860 reference to this text in the session laws, in the reported case law, or in newspapers.

[75] A typical report from a case in a Baltimore City court:

> Wm. Hitchens, colored, by his next friend, John Needles, vs. Jonathan M. Wilson and Moses G. Hindes – petition for a habeas corpus to obtain the discharge of petitioner, claimed as a slave for life. Petition dismissed, this court having no jurisdiction in such cases.

The Sun (Baltimore), Aug. 5, 1859, at 1. The results were sometimes better in other states. See The Sun (Baltimore), Nov. 15, 1852, at 1 (reporting that New York court discharged eight black petitioners who had traveled there from Virginia).

[76] See The Sun (Baltimore), Sep. 10, 1856, at 1 (report of hearing on petition of German-immigrant parents, represented by George William Brown, to recover their child who had essentially been lost in transit from Germany and left with an almshouse in Baltimore, and was located in the custody of a local actor who "did not wish to part" with the child); The Sun (Baltimore), Sep. 12, 1856, at 1 (reporting that court returned child to parents). See also

indentured servants and their next friends filed petitions against masters;[78] underage soldiers filed petitions for release from the armed services;[79] debtors filed petitions against their jailers after the abolition of debtor's prison;[80] and so on.[81] Parties accused or convicted of crimes also filed petitions, as a form of pretrial release[82] and sometimes post-conviction,[83] although writs were often refused on jurisdictional grounds.

An amendment to Maryland's habeas corpus statute in 1862 deprived courts of jurisdiction when the petitioner's detention was "for treason or felony plainly expressed in the warrant of commitment," and when the petitioner had been convicted or charged by legal process, although a habeas court could still grant bail where allowed by law.[84] Habeas cases appeared to wane

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The Sun (Baltimore), Oct. 14, 1856, at 1 (ordering St. Mary's Orphan Asylum to retain custody of child because "complainant was not the proper party to have the custody of the child"); The American and Commercial Advertiser (Baltimore), Oct. 3, 1856, at 1 (dismissing petition upon return averring that "the child was not in [respondent's] custody").

[77] See The Sun (Baltimore), June 2, 1852, at 1 (on father's petition to obtain the custody of 15-year old daughter who was "at a house of ill-fame," daughter claimed mistreatment by parents, who denied it, and court remanded daughter to custody of father who "prior to leaving the court room, said if she did not stay home, he would kill her, whereupon the court rescinded its decision and ordered the girl to go about her business").

[78] See The Sun (Baltimore), June 17, 1856, at 1 (dismissing petition by agreement after respondent produced the indentures of apprenticeship); The Sun (Baltimore), Aug. 19, 1857, at 1 (petition filed by apprentice who was jailed after master accused him of "being a runaway").

[79] See The Sun (Baltimore), Aug. 31, 1855, at 1 (reporting that the Baltimore City Circuit Court granted a mother's habeas petition and ordered her son discharged from the United States army as "[i]t was shown conclusively that the party was not of age"); The Sun (Baltimore), July 16, 1856, at 1 (also discharging minor from U.S. service). In these cases, decided before Ableman v. Booth, 62 U.S. 506 (1859), a state court discharged a person held by federal officials. In *Ableman*, the petitioner had been arrested by federal officials for abetting the escape of a runaway slave held in federal custody under the federal Fugitive Slave Act. Wisconsin courts held the Act unconstitutional and ordered the petitioner released. The Supreme Court, in a unanimous decision written by Chief Justice Taney, held that state courts had no authority to release prisoners held in federal custody, rejecting a states' right view of the Constitution that was much more common in the South. The Court also upheld the constitutionality of the hateful Fugitive Slave Act. The case is soaked in irony and unintended consequences. See generally Jeffrey Schmitt, Rethinking *Ableman v. Booth* and States' Rights in Wisconsin, 93 Va. L. Rev. 1315 (2007).

[80] See The Sun (Baltimore), July 26, 1856, at 1 (Baltimore City Circuit Court discharged "absconding" seaman whose vessel left without him and whose employer sought return of seaman's advance money).

[81] See The Sun (Baltimore), Sep. 19, 1857, at 1 (petitioner alleged he was "violently arrested without color of law and placed in irons on board of the schooner Priscilla").

[82] See The Daily Exchange (Baltimore), Aug. 17, 1860, at 1 (petitioner arrested and charged with murder filed habeas petition with single judge of the Court of Appeals, who discharged the petitioner after a lengthy evidentiary hearing failed to produce evidence that petitioner was likely the shooter); The Sun (Baltimore), Oct. 17, 1857, at 1 (refusing writ for prisoners accused of shooting an officer apparently because the matter was before a grand jury); The Sun (Baltimore), April 9, 1860 (hearing petition of individual arrested as alleged fugitive from justice in Ohio); id., April 10, 1860 (remanding prisoner after hearing testimony of witnesses and concluding that court had no doubt that the prisoner was the person indicted).

[83] See The Sun (Baltimore), May 17, 1858, at 1 (petitioner alleged that he was illegally detained after failing to pay criminal fine; "Discharge refused, the proper remedy being in appeal to the Court of Common Pleas"); The Sun (Baltimore), July 1, 1858, at 1 (circuit court remanded petitioners who had been arrested for robbery after sorting out competing claims as to whether petitioners were entitled to bail); American and Commercial Advertiser (Baltimore), July 1, 1858, at 1 (in same case, reporting that court refused to entertain the petition on account of the criminal nature of the offense).

[84] 1862 Md. Laws ch. 36 (Feb. 1, 1862).

during the war years, although whether the 1862 act was the cause is difficult to ascertain, and newspaper reports from 1862 through 1865 show that jurisdiction remained broad.[85]

Because limitations on appellate jurisdiction kept most of these cases out of the official Maryland Reports, newspaper reports are probably the best guide of the nature and scope of the writ in the period immediately before Maryland prohibited its suspension for the first time. And if the federal model is to be followed – meaning that a constitutional suspension clause locks in habeas rights at least as robust as those that existed when the clause was adopted – then the Maryland courts should look to the innumerable cases published day after day in the State's newspapers.[86]

D. Habeas in War (1861 to 1866)

The Baltimore riots of April 19, 1861, electrified Marylanders and sharpened partisan divisions. When John Merryman of Cockeysville was arrested a month later by military authorities and imprisoned at Ft. McHenry, the entire State seemed ready for the judicial showdown to follow. Merryman was arrested in the early morning of May 25,[87] a Friday. The petition was delivered to Chief Justice Taney in Washington D.C. on the afternoon of the same day,[88] and a writ of habeas corpus issued from the U.S. Circuit Court in Baltimore on Saturday, May 26. The writ, served later that day, commanded General George Cadwalader

> to be and appear before the Honorable Roger B. Taney Chief Justice of the Supreme Court of the United States at the United States Court Room in the Masonic Hall in the City of Baltimore, on Monday the 27th day of May 1861 at 11 oclock in the morning, and that you have with you the body of John Merryman … and that you certify and make known the day and cause of the Caption and detention of the said John Merryman….[89]

By 11:00 on Monday the court house "was filled by a dense crowd." The press seemed to sense a constitutional crisis was at hand. As the Baltimore *Daily Exchange* reported, Gen. Cadwalader's aide-de-camp, Col. [R.M.] Lee, appeared a few minutes late and announced that

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[85] See, e.g., The Sun (Baltimore), Jan. 26, 1863, at 1 (noting that Judge Carmichael, on habeas petition, issued bail to a person charged with murder); The Sun (Baltimore), Mar. 24, 1863, at 1 (on father's habeas petition, ordering three-year old son committed to custody of specified woman, with reasonable access given to mother); The Sun (Baltimore), June 2, 1863, at 1 (considering petition on behalf of black individual "confined as a runaway" by a Baltimore "relative of the owner" from Virginia); The Sun (Baltimore), Oct. 19, 1863 (discharging free black who was jailed for failing to fulfill service commitment to employer under law that allowed employer to "take possession of said negro wherever found, and confine him to the public jail for a period not exceeding one week"); The Sun (Baltimore), Oct. 28, 1863, at 1 (remanding daughter to the custody of the Rosine Association, where she had been placed by mother after "run[ing] the streets at night and associat[ing] with very disreputable parties"); The Sun (Baltimore), Apr. 4, 1864, at 1 (discharging prisoner held on a charge of theft without a proper commitment, but petitioner was arrested directly afterward on a bench warrant); The Sun (Baltimore), Aug. 17, 1864, at 1 (discharging petitioner committed to jail by justice of the peace after petitioner failed to pay criminal fine); The Sun (Baltimore), Sep. 5, 1864, at 1 (admitting to bail petitioner accused of crimes in Delaware).

[86] Professor Niles, writing in 1915, suggested that the privilege as articulated in Article III, § 55 "is the right as it existed when the Constitution was adopted, and that this right cannot be restricted by any legislative action." Alfred S. Niles, Maryland Constitutional Law 215 (1915). As explained infra, however, *which* Constitution is still an issue.

[87] Bruce A. Ragsdale, Ex parte Merryman *and Debates on Civil Liberties During the Civil War*, at 2, Federal Judicial Center (2007) (available at www.fjc.gov/sites/ default/files/trials/merryman.pdf).

[88] Id.

[89] Original writ in Ex parte Merryman on file with U.S. District Court of the District of Maryland (copy on file with author).

the General "was unavoidably detained by pressing engagements."[90] Col. Lee read a letter from Gen. Cadwalader, which reported that Merryman was arrested for his avowed "hostility against the Government" and that Gen. Cadwalader "is duly authorized by the President of the United States, in such cases to suspend the writ of *habeas corpus*, for the public safety."[91] Cadwalader's letter included signs of deference and respect, and perhaps a bit of uncertainty: he essentially asked for a postponement until he could "receive instructions from the President of the United States."[92]

Taney was unmoved. The Baltimore *Daily Exchange* reported the ensuing colloquy as a constitutional drama, complete with stage directions:

> Chief Justice – Have you brought with you the body of John Merryman?
>
> Col. Lee – I have no instructions except to deliver this response to the Court.
>
> Chief Justice – The commanding officer then declines to obey the writ?
>
> Col. Lee – After making that communication, my duty is ended, and I have no further power. [Rising and retiring.]
>
> Chief Justice – The Court orders an attachment to issue against George Cadwalader for disobedience to the high writ of the Court, returnable at 12 o'clock tomorrow.[93]

By "an early hour" of the next day "the United States Court building was besieged by an immense crowd."[94] The deputy marshal reported to the Chief Justice that he had not been permitted to enter the gate at Ft. McHenry and "there was no answer to my card." Taney immediately announced that Merryman's detention was unlawful on two grounds: that the president had no authority to suspend the writ of habeas corpus, and that a military officer had no right to arrest and detain a person who was not subject to the rules and articles of war.[95] Taney further explained that he would not require the marshal to raise a *posse comitatus* to seize Cadwalader in light of the general's "notoriously superior" force, but that if "General Cadwalader were before me, I should impose on him the punishment which it is in my province to inflict, that of fine and imprisonment."[96]

Three days later Taney issued his famous 37-page handwritten opinion, which was reprinted in toto in newspapers across Maryland[97] and in many other parts of the country.[98] The ruling itself had little precedential effect given Taney's uncertain jurisdiction and his failure to order the president to do anything. But its soaring rhetoric in defense of the judiciary and of the privilege of the writ habeas corpus had a galvanizing if divisive effect on the populace. In Maryland it was largely but not uniformly hailed as a rebuke to the growing military control of the State.[99]

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[90] The Daily Exchange (Baltimore), May 28, 1861, at 1.

[91] Id.

[92] Id.; compare The South (Maryland), May 27, 1861, at 2 (reading Cadwalader's letter as disrespectful and insubordinate).

[93] Id.; see also The Sun (Baltimore), May 28, 1861, at 1 (providing essentially the same account).

[94] The Daily Exchange (Baltimore), May 29, 1861, at 1.

[95] Id.

[96] Id.

[97] E.g., The Port Tobacco Times, June 13, 1861, at 1; The South (Baltimore), June 3, 1861, at 1; The Sun (Baltimore), June 3, 1861, at 1.

[98] See, e.g., Indiana State Sentinel (Indianapolis), June 19, 1861, at 1; Louisville Daily Courier, June 7, 1861, at 2; The New York Times, June 4, 1861, at 8; The Daily Ohio Statesman (Columbus), June 7, 1861, at 1; The Philadelphia Inquirer, June 4, 1861, at 2.

[99] See The Daily Exchange (Baltimore), June 3, 1861, at 1 ("The lucid and exhaustive opinion of the Chief Justice in the case of John Merryman … must effectually set at rest all doubt, if any such really existed, in regard to

Newspapers in the Southern states predictably praised the opinion and its author and cited it as another transgression of the "tyrant," Abraham Lincoln.[100] Republican and Northern newspapers, by contrast, criticized the ruling for a variety of reasons, some purely emotional[101] and some quite sophisticated.[102]

The *Merryman* case was by no means the only public lesson in habeas corpus during the war years. Among the Maryland arrestees were numerous newspaper editors whose threat to the Union was their speech. They too were detained without habeas rights at federal prisons like Ft. McHenry. They included Frank Key Howard, grandson of a famous Maryland lawyer and amateur songwriter who 50 years earlier spent a memorable night observing the Fort from a British ship.[103]

Other habeas cases unfolded throughout the nation and were regularly reported in the press.[104] In March 1863 Congress formally permitted the president to suspend habeas corpus,[105] a power President Lincoln exercised in September of that year.[106] Predictably, many in Maryland and elsewhere were not much happier when he suspended habeas corpus with Congressional approval than when he did it without.[107] But the privilege of the writ of habeas corpus was a frequent topic of debate, among all the other issues that divided the nation at the time.

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the right of the President to suspend the writ of *habeas corpus*. We commend this able and admirable argument to the careful perusal of every citizen."); The Sun (Baltimore), June 4, 1861, at 1 ("It is not possible to read the opinion of Chief Justice Taney, in the Merryman case, without an impressive sense of the power of truth, and the convincing logic of the constitution and the laws. The paper is unanswerable. Like a stream first issuing as a spring clear and pellucid, it moves forward gathering breadth and strength, majesty and power ….").

[100] E.g., Keowee Courier (Pickens, S.C.), June 22, 1861, at 4 (opinion is "worthy of the great reputation of the venerable jurist" and is "a remarkable indictment of the Washington usurper"); An Upright Judge, The Daily Picayune (New Orleans, La.), June 4, 1861, at 1 ("The usurpations of Lincoln have been at length arraigned" by "the calm clear voice of the venerable Chief Justice … a man illustrious for a long life of purity, profound knowledge of the law and the constitution, and a fervor of patriotism which glows more intensely within, as, approaching the close of life, his thoughts clear themselves of all the dross of earthly passions and contentions."). Meanwhile, Merryman was released on bail on July 14, 1861. See The Sun (Baltimore), July 15, 1861, at 1. Maryland's state song, written in April 1861, makes references to the "despot's heel" and the "tyrant's chain."

[101] See The Daily Courant (Hartford, Ct.), May 31, 1861, at 2 (Taney, "already infamously associated with a decision which shocked the moral feelings of the North by its inhuman monstrosity" has now "in the impotence of his rage" at Cadwalder's disobedience of his writ, "whined his regrets that the superior force … prevented its execution, and to bring the farce to a fitting conclusion announced his intention to appeal to the Executive of the nation"); Pomeroy Weekly Telegraph (Meigs Co., Ohio), May 31, 1861 ("It is convenient, certainly, for the traitors to have a sympathizer in the office of Chief Justice of the United States.").

[102] See The New York Times, June 2, 1861, at 4 (agreeing that the writ was a bulwark of liberty and that it could only be suspended by Congress, but arguing that there was no suspension in the Merryman case; rather, the judiciary had no power to issue the writ to military officials during a time of war).

[103] Carl Schoettler, *A time liberties weren't priority*, The Sun (Baltimore), Nov. 27, 2001.

[104] Two famous cases are Ex parte Vallandigham, 68 U.S. 243 (1864), which was not a habeas case but in which the Supreme Court held it had no authority to review by certiorari the decision of a military tribunal, and Ex parte Milligan, 71 U.S. 2 (1866), in which the Court affirmed a district court's order discharging a military prisoner on a writ of habeas corpus, concluding that military tribunals had no jurisdiction to try civilians when civilian courts were open.

[105] 12 Stat. 755 (Mar. 3, 1863).

[106] Proclamation 104 (A. Lincoln), 13 Stat. 734 (Sep. 15, 1863).

[107] See The Philadelphia Inquirer, Sep. 17, 1863, at 4 ("so far from silencing the columns of the malcontents or satisfying their demands, they are now pouring out fiercer objurgations than ever on the President's recent proclamation under the law"); Daily Milwaukee News, Sep. 19, 1863, at 1 (calling suspension of habeas corpus "stupidity and madness"); compare The Brooklyn Daily Eagle, Sep. 17, 1863, at 2 (setting forth legal and prudential arguments against suspension of habeas corpus).

In the midst of this turmoil Maryland adopted another state constitution. The state elections of 1863, skewed by chaos over loyalty oaths and polling-site chicanery, produced a pro-emancipation legislature whose members knew that abolition in Maryland could come only by constitutional amendment.[108] They promptly called for a public vote that would decide whether to hold a new constitutional convention and, if so, the delegates thereto. Candidates for convention delegate had to swear a strict oath of loyalty to the United States.[109] The oath requirement, reinforced by intimidation tactics at the polls, assured a pro-convention vote and Unionist slate of delegates.[110]

The delegation convened over the summer of 1864 and drafted a comprehensive document that not only abolished slavery, but also disenfranchised Marylanders who fought for or lived in the Confederate states or gave them aid or comfort, among other things.[111] The disenfranchisement provision was lengthy, convoluted, and overbearing, and unmistakably designed to keep Democrats away from the polls and to consolidate power with the Unionists. Comparable provisions were designed to keep Southern-leaning Democrats out of office. Yet an electorate depleted of Democrats barely ratified the new constitution and would have rejected it except for the vote of military personnel in Maryland.[112]

Although the 1864 constitution mentioned habeas corpus, it did not explicitly protect it as a constitutional right.[113] The delegates also mentioned habeas from time to time in their debates, but it was never the subject of serious intellectual debate. Doubtless this was because Unionists generally favored the federal government's view of habeas during the war years, or at least they did not share the Democrats' revulsion at its suspension, and thus they had little interest in securing an unfettered right to habeas corpus through state law. So even as habeas corpus swirled around the State as one of the signal legal issues of the time, Maryland managed to adopt yet another constitution that failed to address it.

E. Habeas in Absoluta (The 1867 Constitution)

When the war ended the Unionist party in Maryland disintegrated and a conservative faction, who became known as Democratic Conservatives (or sometimes Conservative Democrats), prevailed in the state elections of 1866. Although some of these Conservatives had supported the 1864 Constitution,[114] as a whole the party rejected the disenfranchisement of so many Marylanders during peacetime and one of its first orders of business was to call for a new constitutional convention to overturn what they considered to be partisan and unlawful provisions of the 1864 document. A respectable majority of the electorate voted for a new constitutional convention.[115]

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[108] See Charles L. Wagandt, Election by Sword and Ballot: the Emancipationist Victory of 1863, 59 Md. Hist. Mag. 143 (1964).

[109] See III J. Thomas Scharf, History of Maryland 576 (1879) ("…. I have never, either directly or indirectly, by word, act or deed, given aid, comfort or encouragement to those in rebellion against the Government of the United States, and this I swear or affirm, voluntarily, without any mental reservation or qualification whatever.").

[110] See id. at 576-81.

[111] Md. Const. (1864), art I, § 4.

[112] See William Starr Myers, The Self-reconstruction of Maryland, 1864-1867, at 9 (1909).

[113] See Md. Const. (1864), art. IV, § 12 (judges have authority to discharge, on habeas corpus, persons held in slavery); art. IV, § 35 (circuit court for Baltimore City lacks authority to issue writs of habeas corpus in criminal cases).

[114] See Scharf, supra n.109, at 693.

[115] Id. at 701.

The remnants of the Unionist party and others now under the Republican banner considered the convention unlawful and refused to participate in the election to choose delegates. Instead, the Republicans convened a separate conference in Baltimore – likely the first political conference in Maryland that included black delegates.[116] The Republican conference occasionally issued resolutions lambasting the "Democratic Convention," as Republican-leaning newspapers often called the constitutional convention in Annapolis. The Baltimore *American*, a Republican stalwart,[117] greeted the constitutional convention with its customary decorum and restraint:

> At Annapolis yesterday a Convention called in defiance of the Constitution, and with the approval of less than one-third of the white voters of Maryland, assembled to change the organic law of the State, and to further deplete the treasury and increase taxation …. Men notorious during the past five years for their hostility to the cause of the Union, and their sympathy for the "lost cause" … will be found there, and it was but fitting that such a body should elect ex-Judge Carmichael, of Queen Anne's, as their presiding officer. Among the most malignant opponents of the Federal Government during the entire war, and an ardent sympathizer with the rebellion, he was arrested for alleged disloyal practices while upon the bench as a Judge, and confined in Ft. McHenry. He will be remembered by our readers as a member of the last House of Delegates, in which body he introduced the Enfranchisement bill, the special Jury bill for Western Maryland, the act repealing the oath for attorneys, the bill to turn out the present officers of the Insane Hospital, and other kindred measures.[118]

Notwithstanding their rhetoric, Maryland Republicans at the time were mainly looking down the railroad tracks toward Washington, D.C., where a Radical Republican Congress would soon take up Reconstruction legislation and begin implementing the principles laid down in the Fourteenth Amendment.

Although the Democratic Conservatives who gathered at Annapolis doubtless had varying positions on the Civil War, the baseline position was likely that the war had been unnecessary and inadvisable.[119] George William Brown, for instance, was anti-slavery and to some extent pro-Union, but also anti-War. Brown believed that if the South were allowed to secede peacefully, slavery would die naturally and the States would come back to the Union one by one.[120]

Irrespective of their political views, all (or virtually all) the delegates had lived in wartime Maryland, which meant living under the eye if not the rule of the federal military. The convention delegates as a group were white, male, privileged, powerful, property-owning, and Southern-leaning – exactly the type of civilian who would have bristled at orders from Unionist

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[116] See The American and Commercial Advertiser (Baltimore), May 15, 1861, at 1.

[117] Despite the *American*'s strong support of the Union cause, federal authorities in 1862 arrested one of its editors, Charles C. Fulton, apparently for publishing or threatening to publish information the White House deemed confidential. An exasperated Fulton wrote that "To find myself in Fort McHenry, the depot for traitors, is a mortification I cannot express." The American and Commercial Advertiser (Baltimore), July 1, 1862, at 1.

[118] The American and Commercial Advertiser (Baltimore), May 9, 1867, at 1.

[119] See, e.g., The Sun (Baltimore), Oct. 22, 1884, at 1 (noting that Judge Carmichael had been a "states' rights democrat"; he believed states had a constitutional right to secede, but that Maryland should remain part of the Union).

[120] George W. Liebmann, The Mayor and the President 11-12, available at http://www.barlib.org/Merryman_by_George_Liebmann.pdf.

military leaders. One key to the military's control of Maryland was the arrest of not only private citizens like John Merryman, who violently impeded the progress of Union troops, but also state and municipal officials such as legislators, judges, mayors, and police officers, who were arrested for acts as American as casting a vote or expressing an opinion, and often an opinion that was not particularly inflammatory.

Many of the 1867 convention delegates had exquisitely personal reasons to enshrine habeas corpus as an impenetrable constitutional right. As noted, the president of the convention, Judge Richard Carmichael, had been dragged from his Easton courtroom in May 1862 by federal marshals and beaten when he refused to submit. Carmichael's transgression was to instruct local grand juries to indict all military officers who arrested private citizens.[121] Carmichael was imprisoned without judicial review at Ft. McHenry and Ft. Delaware until December 1862, when he was unconditionally released.[122]

The secretary of the 1867 convention, Milton Y. Kidd, had been Clerk of the House of Delegates in the fall of 1861 when the federal government arrested more than 20 members of the General Assembly; Kidd too was arrested but was released after signing a loyalty oath. John B. Brooke, the president of the Senate at the time, was among the legislators slated for arrest and may have been arrested, but he surfaced in Richmond in August 1862 and recruited Maryland refugees for the CSA,[123] if he didn't join the CSA himself.

George William Brown, delegate from Baltimore City, was arrested by federal officials in September 1862 while serving as Mayor of Baltimore. Brown was detained for 15 months at a series of federal prisons after refusing to resign his office or to take an oath of loyalty.[124] George Gill, another delegate from Baltimore City and a prominent lawyer, had represented John Merryman in his habeas petition before Chief Justice Taney. Charles A. Buchanan, a delegate from Baltimore County, was a suretor for Merryman's bail.[125] Thomas J. McKaig was arrested while serving as a state Senator from Allegany County; he was quickly released and then re-arrested after he violated his parole.[126] E.G. Kilbourn, a delegate from Anne Arundel, was arrested while serving as speaker of the House of Delegates for voting to recognize the

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[121] See Easton Gazette, May 31, 1862, at 1.

[122] Cecil Whig, Dec. 6, 1862, at 2.

[123] See The Daily Dispatch (Richmond, Va.), Aug. 20, 1862, at 1 ("The Hon. John B. Brooke, President of the Senate of Maryland, arrived in Richmond yesterday, a prescribed refugee from his home. Many other well-known citizens of that State are constantly arriving, (40 landed here yesterday.) and they report their brethren of the true faith 'on the wing.'"); The Daily Dispatch (Richmond, Va.), Aug. 27, 1862, at 2 ("JOHN B. BROOKE, late of Maryland, and Captain E. PLINY BRYAN, propose recruiting companies of Light Infantry, which are to form a portion of the Maryland Line."); When War Brought Ruin to Old Upper Marlboro, The Sun (Baltimore), Nov. 10, 1907, at 14 (Brooke "went South and did not return until after the war"). Brooke had been the youngest president of the Senate and after the constitutional convention he lived a long life in Prince George's County, serving as a circuit court judge for 15 years. When he died in 1905, his obituaries did not mention his arrest, or his removal to the Confederacy during the Civil War. See The Sun (Baltimore), Dec. 23, 1905, at 10; The Washington Post, Dec. 23, 1905, at 1; The Evening Star (Washington, D.C.), Dec. 23, 1905, at 12.

[124] Liebmann, supra n.120, at 6-7.

[125] The Sun (Baltimore), July 15, 1861, at 1. Merryman was charged with treason but never tried. He was bailed on July 14 after only about seven weeks in jail, less than many of the politicians, who generally were not charged with crimes.

[126] See The New York Times, Oct. 19, 1861; see also Straddling Secession, Thomas Holliday Hicks and the Beginning of the Civil War in Maryland (available at: http://msa.maryland.gov/msa/educ/exhibits/hicks/html/intro.html) (accessed June 23, 2017). McKaig's home and property were later vandalized by Union troops. I J. Thomas Scharf, History of Western Maryland 223 (1882).

independence of the Confederacy.[127] He was held for a year in federal prisons. William P. Maulsby, a delegate from Frederick County and a Colonel in the U.S. army during the Civil War, had himself petitioned for a writ of habeas corpus after he was jailed for contempt.[128]

Yet as the Convention opened no delegate rose to insist that Maryland finally include the privilege of the writ of habeas corpus as an express constitutional right. A subcommittee reported out a new declaration of rights, modeled closely on versions in the three preceding constitutions but also adding several new provisions. One addition, introduced by Baltimore County lawyer and Southern sympathizer[129] Robert C. Barry, stated "That the provisions of the Constitution of the United States, and of this State, apply as well in time of war as in time of peace; and any departure therefrom, or violation thereof, under the plea of necessity, or any other plea, is subversive of good government and tends to anarchy and despotism."[130] The subcommittee's draft of the declaration of rights prompted other amendments and debates over the course of multiple sessions, but no one suggested including a provision on habeas corpus.

On July 12, the 45th day of the convention, the delegates took up consideration of the Report of the Committee upon the Legislative Department.[131] Mr. Archer then submitted an amendment "to come-in as an additional section to the Supplementary Report: Sec. ___. The General Assembly shall pass no law suspending the privilege of the writ of Habeas Corpus." The amendment was adopted without comment, at this or any other point in the convention insofar as the newspaper reports of the debates reveal.

Mr. Archer was Henry W. Archer, a lawyer from Harford County who also practiced in Baltimore City and other parts of the State. Archer was not a member of the committees on the legislative department or the declaration of rights, the two bodies most likely to consider a habeas provision, and he was not one of the delegates who had been detained without trial during the Civil War. In a convention of delegates that included Richard Carmichael, George William Brown, and George Gill, why was Henry Archer the one who insisted on an inalterable right to habeas corpus?

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[127] See The Sun (Baltimore), Sep. 20, 1861, at 1; Archives of Maryland (Biographical Series), E.G. Kilbourn, available at: http://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/012500/012512/html/12512bio.html (accessed June 23, 2017).

[128] See supra text at nn.60-61. Other notable delegates who were arrested: John B. Brooke of Prince George's, formerly president of the Maryland Senate who may have fought for the South after his release (see supra n.123), Henry D. Farnandis of Harford, briefly, see The Sun (Baltimore), July 15, 1861, at 1; J. Hopkins Tarr of Worcester, see The (Sun) Baltimore, April 7, 1862, at 4.

[129] See The Sun (Baltimore), March 14, 1861, at 1 ("Robert C. Barry said … should Mr. Lincoln inaugurate civil war, shall Maryland wait until her Legislature or a convention shall be called! No sir; but we should join with our brethren from the South – that with them we will stand or fall.").

[130] Md. Const. (1867), Decl. Rts. art. 44. This provision, which remains in Maryland's Constitution today, prompted little debate or controversy at the convention, but it did not escape the dyspeptic but generally incisive editors at *The* Baltimore *American*, who began their analysis by stating: "A poorer, more ambiguous and insignificant proposition we do not think could have been articulated than this same." American and Commercial Advertiser (Baltimore), May 22, 1867, at 1. The editorial becomes less temperate thereafter, accusing the "wretched illegal body which is enacting this constitutional farce" of attempting to overrule the "Mulligan" decision (probably Ex parte Milligan), and concluding that "Here we have a permanent, embodied, constitutional secession of the State." Id. In fact, history has suggested the *American* was right the first time: the provision is more insignificant than insubordinate.

[131] Perlman at 398.

Archer's biography on the Maryland Archives website is thin.[132] He was born in Harford County in 1813 and died there in 1887; he became a lawyer in 1835 after studying at Yale and Union College; he married and had nine children; he practiced law in Harford and Cecil Counties; and he was a one-term member of the House of Delegates in 1844-46.

Other sources suggest that Archer was a prototypical elite Marylander caught up in the chaotic politics and prejudices of a border state during the Civil War. Professionally, Archer was a successful lawyer who had a long career and died leaving an estate of some $400,000-$500,000.[133] He practiced at times with Stevenson Archer, the son of the Chief Judge of the Court of Appeals and likely a relative. His obituaries described him as a loyal Whig until 1861, and a Democrat thereafter.

At least two of Archer's brothers fought for the Confederate States Army.[134] One was James Jay Archer,[135] a lawyer and a soldier who left the U.S. army in 1861 to join the CSA and ultimately became a brigadier general with a reputation as a fierce fighter. He led "Archer's brigade" and fought the Union army at Sharpsburg and many other battle sites before he was captured at Gettysburg.[136] Gen. Archer's letters from prison suggest that his relationship with Henry was complicated,[137] although the full extent of their relationship is unknown and James died in prison before they could reunite in post-war Harford County.

Although Archer did not join his brothers in fighting for the South, he was no fan of the Union army's interference in Maryland's affairs. The *Merryman* case may have been an awakening for him, as it was for many other Marylanders. On May 23, 1861, two days before Merryman was arrested, Archer attended the Union State Convention in Baltimore where he delivered a minority report from the committee on resolutions. Archer's report disfavored

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[132] See Archives of Maryland (Biographical Series), Henry W. Archer (1813-1887) available at http://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/ 013100/013175/html/13175bio.html.

[133] See The Cecil Whig (Elkton, Md.), July 16, 1887, at 2.

[134] See The James J. Archer Letters: A Marylander in the Civil War, Part I (C.A. Porter Hayden ed.), 56 Md. Hist. Mag. 125, 125 (1961) (letter from Gen. James J. Archer to Lt. Col. R.H. Archer dated Jan. 8, 1862).

[135] The Aegis and Intelligencer (Bel Air, Md.), July 15, 1887, at 2.

[136] See Wikipedia, James Jay Archer (accessed June 20, 2017).

[137] Henry sent funds for the benefit of both his CSA brothers while they were prisoners of war, see, e.g., The James J. Archer Letters: A Marylander in the Civil War, Part II (C.A. Porter Hayden ed.), 56 Md. Hist. Mag. 352, 358-59 (1961), and James responded to Henry with an occasional cordial letter. See id. at 358, 369. But James wrote much more frequently to his CSA brother, his sister, and his mother, and his letters to his mother suggest a conspiratorial distaste for the "horrible tyrany practised in Maryland" that James "always knew … would come if none resisted in the beginning." Id. at 362. James described his brother Henry in one extraordinary letter to his mother sent from Ft. Colville in the Washington Territory on March 1, 1861, before James resigned his commission in the U.S. army, and before the 19th of April riots in Baltimore or the arrest of John Merryman:

> I received a letter from Henry by last mail just barely touching upon the *great question* and showing by his remarks that, he has been too much occupied with the business of his profession to apply his clear head to that which is only second in importance to himself, to the salvation of his soul – He says that a hostile fanatical party is in possession of absolute power against the abuses of which there seems no security – In other words that Maryland is in a condition of slavery and if she don't feel the scourge it is only because her master is kind – and yet he says we will remain in the union – I do not recognize in this my noble generous self denying devoted & chivalrous brother –
>
> He has not digested the events or followed out his opinions to their logical conclusions – in fact he has withdrawn himself too much from the political duties which his position demands of him or he would have thought enough on this subject to for logical & correct opinions. But I might as well be talking to the wind as to those who will not hear me until all these matters shall have been decided[.]

Id. at 383.

secession and supported the Union but "if the only choice is between civil war, such as is now impending, and peaceful separation – we say in God's name let us part in peace, rather than stain our hands in fratricidal strife, and bring wide spread destruction upon the country."[138] The delegates responded with a "storm of hisses," and Archer would soon part their company.

On August 17, 1861, an "Unconditional Union Man" wrote an open "Letter to Henry W. Archer, Esq." in *The Cecil Whig*,[139] evidently in response to an unknown letter from Archer. Union Man had found "last February" that Archer was "floundering in a dead sea of uncertainties and false issues" rather than "[keeping] steadily in view the great, leading principle, that the first duty of every citizen is to preserve intact the authority of the Government." He quotes Archer as stating "we have in fact no legal protection here in Maryland, for life, liberty or property, but hold them all at the mercy of our military rulers." Union Man defends at length the military suppression of traitors who were ruining his State. He concludes with a rousing defense of Lincoln's suspension of habeas corpus, asking Archer "[o]f what avail, my friend, is the writ of *Habeas Corpus* to" persons detained by the Confederacy? "Will you dare to say that one half the evidence which the Government now has against Gatchel, Howard and Merryman would not consign those poor men to the gallows, instead of confining them as State prisoners in a pleasant fort, with every attention paid to their wants?" And "when instead of condemning John Merryman for that felonious act of burning the railroad bridges, you plead in his behalf the technicality of the writ of *habeas corpus*."[140] And finally, echoing Lincoln's "all the laws but one" speech, Union Man drills into the marrow of the Maryland resistance:

> What Virginia is today, you know Maryland would be, but that the Government stepped in to her rescue. Here in our midst, with only a change in name, would have been Phillipi, Rich Mountain, Bull Run and Manassas. Instead of going to our fields with the utmost of security, and gathering in perfect peace the product of our soil, the sword would have mown down our young men, and Death have reaped a purple harvest from our very hearthstones. What a consolation it would have been to Maryland, with her fields trodden over by armed thousands, or plowed with cannon balls, her towns and cities smoking ruins, and her brave sons watering her soils with their blood, to reflect in her desolation that the writ of *habeas corpus* had not been suspended, I leave you to calculate.[141]

Union Man, it is safe to say, was not a delegate to the 1867 constitutional convention. Nor was Frederick Douglass, Maryland's towering conscience, who skewered the tendency to enshrine habeas as a moral principle.[142] No one held their torch when Mr. Archer insisted that the General Assembly pass no law suspending the privilege of the writ of habeas corpus. Certainly no complaint was heard from the likes of Carmichael or Kidd, McKaig or Kilbourn, Brown or Gill. The convention rolled on, laying waste to the lofty ideals of the 1864 constitution, yet preserving in stone the greatest civil right of all.

F. Habeas in Peace (1868 to 1935)

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[138] The Daily Exchange (Baltimore), May 24, 1861, at 1.

[139] The Cecil Whig (Elkton, Md.), Aug. 17, 1861, at 1.

[140] Id.

[141] Id.

[142] See Frederick Douglass, Speech at Cooper Institute, Jan. 13, 1864 (available at http://www.blackpast.org/1864-frederick-douglass-mission-war) ("Ask why [the Democratic Party] was opposed to habeas corpus when a Negro was the applicant, and it answers slavery. Ask why it is now in favor of the habeas corpus, when rebels and traitors are the applicants for its benefits, and it answers, slavery.").

Maryland's belated preservation of habeas corpus followed soon after the Supreme Court eliminated state authority to release federal detainees. It also coincided with new federal legislation that initially seemed a modest expansion of federal-court habeas jurisdiction to enforce the Thirteenth Amendment and perhaps other Reconstruction initiatives, but ultimately would be interpreted to give federal courts broad authority to review state convictions for violations of federal law.[143] These two mid-19th Century events would result, some 100 years later, in the rise of federal courts as an arbiter of habeas rights for criminal petitioners. In cases of civil confinement, state habeas cases would gradually be displaced by other legal remedies, such as the advent of domestic relations laws and the Post-Conviction Procedure Act, or by enlightened policies, such as the demise of indentured servitude.

In Reconstruction-era Maryland, however, habeas cases in state trial courts were at least as common as they had been immediately before ratification of the 1867 Constitution. The Baltimore newspapers alone reported on scores of petitions addressing various types of civil and criminal custody.[144] The state courts no longer adjudicated petitions from federal prisoners, and the federal courts absorbed most of the petitions of former slaves, but state courts handled a great variety of other cases. In 1876 the General Assembly amended the text of the principal habeas statute to reflect the broad jurisdiction that existed prior to the 1862 amendment.[145]

In the most significant reported case of the era, the Court of Appeals considered the petition of a woman who was convicted of being a disorderly person in Baltimore City and sentenced to six months in the House of Correction, located in Anne Arundel County.[146] A judge of the Third Judicial Circuit, comprising Baltimore and Harford Counties, issued a writ and discharged the petitioner on the ground that a justice of the peace was not authorized to render a conviction on that charge. The case reached the Court of Appeals because a recent amendment to the habeas corpus statute provided automatic appellate jurisdiction over any habeas case discharging a prisoner on the ground that a Maryland statute was unconstitutional.[147] The same act also limited habeas jurisdiction to trial-level judges and courts sitting in the place where the petitioner was detained, while the "Chief Justice"[148] and the Court of Appeals had jurisdiction statewide.[149] Writing for the court, Judge Alvey (a delegate to the 1867 convention) held this geographic

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[143] See Habeas Corpus Act of 1867, ch. 27-28, 14 Stat. 385 (Feb. 5, 1867); see Lewis Mayers, The Supreme Court as Legal Historian, 33 U. Chi. L. Rev. 31 (1965) (arguing that expansive Supreme Court decisions in the 1960s misinterpreted intent of 1867 Act).

[144] See, e.g., The Sun (Baltimore), Jan. 3, 1868, at 1 (on father's petition, city court discharged 12 year old boy from custody of the House of Refuge, where he had been committed essentially as a juvenile delinquent although not on conviction of a crime); The Sun (Baltimore), April 23, 1868, at 1 (discharging person held in Maryland prison for alleged crime in Virginia after Virginia authorities failed to demand prisoner on a requisition); The Sun (Baltimore), May 1, 1868, at 1 (discharging petitioner from custody of the Maryland Hospital for the Insane after proof showed petitioner was merely eccentric); The Sun (Baltimore), Aug. 25, 1868, at 1 (issuing two writs to determine the lawfulness of custody predicated on commitments issued by a justice of the peace on charges of horse theft in Pennsylvania); The Sun (Baltimore), Nov. 3, 1868 (single judge of Court of Appeals discharging a bail surety who failed to produce the bailee because surety's detention amounted to an unconstitutional imprisonment for debt).

[145] 1876 Md. Laws ch. 373 (Apr. 7, 1876).

[146] In re Glenn, 54 Md. 572 (1880).

[147] See 1880 Md. Laws ch. 6, § 3.

[148] The trial judge in the case was as confused by this term as any modern Maryland lawyer would be, as Maryland has never had a Chief Justice. See The Sun (Baltimore), June 11, 1880, at 1 ("It would have been as appropriate to have conferred the power on 'The Lord Chief Justice of Maryland' or 'The Lord Chancellor of the State.'").

[149] 1880 Md. Laws ch. 6, § 1.

limitation unconstitutional, but *not* under Maryland's suspension clause. He saw no need to reach that clause because a different section of Maryland's constitution provided that "all Judges shall, by virtue of their offices, be conservators of the peace throughout the State."[150] This provision was added in the 1851 constitution, and an 1855 decision of the Court of Appeals had interpreted it to mean that every case of unlawful imprisonment was a violation of the peace of the State, and therefore "it was within the power of the Judge to use the writ of *habeas corpus* as a means to effect the right of such case."[151] Accordingly, the Court of Appeals concluded in 1880 that the conservator-of-the-peace clause effectively prevented the General Assembly from narrowing at least the geographic reach of habeas jurisdiction from what existed in 1851, which was when the clause was adopted. The conservator-of-the-peace clause was retained in the 1864 and 1867 constitutions and remains unchanged today.[152]

In 1885, The Sun published an editorial identifying the "legal difficulties" that had arisen from Maryland's interpretation of habeas procedure. Under the *Glenn* decision, the newspaper observed, "an associate judge in Worcester county may issue, and would upon application be bound to issue, his writ commanding the sheriff of Garrett county to bring a person committed in the latter county before him." And because a ruling on habeas was not final or appealable, if the Worcester county judge ordered a remand, the prisoner could "remove his petition before another judge, and so continue until he had a hearing before each of the twenty-seven judges, and had visited every portion of the State."[153]

Nevertheless, trial courts and individual appellate judges continued to adjudicate a vast array of habeas cases through the end of the 19th Century. The "best interest of the child" standard so familiar in modern domestic litigation was applied if not formulated in habeas cases,[154] and cases involving custody of minors were probably the largest single category of habeas petitions. Courts discharged convicted defendants for violations of the double jeopardy clause,[155] the right to trial by jury,[156] and the right not to be re-arrested on the same charge after once being discharged on habeas.[157] They discharged persons arrested on dubious political charges,[158] and persons held on warrants before they could be transferred to the issuing jurisdiction.[159] They continued to adjudicate what were effectively bail decisions for pretrial detainees.[160] They frequently invalidated improper commitments sworn out by justices of the peace, at times showing

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[150] See 54 Md. at 595 (citing Md. Const. (1867), art. 4, § 6).

[151] 54 Md. at 596 (citing Ex parte O'Neill, 8 Md. 227 (1855)). The *O'Neill* decision is a thin foundation for constitutionalizing the right of all judges in the state to issue writs of habeas corpus. It is arguably an alternative holding and its reasoning is a single, unsupported sentence. The debates of the 1851 convention, when the conservators of the peace clause was first added to a Maryland constitution, contain no indication that the framers thought the clause would confer habeas authority on Maryland judges. See 2 Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution 559 (1851).

[152] Md. Const., art. IV, § 6.

[153] The Sun (Baltimore), May 19, 1885, at 1.

[154] See, e.g., The Sun (Baltimore), Jan. 27, 1870, at 1.

[155] See The Sun (Baltimore), July 17, 1870, at 1.

[156] See The Sun (Baltimore), Feb. 9, 1881, at 4.

[157] See The Sun (Baltimore), May 13, 1885, at 4.

[158] Watchers Arrested, The Sun (Baltimore), Sep. 18, 1895, at 10 (discharging political party representatives arrested for watching voter registrations).

[159] The Sun (Baltimore), Aug. 30, 1886, at 4 (Baltimore City judge discharging two brothers held on a warrant issued by a Cumberland judge for allegedly selling worthless lubricating oil to a glass manufacturer).

[160] See The Sun (Baltimore), July 14, 1883, at 4; The News (Frederick, Md.), July 29, 1903, at 1 (releasing on bail woman held for larceny of two bicycles).

exasperation at the justices' incompetence.[161] They heard cases alleging that a mother-in-law "detained" a new (17 year old) bride from her husband,[162] and that a husband committed bigamy by having a second wife in Pennsylvania.[163] Although Baltimore was the focus of both the press and the courts, judges issued writs on the Eastern Shore[164] and in western Maryland,[165] in southern Maryland[166] and in North East.[167] An unscientific survey of the newspaper reports suggest that habeas litigation was at a high water mark in the period from 1880 through 1920. Trial courts churned through cases. Appellate courts generally had no jurisdiction to review the decisions. Dissatisfied petitioners could simply re-file in a new jurisdiction anywhere in the State. And judges could be punished for failing to hear them.

II. HABEAS IN PRAESENTI

A. Abuse of Privilege

In 1928 Louis Berman shot and killed his former lawyer Clifton Brown after Brown sued Berman to collect a $2500 fee in an estate matter.[168] Berman's insanity defense failed and he was sentenced to life in prison. Over the next seven years he filed 25 petitions for habeas corpus. His fourth petition, filed in Baltimore City, required live testimony from two judges, five attorneys, and the warden of the penitentiary.[169] His sixth, filed in Rockville, made news when his return from court to the penitentiary ended in collision with a novice driver and her instructor.[170] For the hearing on his seventh petition he summoned the governor.[171] He filed additional petitions in Frederick, Cumberland, and Talbot counties (although judges sometimes referred the petitions to judges nearer the penitentiary). Finally in 1935 Judge Eugene O'Dunne of the Circuit Court for Baltimore City put his foot down. He declined to hear petition number 22, calling it a farce, and

[161] See Worse Than Wasted, The Sun (Baltimore), Feb. 12, 1898, at 10 ("A large number of the commitments which come to Towson are absolutely absurd, either from ignorance or design, and could not possibly have any standing from a legal standpoint.).

[162] See The Sun (Baltimore), Sep. 29-30, 1891 (reports of trial testimony), and Oct. 1, at 1 (dismissing petition apparently because wife left of her own accord).

[163] See The Sun (Baltimore), May 18, 1872, at 1 (discharging husband because arrest was based on wife's allegation that husband had second wife in Pennsylvania, but before charges were preferred in Pennsylvania).

[164] E.g., The Star-Democrat (Easton, Md.), Aug. 22, 1876, at 3 (judge did not intend for defendant to be incarcerated).

[165] E.g., Cumberland Evening-Times, June 27, 1895, at 1 (discharging one petitioner who had skipped out on his hotel bill and remanding another who had attempted to rob a coat from a passenger on a Pullman sleeper car).

[166] E.g., St. Mary's Beacon, June 21, 1894, at 3 (petitioner sought custody of child obtained by respondent from an orphanage in British Columbia; court issued attachment after custodian failed to appear with the child after service of the writ).

[167] See A North East Habeas Corpus Case, Cecil Whig, Apr. 10, 1897, at 1. The North East case showed how elaborate habeas hearings had become, and how much discretion courts had acquired in habeas cases involving custody of minors. An absentee father had his teenage daughter committed to the Female House of Refuge on grounds that she was "incorrigible." The daughter's step-parents, who had cared for her all her life, petitioned for a writ of habeas corpus, and the court heard testimony from about 20 witnesses before ruling that the daughter was not incorrigible. The judge could not decide where to send her, however, so he committed her to the custody of a railroad worker while he contemplated his final decision.

[168] The News (Frederick, Md.), June 4, 1928, at 1.

[169] The Sun (Baltimore), Dec. 3, 1933, at 18.

[170] The Sun (Baltimore), Jan. 3, 1934, at 20.

[171] The Sun (Baltimore), Feb. 2, 1934, at 5.

thereby risking personal fines and penalties. Other judges followed suit with petition numbers 23 through 25.[172]

Berman's antics prompted Maryland officials to contemplate legislative fixes that would not violate the constitution. They theorized that a statutory right to appeal from a habeas ruling would obviate the need to adjudicate successive petitions over the same issue, but enacting a pertinent law proved difficult. Ironically, as Maryland adhered to its general rule permitting unlimited petitions and prohibiting most appeals, the U.S. Supreme Court issued a writ of certiorari to Judge Carroll T. Bond of the Court of Appeals. Judge Bond, an icon of Maryland jurisprudence,[173] had decided the habeas petition of Smith Betts, a poor farmer accused of robbery whose repeated requests for a lawyer were rejected by the Circuit Court for Carroll County. Betts represented himself and lost. Judge Bond carefully balanced Betts's need for a lawyer in light of all the circumstances and somehow concluded that he did not. On review, the Supreme Court decided first whether it had jurisdiction to hear a petition for certiorari from what amounted to a nonfinal decision of a single judge in Maryland. The Court pragmatically worked through those issues in favor of its own jurisdiction – recognizing that Judge Bond's decision was unreviewable and therefore effectively final even if nonbinding on other Maryland judges – and then held that the Sixth Amendment did not apply to the states and Betts was not entitled to appointed counsel.[174] Twenty-one years later the *Betts* decision was thoroughly dismantled and famously overruled in *Gideon* v. *Wainwright*.[175]

In the early 1940s the General Assembly enacted laws that permitted judges to refuse the writ if it appeared from the complaint and related papers that the petitioner would not be entitled to relief.[176] The General Assembly also allowed, contrary to the longstanding rule in Maryland, a relatively broad right of appeal in habeas cases arising from criminal detention, either pre-trial or post-conviction.[177] This right of appeal likely was intended to limit petitioners' rights rather than to expand them; a denial of a petition affirmed on appeal probably restricts the right to file subsequent petitions on the same grounds.[178]

As Judge Eldridge explained for the Court of Appeals in *Gluckstern* v. *Sutton*, the broad right of appeal enacted in 1945 was in turn supplanted by the original Post Conviction Procedure Act enacted in 1958, which was construed to eliminate habeas appeals in all cases, criminal or civil, unless specifically authorized by statute. The General Assembly then amended the Act to provide that the statutory elimination of appellate jurisdiction did not apply to "any other proceeding in which a writ of habeas corpus is sought for any purpose other than to challenge the legality of a conviction of a crime or sentence of death or imprisonment." That provision, the Court held, *permitted* appeals in "other proceeding[s] in which a writ of habeas corpus is sought."[179] In 2014,

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[172] The Sun (Baltimore), Feb. 24, 1935, at sec. 2, page 3.

[173] See, e.g., Pearson v. Murray, 169 Md. 478, 182 A. 590 (1936) (affirming, during the separate-but-equal regime of Plessy v. Ferguson, an order requiring the University of Maryland to admit a black student).

[174] Betts v. Brady, 316 U.S. 455 (1942).

[175] 372 U.S. 335 (1963).

[176] See Olewiler v. Brady, 185 Md. 341, 44 A.2d 807 (1945); see also State ex rel. Harris v. Warden, 195 Md. 702, 72 A.2d 713 (1950) (trial judge exercised reasonable discretion in declining to issue writ in favor of petitioner who had filed five previous habeas petitions and did not offer any proof that the reasons advanced in new petition were not presented in prior petitions).

[177] See Gluckstern v. Sutton, 319 Md. 634, 657, 574 A.2d 898, 909 (1988).

[178] See Fuller v. State, 397 Md. 372, 392-93, 918 A.2d 453, 465-66 (2007) (quoting former Chief Judge of the Court of Appeals for the proposition that appellate jurisdiction was included in the 1945 Act to limit the right to file successive petitions with other trial court judges).

[179] Id. at 662, 574 A.2d at 912; see also Douglas v. State, 423 Md. 156, 175, 31 A.3d 250, 262 (2011).

the Court of Special Appeals seemed to get lost in these twists and turns and ended up misconstruing *Gluckstern* to bar an appeal by a mother who petitioned for a writ of habeas corpus to have her children returned to her care.[180] The court correctly cited *Gluckstern* for the proposition that appeals in habeas cases may be taken only when authorized by statute, and it correctly identified four statutes that authorized such appeals.[181] Inexplicably, however, it declared that none of the statutes "are even arguably applicable here,"[182] when the exception under the Post Conviction Procedure Act, as interpreted by *Gluckstern*, was directly on point.

Today, Maryland's chief habeas statute bears the core of the broadly worded text that appeared (somewhat mysteriously) in the 1860 Code.[183] Anyone in Maryland "committed, detained, confined, or restrained from his lawful liberty" is entitled to a writ of habeas corpus to inquire into the lawfulness of the restraint. A number of other provisions of the Code provide for habeas corpus in specific types of detention.[184] The application may be presented to any judge of the circuit or appellate courts in the State.[185] Upon receipt of the application the judge must grant the writ immediately if it appears that the petitioner is entitled to relief. Venue is mostly irrelevant, but the judge may refer the application to a court in the judicial circuit in which the applicant was convicted. In recognition of the Berman problem, the judge has discretion not to issue the writ if it appears that the petitioner is confined after conviction for a criminal offense and "has previously been given a hearing on a prior petition for release from confinement under the same commitment."[186] In exercising discretion the judge may consider whether the subsequent petition is presenting new grounds or simply recycling the same arguments.[187]

No modern legislature starting from scratch would write such laws. These habeas statutes have been bequeathed to Marylanders by their forebears, who lived through war, military occupation, slavery, indentured servitude, private prisons, competing judicial officials, long treks to court, and vacated courtrooms when they arrived. The lawmakers of this State – its constitutional framers, its legislators, and especially its judges – reinforced the right of habeas corpus with so many interlocking constitutional protections that the flat ban on suspension of the writ is nearly superfluous. But it does reduce the State's policy to an uncharacteristically crisp declarative sentence: "The General Assembly shall pass no Law suspending the privilege of the Writ of *Habeas Corpus*."

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[180] In re Zealand W., 220 Md. App. 66, 106 A.2d 837 (2014).

[181] See Md. Code Ann., Cts. & Jud. Proc. § 3-707 (permitting appeal from certain decisions on bail); Md. Code Ann., Crim. Proc. § 9-110(c) (extradition); id. § 3-706 (release on grounds that law is unconstitutional); id. § 7-107 (certain post conviction circumstances, as well as others pursuant to *Gluckstern*).

[182] Id. at 88, 102 A.2d at 849.

[183] Md. Code Ann., Cts. & Jud. Proc. § 3-702(a) ("A person committed, detained, confined, or restrained from his lawful liberty within the State for any alleged offense or under any color or pretense or any person in his behalf, may petition for the writ of habeas corpus to the end that the cause of the commitment, detainer, confinement, or restraint may be inquired into."). See supra n.74 for the mysterious appearance of this text.

[184] See Md. Code Ann., Crim. Proc. § 3-105(e) (defendant held for competency hearing); id. § 9-110(a)(2) (person awaiting extradition to another state); Md. Code Ann., Health-Gen. § 7-506 (individual who has been admitted to a State residential center for individuals with an intellectual disability); id. § 10-804 (individual admitted to a hospital).

[185] Md. Code Ann., Cts. & Jud. Proc. § 3-701.

[186] Id. § 3-703(a).

[187] Id. § 3-703(b).

B. Habeas in Decline

Notwithstanding this legacy, habeas cases in state court seem far less frequent than they once were, at least as a percentage of the docket. This is probably explainable by expansion of other judicial remedies and, in all likelihood, reductions in unlawful confinement. It may also be a function of edicts from appellate courts, finally free to speak in habeas cases, clarifying restrictions on habeas that were irregularly applied by trial courts in the 19th Century. Thus, in *Bernard* v. *Warden*,[188] the Court of Appeals held that habeas could not be used to challenge the legal sufficiency of evidence before a grand jury, or at trial after a conviction, "except where the sentence is shown to be a nullity."[189] Newspaper reports of habeas cases from the 1850s and 1860s provide support for that proposition,[190] but also show that it was not a uniform rule.[191]

Another factor in the reduction of habeas cases is likely the modern procedural rules promulgated by the Court of Appeals and collected at Title 15, Chapter 300 of the Maryland Rules. One can sympathize with the drafters of these rules, who were undoubtedly channeling the exasperated pleas of dozens of Eugene O'Dunnes who had faced hundreds of Louis Bermans. Nonetheless, a number of the rules would be subject to challenge on the ground that they narrow the privilege of the writ from its historical scope. A rule now sets forth a detailed list of items a petition must include, and permits courts to decline to issue a writ if the petition omits an item.[192] Although that procedure seems less onerous than the threshold requirements for commencing litigation in other contexts, the great strength of habeas through the ages has been its refusal to set technical or procedural hurdles in favor of a rapid hearing on the merits. The modern rule also now permits judges to deny the writ if "there is no good reason why new grounds now raised by the petitioner were not raised in previous proceedings," or "there has been an unjustified delay in filing the petition that has prejudiced the ability" of the custodian to respond.[193] These rules seem inconsistent with the historical practice, and perhaps for that reason the judge may not deny the writ on these grounds unless the petitioner has been given notice of the ground and has an opportunity to reply.[194]

Another rule now permits judges to refer most petitions to the administrative judge of the court in which the petitioner's confinement originated, and that court assigns the petition to a judge other than the one who previously presided in the petitioner's case.[195] This appears to violate the spirit of the decision in *In re Glenn*, which plainly holds that the General Assembly cannot limit the power of any judge in Maryland to issue a writ anywhere in the State. The modern rule does not *require* transfer of a petition, and the older cases did not *prohibit* transfer,

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[188] 187 Md. 273, 49 A.2d 737 (1947)

[189] 49 A.2d at 740; see also Strait v. Bell, 198 Md. 677, 84 A.2d 697 (1951).

[190] E.g., The Sun (Baltimore), Oct. 17, 1857, at 1 (same court refused two separate petitions on same day apparently because matters were before a grand jury).

[191] Two newspapers provided detailed reports on the habeas petition of Erasmus Levy, who had been arrested and charged with shooting Franklin Naff. Judge Bartol of the Court of Appeals, after hearing extensive testimony from the state and from the accused, concluded that the evidence was insufficient to authorize Levy's detention and ordered him released. The Daily Exchange (Baltimore), Aug. 17, 1860, at 1, 2; The Sun (Baltimore), Aug. 17, 1860, at 1. See also The Sun (Baltimore), Jan. 15, 1855, at 1 (discharging petitioner who had been arrested and charged with robbery of an express company, "but an examination of the facts found there was no evidence to criminate him in any way").

[192] Md. R. 15-302(a) (requirements of petition); Md. R. 15-302(e)(2) (permitting judge to deny the petition for failure to comply with procedural requisites).

[193] Md. R. 15-302(e)(3)(C), (D).

[194] Md. R. 15-302(e)(4).

[195] Md. R. 15-303(c).

so the modern rule is not facially unconstitutional. But it would transgress historical practice if judges routinely transferred petitions to the original jurisdiction of confinement.

If Chief Judge Bartol of mid-19th Century Maryland could review Chapter 300, he likely would be most offended by the failure to impose short and plain deadlines for at least some habeas proceedings. Today, if the petitioner is confined after sentence in a criminal case, the judge need not issue the writ, but instead may issue an order to show cause why the writ should not issue. The rule sets no deadlines for the show cause procedure and does not even suggest alacrity as an aspiration, such as by requiring advancement on the court's calendar. As a result, one could easily see habeas petitions languishing in the avalanche of other court business. Imagine the reaction of Roger Taney, who received Merryman's petition on a Friday, issued the writ that day and scheduled the return for Monday, then at age 84 traveled from D.C. to Baltimore on the weekend to receive the return. Merryman was a political case, to be sure, but its pace was not unusual for habeas cases in that era.

The modern habeas rules contain other provisions of interest whose constitutionality must await the unusual events they contemplate. In cases involving isolation or quarantine, the rules seem to allow the hearing to be conducted remotely.[196] The most likely remote witness, of course, would be the quarantined petitioner, and who would want a tuberculosis-infected body brought to a public courtroom. As sensible as this rule seems, the core of habeas is the presence of the petitioner, who walks out the front door of the courthouse if he is discharged. One imagines, however, that courts will sustain this rule, if ever it is challenged, as a sensible expression of habeas's flexibility.

Another significant question is whether judges of Maryland's district courts have authority to issue writs of habeas corpus. It is generally accepted that they do not, because the statute conferring habeas authority on specific judges and courts was not amended after creation of the district courts in 1971. As Judge Wilner has observed, however, the source of habeas authority in Maryland derives at least in part from the conservators of the peace clause, and therefore district court judges may have constitutional authority to issue writs despite the absence of statutory authority.[197]

The Court of Appeals has held in the modern era that "While the legislature may 'reasonably' regulate the issuance of the writ, any legislatively imposed regulations must not impair the fundamental right to the substantive remedy of habeas corpus."[198] The court's 1880 decision in *Glenn* suggests, but does not actually decide, that Maryland follows the federal view that the scope of habeas cannot be narrower than it was at the time the constitution was ratified.[199] In Maryland, *which* constitution is not entirely clear – it might be the superseded 1851 version, when the conservator of the peace clause was added, or the current 1867 document, which retained the conservator clause and added the suspension clause. As this article explains, reported habeas cases from the relevant era are sparse, while newspaper reports of trial court proceedings fill the gap to some extent. Those reports reflect a mid 19th Century habeas procedure that was robust, varied, flexible, and rapid. Still, the U.S. Supreme Court has

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[196] Md. R. 15-309(b).

[197] Walker v. State, 392 Md. 1, 14 n.6, 895 A.2d 1024, 1032 n.6 (2006).

[198] Maryland House of Corrections v. Fields, 348 Md. 245, 260, 703 A.2d 167, 175 (1997), overruled on other grounds sub nom. Moats v. Scott, 358 Md. 593, 751 A.2d 462 (2000).

[199] Compare In re Glenn, 54 Md. 572, 595-96 (1880) (questioning whether legislatures can narrow the state writ beyond the practice at the time of ratification) with INS v. St. Cyr, 533 U.S. 289, 301 (2001) (suspension clause at minimum protects the federal writ as it existed in 1789).

sanctioned significant procedural limitations on habeas practice as consistent with the spirit of limitations that existed at common law.[200]

In any event, changes in habeas procedure are not to be lightly imposed. In the end habeas is not a substantive remedy; it is a rapid set of procedures designed to determine the lawfulness of detention. Other law determines lawfulness. Habeas mired in procedural rules is not habeas, and too many such rules may violate the constitution.

III. HABEAS IN FUTURO

Like many states, Maryland law gives the governor extraordinary powers during certain emergencies,[201] including the power to "suspend the effect of any statute or rule or regulation of an agency of the State or a political subdivision."[202] The tension between the governor's emergency powers and the constitution's anti-suspension clauses has not been tested in war, military occupation, or natural disaster. But it has been tested in riot.

In April 1968, after the assassination of Martin Luther King Jr., Baltimore City exploded in violence and chaos. Governor Spiro T. Agnew, at the behest of Mayor Thomas D'Alesandro, called in the Maryland State Police, the National Guard, and finally federal troops. The governor imposed a strict curfew – beginning at 4:00 p.m. on one day – and prohibited the sale of alcoholic beverages, firearms, and flammable materials.[203] What the governor did not do was suspend the writ of habeas corpus. That law, he could not suspend.

Over 5000 Baltimore residents were arrested, about 3500 for curfew violations.[204] The State's Attorney for Baltimore City was 37-year-old Charles E. Moylan Jr., who would become one of the State's leading legal scholars and appellate jurists. Neither he nor anyone else in city government tried to avoid prompt hearings for arrestees. Moylan deputized additional prosecutors and helped assemble an extraordinary if makeshift system of justice that resembled habeas proceedings of old, although they were not habeas cases per se.[205] Bodies were brought to court – often by school buses from temporary detention centers like Memorial Stadium. Prosecutors and police presented the basis of detention. Defense lawyers defended. Deals were cut. Judges ruled, and defendants walked out the front door or were led out the side. Fewer than

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[200] E.g., Felker v. Turpin, 518 U.S. 651 (1996) (restrictions imposed on number of petitions well within the "abuse of the writ" doctrine as it evolved in habeas jurisprudence).

[201] See Md. Code Ann., Pub. Safety §§ 13-702, 14-303.

[202] Md. Code Ann., Pub. Safety § 14-107(d)(1)(i).

[203] See Spiro T. Agnew, Address to Citizens of Maryland on Burning and Looting, Apr. 7, 1968, reprinted in 83 Archives of Maryland 755.

[204] See George L. Russell Jr., Chair, Report of Baltimore Committee on the Administration of Justice under Emergency Conditions, at 6 (May 31, 1968) [hereafter, "Russell Report"].

[205] See Russell Report at 7. Judge Moylan does not recall that the threat of habeas was a significant consideration at the time. Author's interview with Hon. Charles E. Moylan Jr. (July 5, 2017). Indeed, post-riot reporting indicated that only one convicted defendant was released on a writ of habeas corpus. But habeas operated in the background to some degree, because petitions were filed by public interest attorneys on behalf of all arrestees. See id. at 60; see also Mitchell v. Schoonfield, 285 F. Supp. 728 (D. Md. 1968) (denying putative class action on behalf of riot defendants imprisoned because they could not pay fines, on ground that petitioners had not exhausted state remedies); Kelly v. Schoonfield, 301 F. Supp. 158 (D. Md. 1968) (mixed ruling in class action seeking to invalidate as unconstitutional the incarceration of curfew defendants who could not pay criminal fine). It seems likely that Governor Agnew would have suspended the writ if he thought he had the power. Doing so would have allowed police to clear the streets and hold agitators during the worst of the chaos. But it might also have agitated the public even more, and made matters worse.

five percent of arrestees were untried at the end of the emergency.[206] Eleven days after the first act of violence, Baltimore courts resumed normal operations.[207]

On the whole, commentators praised the process by comparison to the results in other cities, notwithstanding troubling shortcuts and glitches.[208] The most significant criticism leveled by a blue-ribbon commission was the widespread use of high bail for curfew violations – generally $500 for a misdemeanor punishable by a $100 fine or 60 days in jail.[209] The inability to contact friends, family, or bondsmen during the curfew pushed many defendants into accepting a trial by stipulation, essentially shifting the burden to the defendant to rebut the arrest report. The question naturally arises whether judges set high bail to keep the streets clear and the courts functioning during a major crisis, without regard to any individual defendant's constitutional rights. And if that were true, was it wrong? Certainly city officials, prosecutors, and police fashioned a judicial system around curfew violations as an effort to conserve the peace[210] – consistent with their constitutional duties.[211] As we have seen, however, judges in this state also are conservators of the peace, and perhaps the highest duty of a conservator of the peace is to quell a riot.[212]

There is no indication that any judge during the 1968 riots felt tension between the duty to individual defendants to rule fairly and a constitutional duty to the public to conserve the peace. Although a curfew violation had few defenses, about 20 percent of the cases were dismissed and 16 percent of curfew defendants received probation before judgment or a suspended fine or sentence. About 32 percent were committed to jail.[213]

Whether the assembly-line justice of April 1968 would work in a statewide riot, or a rebellion, or a pandemic, cannot be answered.[214] Maryland has no recent quarantines of significance, for instance, although they used to be common given Baltimore's prominence as a port of entry.[215] But the experience of 1968, and to some extent in the Freddie Gray unrest of 2015, suggests that Maryland's version of Absolute Habeas is workable even in times of crisis.

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[206] Russell Report at 8.

[207] Id.

[208] See Russell Report at 53-54; see also Maryland Crime Investigating Commission, A Report of the Baltimore Civil Disturbances of April 6 to April 11, 1968, at 3 (June 3, 1968) [hereafter, 1968 Riot Report] (available at: http://msa.maryland.gov/megafile/msa/speccol/sc2200/sc2221/000012/000015/pdf/report-balt-civil-distrub-comm-1968.pdf_access.pdf); Mitchell v. Schoonfield, 285 F. Supp. 728, 732 n.3 (D. Md. 1968) (quoting report of Maryland State Bar Association president praising private lawyers, as well as prosecutors, police, and judges).

[209] Russell Report at 32.

[210] Interview with Hon. Charles E. Moylan Jr., July 5, 2017.

[211] See Mayor & City Council of Baltimore v. Silver, 263 Md. 439, 283 A.2d 788 (1971) (holding that city might be liable for failing to quell 1968 riots in part because Mayor was a conservator of the peace and could have taken various actions, including possibly assembling a posse comitatus); see also Hagerstown v. Dechert 32 Md. 369 (1870) (discussing mayor of Hagerstown's duty to protect property of citizen from "actions of a tumultuous assemblage").

[212] See Silver, 263 Md. at 452, 283 A.2d at 795 ("The general duty of the conservators of the peace, by common law is to employ their own and to command the help of others to arrest and pacify all such, who, in their presence, and within their jurisdiction and limits, shall go about to break the peace.") (citations and internal quotations omitted).

[213] Russell Report at 29.

[214] In rebellion or invasion, of course, *Congress* could suspend the federal privilege of the writ of habeas corpus, and a state writ would not reach persons held in federal custody.

[215] I can find no report of a Maryland habeas case during quarantine. In other states quarantined petitioners have had little success through habeas. See Christopher Ogolla, *Non-Criminal Habeas Corpus for Quarantine and Isolation Detainees: Serving the Private Right or Violating Public Policy?*, 14 DePaul J. Health Care L. 135, 149-54 (2011).

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The history of habeas corpus in Maryland is the history of Maryland, and to some extent its essence as a sovereign state. Its purveyors and players are carved into the frieze of the Maryland edifice, amid gods and gargoyles. Key. Smith. Taney. Carmichael. Douglass. Bond. John Doncastle begat John Merryman, who begat Henry Archer, who begat Louis Berman, who begat Eugene O'Dunne. And so on, from tragedy to farce, with justice and honor and principle in between. Habeas is the ark of the covenant, carrying the rule of law from generation to generation, a perfect power often besmirched by imperfect men. In the hands of a villain like Roger Taney it stares down an entire Union army verging on despotism. In the hands of an icon like Carroll Bond it rejects a poor farmer's plea for a lawyer to defend a serious criminal charge.

Who but the people of Maryland have had occasion to ask: Where is my legislator? My mayor? My police commissioner? Arrested! Flung into Ft. McHenry without charge! By a primitive despot from the boondocks, no less, even as we support his infernal Union. Never again in this State, came the response from the embittered delegates of 1867. But it was only a response, not an answer. The basic dispute remains: Archer vs. Union Man; Taney vs. Lincoln; fertile fields vs. federal bootheels; liberty vs. security. Where does habeas draw the line? Will all the laws but one go unexecuted?

Who knows. Three wars have been fought on State of Maryland soil. The first elicited authority to suspend habeas; the third, a flat ban. Would the ban survive a fourth war? A massive riot? An Ebola epidemic? The law in this State says it should. What consolation that shall bring, Union Man might say, is for posterity to calculate.

Market Approaches to Congestion Control

November 1st, 2003

Calvert Report November 2003
Market Approaches to Congestion Control
Transcript of a Discussion

On October 7, 2002, during the State election campaign, the Calvert Institute sponsored a symposium at Montgomery College, Germantown, including presentations by four leading transportation experts on the then little-discussed subject of Market Approaches to Congestion Control. The symposium coincided with the initial sniper attacks, and received little press coverage; the papers distributed were published by the Institute in October 2002. Since that time, there has been an explosion of interest in the subject, which has been actively pursued by a new state administration. Major increases in tolls at existing toll facilities have been announced, consideration of creation of a network of HOT lanes revived, and the use of tolling as a means of financing major transportation facilities such as the ICC and Wilson Bridge discussed. Consideration is being given to time-variable tolling of other facilities, such as the Bay Bridge. Against this background, publication of the Symposium proceedings is particularly timely.

Peter Samuel, a resident of Frederick, is the editor of the internationally-distributed Toll Roads Newsletter. C.Kenneth Orski, a Northern Virginia resident, has been for 13 years editor of Innovation Briefs, reporting on transportation sector developments. Kenneth Reid, a civic activist in Montgomery County and later in Northern Virginia is the former Chairman of Marylanders for a Second Crossing. Ronald Utt is the Heritage Foundation's resident expert on transportation issues. All have relevant and impressive academic and vocational backgrounds.

(Videotaped by G. Stanley Doore, transcribed by W. Banister, revisions by the Executive Director)

MR. GEORGE LIEBMANN: Welcome to the Calvert Institute's symposium on market approaches to congestion. This is a subject that is unfamiliar to many people. It's not unfamiliar, I'm sure, to members of our loyal audience. We hope that what we have to say today will resonate and we believe that what we have to communicate will be of interest to anyone who is concerned with public policy in this state. The subject of market approaches to congestion is one that has received very little discussion in Maryland. It's received very little discussion because a great deal of discussion was cut off late last summer when Governor Glendening issued a statement to the effect that HOT lanes would not be considered for adoption in Maryland on the premise that, "it's unfair to equate an easier commute with a person's ability to pay. Our goal is to ease congestion overall." Our speakers this morning are generally going to review that policy judgment, and contend that congestion cannot be eased for all without some measure of making at least some forms of commuter travel a function of ability or willingness to pay. This is so for several reasons. One of them is that one of the best ways of facilitating highway travel in conventional automobiles is by attempting to smooth out the traffic flow so that there is not congestion for what are our peak hours. This can be done in a number of ways, through better information, but also through congestion pricing. A second reason that this policy judgment is a

questionable one is that another way of easing congestion for all is to facilitate bus and van transportation, which is the key to all mass transportation. People are not interested in using buses or vans if their commute is going to be significantly longer than commuting by private automobile. Unless there are dedicated bus or van lanes, the common commute is inevitably going to be longer since it involves assembling and picking up more people. It becomes difficult or impossible to secure the necessary political support unless the lane is perceived to be relevant and will be used; buses and vans themselves do not generate enough traffic to fully occupy a traffic lane. If the lane is going to ease congestion , some other vehicles have to be let on the lane. A logical means to let them on is by some form of charging. When one considers the other means, they all seem equally unattractive. You could admit a limited number of cars in the order in which they appear in which case you would lose a lot of commerce from such cars on the HOT lanes. You could hold a lottery for the purpose of entering the HOT lanes but that would be totally illogical. It would do little to ease congestion. You could admit favored groups to the HOT lanes. In the former Soviet Union only the nomenklatura could use certain lanes. This is not a satisfactory way of doing things either.

In the long run, the fairest way of promoting HOT lanes, provided there was sufficient usage to justify their creation and at the same time provide a means for buses and vans to compete effectively with the private automobile, is to have some form of charging.

In any event, this is a subject of great fascination and I've only touched on one small aspect of it. It's a subject of great fascination because unlike most public policy subjects, this is one area in which technology is far ahead of politics. This is not an area where people are creating high dreams of what will come possible 20 years from now when the necessary technology is available. This is an area in which, as our speakers will tell you, the technology is already available. It's in use in many places, some in Maryland, some in other parts of the world, and has enormous possibilities.

There is one other matter that I'd like to touch upon, that is the Calvert Institute is traditionally thought of as a somewhat conservative think-tank. We have recently constituted its board, we think of ourselves now as a somewhat more centrist organization, one that has an interest in market based approaches. One point that is not sufficiently understood about the congestion charge is that it is an approach which is not a novelty to any particular political faction or ideology. Some of the major foreign developments have taken place under varied governments.

The Norwegian program on congestion charging was introduced by an essentially social democratic government and was carried forward by a centrist government.. The congestion charges program for the City of London were implemented by 'Red Ken Livingstone who is a member of the left wing of the Labor Party. The program in Singapore was implemented by a man who has been a critic of most western ideologies.

These techniques aren't the exclusive province of any particular party or ideology or faction. Our speakers are all figures who know far more about the subject than I do. We will begin with Peter Samuel who has done much work on toll roads, on what many describe as the supply side aspect of congestion charging.

MR. PETER SAMUEL: I think most people looking at this would say that congestion relief is job one for transportation policy because of the costs of congestion, estimated at $3.2 billion per year in the Washington-Baltimore area. Common sense would suggest that it would be the main objective of planners and policymakers, and I think that most citizens assume that the planners and policymakers are trying to relieve congestion, that it's one of their principal objectives. But they'd be wrong on all counts. If you examine the documents, the long-range planning documents, such as the one for the Baltimore area, the 2001 long-range plan.

The four guiding principles in the Baltimore plan, are smart growth, linking transportation, managing growth; reducing emissions; alternatives to the automobile; preservation of existing systems.

The Washington plan has eight vision policy goals there. All kinds of oozy, clusey you've got to say kind of stuff about having the most modern technology and having reasonable this and reasonable that, preserving the environment. New mechanisms for funding that would mention tolls, that's not anything of interest. Nothing whatever about relieving congestion.

In fact, when you look at these documents they're planning for worse congestion. The preferred alternative for the Baltimore area has delays, the costs of delays doubling from about $400 million to $800 million. The Washington region plan doesn't come up with any precise numbers, but stop and go congestion is expected to be prevalent throughout the entire region in 2025 and that's not just in isolated areas. Why is this happening? It's happening because of a lot of confused people. A lot of fallacies have taken hold of the imagination of these people. The first is we can reduce congestion with transit. The second is that any extra road space just congests. The third is no money in roads.

Now we could go into a big discussion of why these are fallacies but it's still easy to analyze. Transit has narrow specialized roads, leading to downtown jobs which are in the minority and a declining minority. So transit services very few people, under 5% of the persons living and working in the Washington area ,about 2% in the Baltimore area and both numbers are declining. Of course transit does zilch, nothing, for intra-urban freight deliverymen, for service deliveries, and supermarket stock-ups, and commercial and freight tasks. National figures show continuing decline despite the huge program of putting money into transit.

In 2000 many people, including myself, are critical of the celebration of transit. It is still on a decline. The increase in car use in each decade is twice as large as the absolute number of people using transit everywhere in the U.S. as a whole, in metro areas, in the Baltimore/Washington area. It seems to happen regardless of how much you spend. So it just isn't working.

The other fallacy that's used to justify this kind of defeatism and fatalism about congestion is that extra road space will just congest as well. You can't build your way out of congestion is one of the slogans that you hear all the time. It's a complex question, of course, but I just look at some of the surveys of congestion in the Washington area and this is not my conclusion.

I live in Frederick, we talk about down the road. If you're in Frederick you're going down the road which means down 270. Number one is the Dulles toll road. It's solid traffic but its moving well. That's because they put the fourth lane in between '96 and '99. Extra lanes do help.

The next big thing we hear all the time is that we don't have enough money to build more roads. This is such incredible nonsense. It's certainly possible for someone who looks myopically at the existing sources of revenue, the fuel taxes and the license fees, and fails to look at the huge potential in the costs. I mean, here we have this massive congestion cost which surely indicate the opportunity for huge revenues to be going into avoiding those congestion costs. People would pay a lot of money to get around congestion. It's over $3 billion dollars a year.

Patrick Tocola Souza has done estimates of what could be done with pricing, building two hundred miles of toll express lanes on congested interstates in the area. His estimate is that tolls of $600 million dollars a year could be obtained on those. This can reduce delays, reduce emissions and reduce accidents. That's in the Enoch Foundation's Transportation Quarterly magazine, summer, 2000.

The next thing that politicians sometimes say is that people don't like tolls and that's why they want to avoid any discussion of tolls. There's no doubt that people dislike stopping and queuing and the stop and going involved in some traditional toll places. They dislike the process of paying, as much as the payment itself.

Technology has provided a fix, the transponder that's attached to the windshield that allows you to, like a garage door opener, to see a radio signal identifying your account. We know that when the tolls and taxes are put together, as the alternatives, toll roads are usually preferred to higher taxes.

There's just been a case in Missouri where the whole establishment, both parties, was strongly in favor of a beer, wine, and gas sales tax increase was defeated overwhelmingly, 3 to 1. Washington State has voted for tolls too when it was about to defeat a car tax there. North Carolina and South Carolina, you've got toll roads instead of taxes. Politicians often oppose tolls. They try to gain popularity through opposing them. This generally doesn't work. Governor George Ryanin Illinois in 1999 made abolition of tolls a big issue there and put toll abolition to the legislature. It was dead on arrival. It didn't get anywhere. In Miami, the Mayor proposed abolishing tolls in the expressway system there in the same year. Again, the establishment was completely undecided that toll abolition was a good thing. It was pretty decisively rejected 68 to 32 last year in New Jersey, Brett Schundler, the republican, I think he might have won too, was outspoken in promising by a date certain he'd get rid of tolls on the Garden State Parkway. Halfway through the campaign, he played it down and removed all reference to it from his website. He lost. There's other cases as well.

The main reason currently that we don't have any tolls on the New Wilson Bridge is that Governor Glendening said that tolls would cause congestion and he was probably thinking of the old style toll where you stop to pay toll plazas but there's a double error involved because variable tolls a very powerful tool for preventing congestion.

There is a flow chart that you'll find in the traffic engineering textbook showing how when you load up a lane, you go on a certain point, the stream starts to drop away a little bit, the stream drops away much more and then you get a break down. It's a very unstable concertina-like movement, stop and go traffic. This is something which traffic engineers have known for 50 years. If you can manage the inflow of traffic into that road with a variable toll, you could avoid this sudden falling off the cliff, of the stop and go traffic. This is not just a theory, it's in operation with variable message signs at the decision point about entry into the toll express lanes. In San Diego they have dynamic pricing and the toll can vary as much as once every six minutes in order to regulate the traffic and keep free flow going. There's big money in this. People are paying. Highway 15 doesn't have any great patronage and doesn't make a huge amount of money. But Highway 91express lanes is quite different and there they've been running about 25,000 vehicles a day with people paying up to $0.40-$0.45 per mile. Here you have just some summary points about Highway 91 express lanes. The three toll express lanes very often carry over 40% of the peak hour traffic at 60-70 mph, with a 20-30 mph average in the other three lanes. So you have both. You are generating revenue and also you're handling the traffic much more efficiently.

We have many examples now of various toll rates of different kinds. Trondheim, Norway was the first one, just a toll cordon around the middle of the metro area, a small metro area, a couple hundred thousand people. They have morning entry tolls. Singapore has had a system that started off with a sticker and has now progressed to the transponder technology. There are 91 express lanes in the Los Angeles area and the HOT lanes in San Diego and Fort Myers, Florida. The most significant one really is the Port Authority New York-New Jersey bridges. The George Washington bridge is one of those and it's the busiest bridge in the world, toll or otherwise. They say that the congestion has been considerably relieved through encouraging traffic to travel before the peak period, particularly in the 5:00-6:00 a.m. period and also in moving some truck traffic into the night by offering a considerable discount there.

The New Jersey Turnpike has also got something which is now being used on all kinds of tolls. There haven't been any serious problems, breakdowns, in almost every case the forecasts, many of which were made without experience of a similar system, have worked out well.

So it's a very robust approach. We can toll congestion down. We can do toll financing of a major new facility, an intercounty connector or the second crossing. I think we should do a Y down to the District from within the Beltway or we could that perhaps just for trucks, a sort of mini expressway with maybe even one lane in each direction going down the gridline tracks and the right hand Y going up. But the District inside the Beltway very badly need to get better and tolls I think can work.

We're also going to talk more about this, but I think what we could do, is a toll express lane, a HOT lane that's networked on our major existing highways. They are not working. They're not working satisfactorily. Car pooling has many of the same problems. Transit, very few people want to go to the same place at the same time. Organizations are much more informal nowadays than they were ten or 20 years ago about work hours, allowing flexibility to take time off. It's very destructive to car pooling because people's working days vary from one day to the other. They almost all have some excess capacity.

It seems to me it makes sense, since two people often travel together regardless of whether they get the privilege of a carpool lane, it's better to raise the HOV limit to three or four and there you have more space and could really sell the remaining space with a toll to people who want to get a premium service right past the congestion.

I think these existing transportation plans could really be a political time bomb. Americans generally aspire to a better life, living longer, improving medical care, reduced pollution, better housing. We are succeeding in improving most things in our lives. It seems to me preposterous to suggest that in one area alone, in transportation, in urban mobility, that we have to put up with the deterioration and collapse in standings that the plans suggest. I'm firmly of the belief that Americans are problem solvers, they won't vote for fatalists and obstructionists who plan for gridlock. I suggest that the fate of Blair Ewing here and Cronridge and the principal opponents of the intercounty connector is a sign of things to come.

Governor Glendening, in his speeches, makes it clear that he has no interest at all in transportation except as a means of getting around. It's just a tool for smart growth. He stakes it out, he doesn't make any bones about it at all. He's very uninterested. The speech he made at the Smart Growth Conference recently says that the entire budget is a tool for smart growth. Every project has to pass a smart growth test. He says the transportation budget has become the incentive fund for smart growth.

So, transport policies and the motorists' gas tax dollars have been conscripted into a jihad against the satanic sprawl by infidels like myself, in the suburbs. In this context it's no wonder that mobility is the objective that's disappeared; and the theme behind all this is let the infidel suburbanites stew in their congestion. I think there's a great opportunity, a positive opportunity here for less ideologically-driven politicians to ask what does this do for people sitting in traffic and to say that the proper objective of government policy is not some holy war on suburban living but helping people get around by organizing the system more responsibly.

MR. KENNETH ORSKI: I think Peter has given you a pretty good introduction to principles of transportation, and my intent is to follow up with a description of some actual applications of this principle. Modern-day transportation solutions are still met with a lot of skepticism in this region. This will become clearer from my presentation. I have four examples to give. The first would be intercounty measures. This was in the marketplace approach. The approach was proposed by the so-called transportation solutions group, which was convened by Governor Glendening in 1999, which I had the pleasure of serving. The group was charged with coming up with a strategy to improve mobility and relieve traffic congestion in the metropolitan and Washington region. That is the portion of it.

As you probably know, the group concluded to recommend the construction of the ICC. The majority of us felt that if the facility was to provide a high level of service well into the future, it must be operated as a toll facility, using variable pricing to control demand and to assure free flowing traffic at all times.

The technology for this, of course, exists and I think Peter has already mentioned the California Interstate 15 from the north of San Diego a system which automatically raises and lowers tolls

and bills users remotely without requiring them to stop at a tollbooth. In using this approach, I-15 HOT lanes have been able to maintain free flowing traffic even at the height of rush hour.

Our group felt that a variable priced ICC would be politically acceptable provided that travelers felt that they received tangible value for their money, in the form of faster, more reliable, and more predictable travel. Shippers and deliverers of time-sensitive merchandise, UPS and FedEx, would receive higher value in the form of faster and more reliable deliveries and of course, the ICC would also serve as a transit way for rapid transit.

There was some equity concerns expressed, but the group found them to be unjustified. In fact, surveys in California have shown that people of all income levels choose to use the California HOT lanes when saving time is really important to them. There are workers whose job depends on all those people in time, travelers anxious to meet their flight and businesses that depend on just in time deliveries. Indeed, the utility van or the deliver truck is a part of a common sight on California's HOT lanes, not just the proverbial Lexus.

Well, despite these arguments, Governor Glendening, rejected our recommendations and chose not to proceed with the construction of the ICC. Although I don't think that the Governor has the last word on it. The ICC is still very much on the agenda now. Both candidates for the governorship have declared their support for it. So the ICC, I venture to predict, will eventually be built. Whether it will be built as a toll facility, the kind I described, really remains to be seen. I think the winds have shifted now, to very much in favor of the ICC.

My second example of a market-based approach to transportation was a proposal to impose tolls on the reconstruction of Wilson bridge. In an Op-Ed piece in the Washington Post, Peter Samuel and I suggested that variable tolls could help to control congestion on the approach to the bridge as well as help with the funding problem. Tolls would be collected at highway speeds using smart technologies as Peter has described, similar to those already in use on the Dulles tollway. We noted that all comparable major crossings elsewhere in the U.S. are being financed with tolls. For example, the Tacoma Narrows bridge in Washington state, the reconstruction of the Bay Bridge in San Francisco, and the new bridge in New York.

More to the point, several crossings on the I-95 cell, north of the Wilson Bridge, are toll facilities. These include the Fort McHenry toll in Baltimore, the Delaware Memorial Bridge, and the George Washington Bridge. So, we argue that tolls are really the fairest way of funding the new bridge since they would place the fiscal burden on the user. In addition, of course, they help to control congestion because they can spread the traffic.

My third example of a proposed market-based approach to transportation in our region was the 1999 study of variable pricing by the Maryland Department of Transportation. Variable pricing would be an appropriate means of managing congestion in the Washington- Baltimore region. MDOT identified several heavily traveled congested corridors as potential elements of a variable HOT lane network. If I recall I-270, I-95, US 50, Maryland 210,and several crossings, the Chesapeake Bay Bridge

I think, and the three Baltimore Harbor crossings.

Well, in June of last year, Governor Glendening suddenly pulled the rug out from under his own State Transportation Secretary and canceled the plan to introduce a HOT lane on US 50. He cast his objection as an equity issue by saying it would be unfair to allow affluent drivers to buy their way out of congestion. In fact, in a letter to the Washington Post, the Governor explained his position as follows and I quote, "It is fundamentally unfair to give wealthy people the opportunity to buy a faster commute. Why should a lawyer, a lobbyist commuting to Washington, DC get to work faster than an entry level employee simply because the lawyer or lobbyist can bill the extra $1,000.00 yearly costs to clients? An easy commute should not be linked to a person's ability to pay." So said the Governor.

What he chose to ignore, however, was the fact that it isn't just the rich lobbyists who understand the value of time, as I already mentioned, the surveys from California show that people of all income levels elect to use the HOT lanes when they need to get somewhere faster.

The favorite example has been pointed to again and again, is a parent racing to get to the daycare center before closing time which would make them pay $1.00 a minute, or something like that. He or she would be probably just as grateful to pay the toll as, say, a lawyer racing to a courthouse hearing. Besides, if the HOT lane reduces congestion in the free lanes, wouldn't everybody be better off?

My final example of a proposed market-based approach to transportation in this region is the recent proposal by one of the world's largest engineering and construction companies, to widen the Beltway between the Springfield interchange and the Wilson bridge. I think they recommended four HOT lanes, two in each direction, and the project would be financed privately through bonds, underwritten by HOT lane revenue. It would basically use no public funds at all. The proposal did receive support in the Washington Post. But local and state officials reacted "cautiously," according to press reports.

So, there you have it. As I think my four examples made clear, there do exist plenty of opportunities in our region to apply market based approaches to congestion mitigation. The know how and technology to implementing such approaches do exist. What's lacking is the political will, and I hope that meetings like this will help to overcome and solve the current condition.

MR. KENNETH REID: I'm going to talk about how HOT lanes can promote mass transportation,so I have a little bit of difference with Peter. I think mass transit, and buses are a good thing. They've worked well in the Washington area.

Let's first start with some premises. My philosophy is that congestion pricing using HOT lanes should be used to finance new capacity, not to convert existing free lanes to toll lanes. I feel that if we combine HOV and HOT lanes it will provide the necessary lanes for bus rapid transit which is by far the fastest, most flexible, and cost effective form of mass transit.

Unfortunately, a lot of groups think that buses and HOV are not mass transit. I believe they are and that the Washington area is a good example of where HOV and buses work very, very well. I feel that the fixed rail transit is suitable in urban settings and older suburbs seeking renewal, such as the line going to Bethesda, to Silver Spring, to Langley Park, College Park, and New

Carrollton. The purple line was touted as a congestion relief tool. It's not a congestion relief tool, but I have since converted to being an avid supporter of the inner purple line which would be light rail, although I personally support monorail as a solution. But it does not decongest roads.

All studies that have been done in the Washington area and Capital Beltway corridor, the latest transportation policy report study shows that light rail and the railway solution, even buses, these do not decongest freeways. But HOT lanes give you more choice than fixed rail, which is inflexible.

I'm going to talk about two things I am most familiar with. The issue of new Potomac River crossings. I was the co-founder and co-chairman of the citizens' activist group called Maryland is for a Second Crossing. I'm not involved with the issue anymore.

What I'd like to talk about is the Second Crossing as a vehicle for generating money. The Maryland Commission on Transportation Investment, which was commissioned by the legislature and the Governor in 2000, said the State needed at that time $27 billion and we'll revise upward, $29 billion, by the year 2025, that's for transit and roads. That's the whole State of Maryland's need. Maryland currently has a $2 billion budget deficit.

The Washington region in itself, which is Maryland, Virginia and DC, has $1.74 billion transportation funding each year. I think if you count that up it's probably about $30 billion over 25 years. I'm a journalist for a living so I'm not very good at math. Some of these numbers may not add up.

The major, major source of funding is federal. We spent 40% of the Federal Funds on transit and most of it goes to the metropolitan Washington region, Metropolitan area transportation. As the population of the DC area has increased by 1 million residents, I don't buy the argument from so-called smart growth advocates and more mellow groups that we could put all these people in metro stations. Even if we did, I bet you all these new houses will have two car garages so everyone's going to have a car. So one million residents, you can basically anticipate maybe half a million cars or more. That's a lot.

CTR stands for the transportation policy task force in Montgomery County. In June of 2000 they convened 35 citizens. Originally it was designed to sort of put the official stamp of approval on using transit and land use densities to alleviate congestion. It was designed primarily to study, to show that we don't need the intercounty connector, we don't need the Montrose Parkway, which is another controversial road, we don't need new roads, all we need is transit and land use and we can turn Montgomery County into something like an urban village or something like that. But, because o groups like Marylanders for Second Crossing flooded the planning board with comments, they opened the task force up to two of our members. One was Carol Graham who is now the chairman. She sat on the task force.

They eventually studied a river crossing, even though the Montgomery County Council was unanimously against it, the Governor was against it. There was really no politician for it. They studied this against great odds and essentially what they came up with were two concepts.

One was an express techway, which is the term that the Board of Trade and the Northern Virginia Transportation Alliance came up with to describe a river crossing connecting I-370 to Fairfax County Parkway, interconnected with Route 28. They studied HOV and bus lanes and they could be used for HOT lanes although that is not part of the study.

The other concept was what they called the low tech way, which means it didn't constitute an express highway, it was just a stand alone bridge tied into the existing road network. 270 is probably the world's largest, longest parking lot. I think it has replaced the Long Island Expressway with that distinction. I think it's about 180,000 cars per day on 270. It needs a relief valve. It needs the ICC, if you're cutting in from north, into the ICC, going east and it needs a river crossing. So there's an incredible amount of demand.

In bus lanes, there are about 4,300 passengers, users, or whatever, and it can peak out at 5,100. The impact of the second crossing on congestion was great. It improved countywide speeds by 8%, better than the intercounty connector. The inter-county connector improved average speeds 6.9%.

So the river crossing, got a lot of traffic off of inferior two lane roads in Potomac and Darnestown and other areas. It cut traffic of the major route by 6%, about 20,000 vehicles on 270. The environmental impact statement was deliberately skewed. They came up with an alignment in the middle of north Potomac, you take 200 houses and put it through flood plains and what not. So they picked an alignment that was deliberately biased.

The Tyson's Corner purple line the task force rejected because it costs a lot of money and did no good.

This is what certain people in Montgomery County are using as a fig leaf to cover their opposition to river crossings. They want the public to believe that if we build heavy rail or light rail over the Tyson that somehow we'll alleviate the Beltway. Nine hundred users, each way, in 2015 and the opponents of the second crossing were projecting incredible density and land use and jobs. 900 users in p.m. peak. So obviously, the techway does more for transit than the purple line.

There's enough bonding capacity, there's enough demand for this new bridge, techway, whatever you want to call it, that a $3.00 toll could provide $593 million for construction and $831 million in bonding capacity. So it creates a lot of opportunity. What if we had congestion pricing? Well, once again, I'm just assuming that the growth congestion was so severe on 270, a lot of people do have to commute to Virginia and back, that if we charged $100.00 per month, we had about 2,000 people riding in the HOT lanes. It doesn't sound like much, but it's enough to pay for your buses. So that's a little bit of gravy on top of the estimated, I think $100 million a year, that this thing would reap. Once again, it could be a perfect, perfect vehicle for congestion pricing.

Let's look what it does for transit. New York City has 20 more bridges than we have in the Washington area. This is across from Virginia to Maryland. According to the New York MTA annual report which I got from Jerry Garson, this report shows that the New York MTA, since

1969, has taken all the overage in toll revenue, from the Triborough Bridge and other bridges that it deals with, the Port Authority deals with interstate bridges, they have funneled $560 billion into New York City's mass transit. So why can't we do that here, if we build a techway, a western bypass and an eastern bypass?

Well, the Maryland Transportation Authority hasn't really built anything in years. It has paid off the JFK Highway, it's paid off the Chesapeake Bay Bridge, it's basically used as a bank to finance the Baltimore Light Rail. So why can't it be used to build a purple line or some other transit project or just to add lane capacity?

The other thing that some of us added to this was use for conservation purposes because the techway would most likely go through some rural areas of Montgomery County which are off limits to growth. There are obstacles, of course, and initially, I guess Peter summed them up in two words, Parris Glendening. Not only did he kill the HOT lane proposals we mentioned before, but he killed the public-private partnership which existed in this State.

Since that time there have been efforts to revive the techway which have been fought, interestingly enough by legislators who were previously for it, such as Jean Roesser and Jean Cryor. Nothing's going to happen in this State unless the governor says so because the Transportation Secretary is appointed, he's not elected

There are other obstacles to this bridge, which actually would be a major money-maker, a major supporter of conservation programs, and essentially the issue is off the table. I think it's largely because of business groups. They pushed it so much in 2000 and 2001 but then Glendening canceled the federal study. I'm a firm believer that if we don't get people out of the woodwork to support these projects, they're not going to be built. Not every good politician is going to be leery of doing this.

Let's talk now about another concept where congestion pricing would work, that involves toll roads. Maybe the difference here is that the Dulles toll road exists. It's real there. The techway, there's no alignment for it, there's no land dedicated for it, there's no study for it . . . The Dulles road is an existing road which I believe has, what, eight lanes for each direction. I think about $75 million in bonds remains. The tolls are supposed to be eliminated in 2015. Of course this is pending this rail option which we are looking at now.

The Dulles Airport access road is an airport access road. It was built, I think, in 1984. It's there just to carry vehicles to and from the airport. It's really very underutilized. The only data I could find is thatthere were actually 840 passengers at peak hours in the year 2000. I think the daily traffic on this access road is maybe 20,000 versus 90,000. So we have four lanes, completely free lanes, no traffic that are very underutilized. They're not being used except for airport traffic.

About 81% of the people who go to Dulles Airport are riding by car or taxi or some other form of vehicle as opposed to buses. The transit is needed in the corridor but what kind of transit is the question. HOV is not an airport road, it's actually on the toll road itself and utilization there isn't great either.

According to the draft environment impact statement for the Dulles corridor rapid transit project, they're saying that there's only 1200 peak hour vehicles in the HOV lanes in the year 2000 and by 2025 it's actually going to drop. It's about the same, it's maybe down by about 50 or 60 vehicles. So that will mean a major increase here which is a shame. Most of the congestion on a toll road, unlike the techway example which alleviates 270 from the Beltway, most of the congestion here is really the toll booths and the exit ramps. The peak hour traffic is going to increase, we now have 6,200 vehicles in 2000, it's going to go to 8,200 in 2025.

This is pretty much in line with what Maryland finds with the ICC in developing corridors, 20,000 vehicles and buses. But look at the costs. I mean, heavy rail would cost $3.3 billion and in reality, at 78% cost overrun, it's probably more like $5 billion or $6 billion. It would require a raise in tolls of $2.25 each way, to keep the tolls instead of getting rid of them in 2015. They will attract commercial properties in Fairfax County, it's not what they want to do.

So once again, the amount of the taxes and the tolls would be higher than the number involved in the Virginia sales tax referendum.

But there is another solution. Essentially, to take the Dulles access road and make that into your busway, HOV and HOT lane. Right now when you get on the Dulles access road, you basically get on and get off at the airport. You really can't get off. We could have flyover ramps to go over the toll road to get people on and off. People driving HOV, HOT lanes if you pay your bill and buses. That way you can have something to build from.

It's from Leesburg to Reston. We have something going from Reston to Tyson's Corner. You take buses and you have different routes, you don't have to wait for a train to come and stop there at the station and then move on. The bus stop can be at the absolute center, like an erected town center.

In order to lower the costs and get the Airport Authority to buy in, give you the land for nothing, put all the stages in the middle of the toll road, except in Tyson's Corner. You'd have to walk over eight lanes of traffic in order to get to the station, you'd have catwalks or some form of that. Buses could run , HOV's too, we need more, and HOT lanes with congestion pricing. The toll should be increased, right now it's $0.85 flat, all the time, no difference in pricing, I believe that people would understand a $1.50 increase.

I would say to charge $25.00 per month for HOV, $50.00 per month for HOT lanes and with the new revenue help build these ramps, finance the buses, and improve Dulles Airport expansion.

If the density warrants it, fixed rail eventually. Maryland's looking at that with the Carter City project on 270. It could start with buses, an elevated busway, two lanes, and then they could use that for light rail, if the density warrants it. Montgomery County has a very good plan to create density in that corridor.

So what's the difference? With the heavy rail option, we're asking toll payers and taxpayers to essentially subsidize a government monopoly. In this case WMATA. This is only going to

benefit a select few people. $3.3 billion, not to mention the annual operating costs of $111 million which would be borne by Fairfax and Loudon County taxpayers.

Rail in corridor will eliminate buses. That's another big, dirty secret. They did a study in 1996 of 600,000 rail riders, something like three-fourths of them were people who were taking buses. That's what MATA does, they bring rail in, they cancel the buses. That's what happens.

And so now we have 20,000 people using the Fairfax connector every day, and I think there's 13,000 people on the WMATA buses, they will all be converted to rail, most likely. We're asking for single occupancy motorists to subsidize transit. Private companies can operate these buses, they do it now on Shirley Highway in Virginia, under contracts. Congestion pricing lets the market decide the cost of using the transportation facility based on supply and demand. That's not being done on the Dulles toll road.

But with a rail solution, what you're doing is only giving people two choices. They can drive or they pay for the rail. Buses will most likely be eliminated. So if you want to find out other success stories, Shirley Highway in Virginia, There is a website, roadsofthefuture.com. I highly recommend, if you're interested in history of transportation in the Washington area. Dallas and Pittsburgh have successful busways, as well as Los Angeles.

MR. RONALD UTT: Batting in fourth place usually makes me the clean-up hitter, but since all of my predecessors have hit home runs, the task is a lot easier. I share their concerns. I believe in many of the same things that they do.

What I'd like to talk about is how do we take these interesting ideas that we've talked about and fiddled around with in one way or the other for many years, and discussed and been implemented here or there all with great success. How do we turn those into public policy action rather than thoughts and projects and debate?

One of the problems that we confront in public policy in a democracy is that things just take a long, long time to happen. The idea is if it ain't broke, don't fix it. It's probably a good enough description of people's attitudes towards change as anything else. Sure, it doesn't work quite as well as it does, yeah, it's inconvenient but I'm afraid of change, it could be destabilizing, I may be a loser. Yes, this situation is bad but the other situation afterwards may even be worse and the costs of congestion would be simply paying more money.

Well, what we have to do now, I think, or how we have to start thinking about this is how do we begin the process of implementing these steps? There's lots of good ideas around and there's lots of case studies that we can draw on. How do we make a case to the people? Well, a case has been made.

I think that what we have to understand is that congestion is a big priority in Washington, DC. We are, in fact, the third worst congested metropolitan area in the United States, which is the same ranking it had ten years ago in 1990 when this was performed.

So, it's a big issue here, but is it a big issue in other places? Jacksonville, Florida., Richmond, Virginia. Are people in those communities challenged with the same kind of inconvenience and the same problems that we are? In fact, are congestion factors here in Washington materially worse than they were ten years ago? I've been in Washington now for 25 years, I have never known it to be an uncongested place. This is something we've learned to live with and we always complain. Has it reached the crisis proportions, perhaps?

In fact, the Department of Transportation does every five or so years a study called the Community Tops, and they report this. It turns out that for the average American, the commute time to work is a couple minutes shorter today than it was in 1969. Now, part of that reduction is that fewer people are riding transit which was very slow compared to riding in automobiles.

Though national averages tell us very little about what's happening in a particular city or a particular region, it would suggest that in order to find solutions, the solutions we're going to have to look for are going to have to be regional in nature and we're not going to be able to look to the Federal Highway Program or the U.S. Congress to make changes in something that simply isn't galvanizing the rest of America.

Another aspect that I also want to address is congestion pricing, the idea of tolls, as both an scarce resource to make people change their traffic pattern, and a funder for new resources and to repair existing resources'

In all the congestion pricing discussion people are talking about not finding the resources to do something, but providing motorists and commuters with signals to change their behavior and act more efficiently in how they allocate their time in how they get to work and how they do other things.

We may find opportunity to begin making inroads, not directly, but by setting up a process in which congestion pricing is an inevitable outcome as opposed to a goal that we seek from the beginning. Most transportation in the United States is funded by the gas tax, which is a state gas tax and there's a federal fuel tax. The fuel tax is $0.18.4 per gallon. That yields about $32 billion a year to the federal government that is then allocated toward a variety of different transportation center divisions.

There's a couple of problems with the federal fuel tax and a high rate program that absorbs it, contains it in a trust fund, and then spends it by sending it back to the States. One is that it has a number of fairly severe national, regional inequities associated with it. You send your dollar to Washington, not everybody gets a dollar back. Some people get $1.20 back, some people get $0.90 back, some people get $0.75 back.

This is not a random pattern. It turns out that the donors and the recipients, or the payers and the beneficiaries of the system tend to involve long-standing regional differences. Although some of these differences shift from time to time, if you look over the last 15 years, all the fast-growing states, south of the Mason-Dixon line, have been the donors. That is, they have been sending more to the Federal Highway Trust Fund than they have getting back on a consistent year-after-year basis.

At the same time, many of the states or most of the states above the Mason-Dixon line, Pennsylvania, New York, New England, have traditionally gotten more back from the highway system than they put in. This has gone on year after year.

This makes a big difference, even though we're talking about small percentage points that you pay at the tank. Both Maryland and Virginia in the last couple of years have been getting back about $0.80, $0.89 on the dollar. For each of those states, that shortfall, means that we're surrendering, we're losing, we're giving up, we're not receiving something on the order of $80 to $100 million dollars a year. This money is going elsewhere around the country, specifically to those states that are getting more than $1.00 back.

This happens year after year. We're talking about a fairly significant volume of resources. Within states themselves, there are also fairly significant inequities all depending upon what the jurisdictions are. If you're looking on a county-by-county basis, particularly in Northern Virginia which feels that its resources are for transportation. Northern Virginia shifts an enormous amount of money to address the State. I suspect that Montgomery County is doing the same for Maryland, although I don't have the figures.

Another problem associated with the highway trust fund and also with many state trust funds is that even after you adjust for the mutual inequities, once you get your dollar back, there is an enormous number of leakages that occur before you the average motorist gets something that's of value. Of the money that you send in to the Federal Highway Trust Fund, $0.18 to $0.20 per year goes to fund federal transit programs. What they say is that nobody expects the highway trust fund to operate at a profit.

Well, folks, it does operate at a profit with large surpluses providing for transit or a variety of environmental programs, a lot of beautification programs, along with historic renovation programs. In fact, I calculate something on the order of $0.65 is what comes back from $1.00 of fuel tax to the average motorist. We're also paying for roads in national parks and or for national parks as well. The Federal Highway Trust Fund has become a huge source of money, a huge money pot for a variety of programs and the pressures to extend that into other areas are growing year after year.

As everybody gears up this time for the reauthorization of T-21, transit groups say well it's hard for us to get a bigger share and environmentalists want a bigger share. Amtrak is saying we can't face financial insolvency year after year, we need to have access to the Federal Highway Trust Fund. So the competition between motorists and everybody else is only going to get more intense before it's solved and gets better.

Another problem is the gas tax besides all these inequities is turning out to be less than an attractive source of revenue to highway programs than it was 10 or 15 years ago. Driving, whether measured in mileage or passenger miles per year, has yet to peak but it has slowed down significantly. I look at mileage, incremental increases in mileage every year of the 1990's to the present, and compared them with growth in the economy and the growth in mileage is not growing as fast as the economy has been growing.

We have a revenue source that's simply not keeping up with the recent growth of the economy. It's what we call an inferior good. Spending on it is less and less.

As a consequence, the growth of revenue is ceasing at a time when the costs of recurring highway projects we now confront are escalating. Because most of what we need to do on the Federal Highway Program is retrofit the railway, highways and interchanges, roads already subject, in fairly dense parts of the country, to quite a bit of congestion. We have a cost to retrofit.

When the needs and costs are rising, the revenues are not coming in as quickly as before, we are confronted with a revenue problem that can be used to make tolls more attractive to individuals than they have been before,in other words, to add tolls. Efforts to have experimental toll programs within the Federal Highway Trust Fund have been very difficult to impose, have been always at the risk of being removed and repealed in subsequent years.

The idea being that, hey, you paid for this once, why should you have to pay for it again. The problem is that any road that has ever had a federal investment in it, no matter when the time, ends up carrying some vague federal property right that prevents you from doing anything else to it. So, we're limited there.

Let me briefly pick up on something that Peter and Ken have both talked about and that is one of the popular ways now of building your way out of congestion or relieving congestion is to look at transit rather than look at the price. We see this in the Northern Virginia governments saying that fully 40% of the funds that are being raised are to be devoted to transit. Yet, in Northern Virginia only about 7.5% of commuters, and that's a shrinking share of the commuting market, actually use transit. So, 40% of the money is going to 7% of the commuters.

The statistics on these factors are all from the U.S. Census Department so they can't be disputed as something the Heritage Foundation or the Federal Highway Administration, or AAA, or truckers made up. They indicate that transit has been falling year after year and in fact efforts to make it even more appealing with very costly systems have not been very successful. A lot of us believe that the Washington metro area is one of the great transit successes.

If we look at the trains they're packed and crowded. People seem to be using them with great frequency. It's interesting to note that in both, the lion's share of the transit commuter market is in the Washington metro market. I'm told the numbers I'm using are a share of the commuter market and some of the numbers I'm using are actually broke out in the Washington metro area, in what is now recorded as the Washington-Baltimore area.

Frankly, there's such dramatic differences between the two cities that the conglomeration of numbers for something like transportation often doesn't make any sense. But anyway, the Washington, DC area in 1970, a couple of years before the first metro line opened up, the share of commuters in the Washington metropolitan area using some form of transit, whether it was a bus or commuter rail or whatever was around back then, was about 16% of the market. Shortly thereafter we began a massive investment program which in inflation adjusted terms amounts to $10 billion dollars. Quite a very substantial and costly system.

We now have one of the most extensive systems in the country and yet the share of commuters in the Washington metro area using transit, whether it's the metro now or the buses, is now down to just a tad over 10%. So, despite the investment, a massive investment relative to other communities, we have not been able to reverse this trend of people simply moving away and choosing cars over transit because cars are cheaper. They're more convenient, your mobility is enhanced, notwithstanding issues of congestion and everything else.

We're seeing that and we're seeing the mistake being repeated, but even at a more extreme level in the Northern Virginia, where people are expected to raise $5 billion dollars and spend 40% of it on transit, which means that we're spending an enormous amount of money that will have very little impact whatsoever on the congestion that most people confront in the Northern Virginia area.

I just completed an Op-Ed on that which will be published by the Virginia Public Policy Institute. Just trying to come up with looking at the balance and how the money is being allocated in comparison to how actually people choose and what their preferences are in getting from one place to the other. What can we hope for and where should we be focusing on, and hope will sort of bring about the change that we've all talked about today.

Change comes very slowly and the most likely source of an impetus for change would be a local level. I see no expectation that we're going to see some dramatic change or dramatic recommendation occurring at the federal level. Notwithstanding the problems associated with the gas tax and the revenue shortages its slow growth is now revealing to members of congress. I don't think it's sufficient to induce them to change from the sort of very basic program they have now.

More importantly, it's become so politically attractive with the federal fuel tax raising over $30 billion dollars per year which the Congress gets to spend, whether on new road projects, on making the environmentalists happy, the transit people happy, the bus people happy, that's a huge pot of money that can be spent for political purposes and it's not likely that they're going to give that up or put it on some form of automatic pilot in which their discretion is diminished.

So one thing I think we need to being doing is start looking for ways to take this basic program and look for mechanisms to decentralize it. To move more and more of the decisions within the confines of the federal program more and more to a local level because these are where the problems are. Transit may work in some places, it doesn't work every place, but we are trying to impose a one size fits all program on the country we are then trying to set up billion dollar light rail systems in small Nebraska cities and small cities in South and North Dakota. It just makes no sense.

When you begin the decision-making and control of resources down into where the problems are and where they vary from place to place, the better off you're going to be. You end up with more authority and more responsibility, you have an opportunity to be more innovative and more creative. It's out of impatience, and people talking about it that it will emerge.

I think the problem is going to get worse before it gets better. As I've said, the gas tax is providing less and less money compared to what people perceive are the needs. At some point, maybe not any time soon, maybe not over the next five years, I think the shortage of resources is going to be quite severe and people are going to look for other things to do.

There is an enormous amount of hostility toward raising taxes. People don't have confidence in their state DOT's, they don't have confidence in the politicians.

A classic case that Peter mentioned was the positive increase in fuel tax in Missouri. It was to be dedicated entirely to transportation. It lost by 3-1. Almost nothing in an election ever loses 3-1. This was whomped. This suggests that despite the problems voters simply have no confidence in taxes as being the solution.

It will be interesting to see whether this is repeated in Northern Virginia or in the Hampton Roads area which also has the referendum that relates to gas taxes for transportation and a portion to be used for schools there. What I think is going to happen is that tolls are going to be implemented not as a general policy, but to deal with projects for which there is no other money. Your inter-county connector may be hastened with existing state funds. You've all worked to do this but we can fund it on a toll basis. Once you've established the principle of tolling, it's a very easy next step to move to the principle of congestion pricing. We're not quite there yet, despite the fact that there are a numbers of successful toll roads in the country. They still remain quite controversial, difficult to get underway, and more are proposed and discussed then are ever implemented.

We need a change in attitude, I think, before we can move there and that change in attitude will come by being stuck in traffic that will make people consider looking to something innovative that they have previously discouraged, at least at the political level.

MR. LIEBMANN: The first question I would ask the panel members is, can you give us some grip on what the costs are, what the capital costs are of implementing a fairly based congestion pricing scheme on a road. In other words, if one were to decide to impose time of day pricing on Interstate 270 or on sections of Interstate 270, what would be involved in dollar terms in installing the technology and the infrastructure necessary to collect tolls?

MR. SAMUEL: If you did it in the existing HOV lanes and there was very little civil engineering beyond some signs, the antennas, and the cameras to get violators busted, the professional work in developing the software and so forth, around $5, $6, $7 million dollars.

MR. LIEBMANN: The preferred technology, the easiest technology to utilize to collect a toll is what? Is it a, sort of like a calling card that you buy at your local 7-Eleven and attach to your car?

MR. SAMUEL: No, the ideal thing to do would be to issue transponders. The kind that Maryland DOT — or Maryland Transportation Authority is issuing already the transponders, easy-pass transponders. They used to call them EZ-Tag. I think they're getting rid of that term because they're now compatible with all systems up north.

It would be very nice also if the transponders that are used on the Dulles toll roads and the Dulles freeway were made compatible too so that you could use the same transponder on both. But that's just a matter of business arrangements being made between the Virginia DOT and the EZ-Pass interagency group that sets standards for inter-operability. You'd use transponders and you could possibly also do license plate recognition, which is a well-established trend of technology now. It's used mostly for getting violators and of course it's used for trying to get people who run red lights, and who speed in a few cases. I don't approve of its use in that case.

Cameras are also used for tolling itself in a number of places on Highway 407 in Toronto, one third of the transactions every day, 70,000- 80,000 transactions a day, are done by license plate imaging with a camera. Then the license plates are matched to the motor registry database with the name and address of the owner of the vehicle and they're tolled through the mail. That's also a similar system is in use in Melbourne, Australia, the city link and in Israel, just a month ago they opened their first toll road, the Trans-Israel Highway, up along the green line there, just south of the line. They've also used the same technology which is based on Hughes Aircraft's imaging hit on the Maverick missile 3 that does pattern matching and is extremely high quality license plate recognition technology.

MR. LIEBMANN: The transponder, , costs what, and is obtained how?

MR. SAMUEL: The transponder costs about $20.00- $25.00. Half of the cost of that is the battery, which is a long life battery. About a seven or eight year battery.

MR. LIEBMANN: And that is attached where?

MR. SAMUEL: Oh, it's normally put in the windshield of the car, near the rear vision mirror. It's usually placed there and it communicates with an antenna that is either hung on sign edging or on an arm from a post, or in the canopy of the toll plaza, up around the 14 foot height. Around that height. So, it's very short-range radio communication which occurs very quickly, in just 2 or 2 milliseconds, the radio communication back and forth. It operates at a high frequency but, essentially its not different from garage door openers. Its more sophisticated. It works at high speed and frequency but it's essentially doing the same thing as you do when you open your garage door.

MR. LIEBMANN: The EZ-Pass works how?

MR. SAMUEL: You have to establish an account with an EZ-Pass and normally you give them the right to debit your credit card or direct to your bank account or else you can pay by check if you want to. It compiles the trips and debits the account. They actually, I think, normally do prepayment. You have to put $30.00, $40.00, or $50.00 in at the start so it would be a debiting against that and when the balance gets to a certain level then an agreement that you sign when you sign up, you give them the right to debit your credit card when the balance gets down.

MR. LIEBMANN: Are there privacy concerns? Are you compiling a central record or are there other ways of doing it so that this is as anonymous as using a garage door opener?

MR. SAMUEL: There are different approaches to the privacy issue. It does get raised by people concerned with privacy and in Singapore and Japan they both have systems that don't depend on a central database. Particularly in Singapore. The whole electronic funds transfer is done between a smart card that is inserted in the transponder. The smart card is a stored value card with a chip in it that gets filled up with a certain value of funds and that money is transferred to the Land Transportation Authority which runs the tolling in Singapore instantaneously.

So they have no central database there, no records of who has paid. That system is compulsory. In Singapore everyone has to have them, a transponder and there's no other way of paying.

No one forces you to have a transponder. You can still pay cash if you want to and indeed, the privacy issue is addressed also by arrangements to have an anonymous account without a name and address on it that they could just get an account at the customer service center and put in money there. Very few people do that. In fact, I think, my personal opinion is the privacy issue is an issue of sort of policy works, and lawyers and activists, rather than a major public issue because very few people seem to take advantage of the anonymous accounts.

Roads are public places, anyone can observe you going on them. Photography is perfectly legitimate, of course, in surveillance, in public places it's perfectly legitimate, the Courts have always decided.

In my personal opinion, privacy is greatly overrated as an issue but there are ways to address that issue if you want to. There are technological ways of doing that.

MR. LIEBMANN: In terms of congestion pricing, time of day pricing, if one were to attempt to implement on an existing road, without any extension of capacity, is that political non-starter or are there ways of regaining the proceeds?

For example, putting all the proceeds in a pool, allowing all the residents of a county to share in a reduction of their annual registration fees? It might make it more politically more palatable to do that. Do you have any reactions to that?

MR. UTT: Peter's right in one of his polls that showed that people preferred tolls to taxes. But they prefer nothing to those two, if given the choice. The message that Congress seems to get when they decide to toll or not toll about this, is that people are opposed to everything. One particularly powerful lobby in transportation AAA is very strongly opposed to tolls and they would fight tooth and nail any effort to do existing roads. Now, one way to get over that is if one of the existing roads need very substantial renovation so you could essentially claim that the road is now fully depreciated of all federal contributions it has received and most of them are. The tolls could be designed to operate in ways that people would buy into. Extra roads, HOT lanes, or something like that.

But I think you have to be willing to declare it. It is even more politically different to do an existing road than let's say a new bridge which is obviously a new service.

AUDIENCE MEMBER: The last thing that would be desirable here would be to sort of re-invent the cities. It's been done in Trondheim and it's now about to begin in London. But, apparently in those places, a lot of people view the program as adding revenues. It is not happening in a suburban setting in this country, when you're not reinventing a city and you're just trying to spread out the traffic on existing arteries.

MR. ORSKI: Well, look what happened on 270. The original HOT lane idea was to be put on the Maryland to the Capital Beltway corridors in 1993, and the 495 Beltway. They looked at HOT lanes and the study came out in 2000 and showed them the cost of $1billion dollars to add two lanes, to make it ten lanes instead of eight. That's from The Wilson Bridge, that's 42 miles and it would cost only about $1 million dollars a year to operate buses, instead of going with the inner purple line also which does nothing to alleviate congestion.

I mean, once again, I support it but there was this big hue and cry over it and that's why the Montgomery County council wrote a letter also opposing HOT lanes on 270. They're supporting it on US 50. Once again, put them into Prince George's County but not here. Because they were talking about existing capacity. Some environmental groups support congestion pricing but I think they want to do it in existing capacity and they want the money to go into transit. They don't want it to go into new lanes. That's why I personally feel that if you're going to do congestion pricing in HOT lanes, it has to be new capacity because I don't think the public is going to support the situation where you have Lexus lanes on existing roads. If you build maybe they'll support it.

MR. SAMUEL: Can I just say something there. I think the only place where that's really a possibility politically in the United States is in New York City. You've already got a lot of tolls there and you know you've got the Brooklyn Bridge, the Queen-Midtown Tunnel and then you've got four free bridges. You've got tolls already on the Hudson River. You've got no tolls coming down the east and west side and across 59th Street there.

I think there's a real argument for doing some kind of cordon pricing around Manhattan south of Central Park. I've looked at that very close and I think that might make a lot of sense, rationalizing the tolls and the lack of tolls on the East River bridges, and they need the money really badly.

One of the things that I found when I look at these European experiments in some detail is that most of them mainly, but certainly the Norwegian ones were mainly motivated by raising money. It was almost an afterthought. They thought, well, we can manage traffic as a result of this, but there was a desperate need which resisted higher taxes. There was some desperate need for some modern highway facilities around Trondheim. They didn't even bother with variable pricing. They were basically toll systems and a cordon is a very efficient toll system because no one can get around it. Now it happens that they've made use of that in order to do good things with variable prices.

The basic political drive was to raise money for highway works. I think in the case of London the basic drive is to raise money for transit there.

MR. ORSKI: I just wanted to comment a little bit on what Peter has just said and ask him a question. First, as far as political acceptance of pricing is concerned, I think the California experience shows that people are willing to pay tolls if they receive a benefit from it. That is the secret of the HOT lanes. The HOT lanes provided the network service and is superior to the lower service obtained in the regular lanes.

MR. SAMUEL: Can I interject here? They pay very high tolls too. On most premium service lanes they are paying tolls that are several times the tolls that people pay on normal toll roads.

But, if the toll is perceived as a penalty or an instrument of trying to influence people's driving habits, I think it's a non-starter.

MR. LIEBMANN: Let's talk about another matter which doesn't involve funding, that is information. The information you get about traffic flow on the roads now is primarily information you get after you've committed yourself and you're already out of your garage and on the highway. You get traffic 'copter information. You may, on some roads, see signs which tell you whether the roads are congested or not.

Do you think any benefit would arise if the highway authorities would simply publish in the local weekly papers, half hour by half hour traffic patterns along the most congested arteries. Would this have a tendency to encourage people to drive earlier or later?

MR. SAMUEL: Well, you already have real time information on the Internet. I mean, you can obtain real time information about traffic, the speed of traffic or the volume of traffic, simply by logging on one of those sites that States and county departments of transportation have.

MR. LIEBMANN: How many people know this and how many people use it?

MR. SAMUEL: I think very few people actually do that. But there is a theoretical means of obtaining that kind of information. I don't think it's very useful.

MR. ORSKI: I think as a user or a potential user of these systems, of course a lot of these things are funded out of the intelligent highways program that has millions of dollars to do these things. So if your new fancy signs are going up across the interstate, it was funded by the federal government.

The problem I have found in the Virginia attempts to give you information is the information is not really good. It's often delayed and when the situation changes that doesn't change. We have discovered that the most efficient thing to do would be traveling on 95 or if you do it during the day, is to ignore all the warnings because they tend to be something that happened and by the time you get there it's been cleaned up. I think that people don't check because it's not valuable information.

So I think we have a long way to go between promise and performance but it's a potentially good idea. The problem is that on many places, like 95, we don't have an option other than, let's say, calling up Ken and saying, Ken, can I come and stay the night with you?

AUDIENCE MEMBER: I live in Montgomery County and we have an incredible system here. They have on their cable channel, during rush hour, morning and evening, they show all these key intersections throughout the county, they show the Beltway, they show everything. The counts are not necessarily going to do anything, because everybody thinks they can get on that freeway and I shudder to think that we want to have people getting up earlier to go to work than we are now.

What they need in this county, what the need in the state of Maryland, and all over this country is more road capacity and they need better transit solutions than what we're getting right now with fixed rail. So the idea of telling people that if you go at 7:30 you're only going to hit 150,000 versus 8:00, I don't think most people are really going to care. If they have to get to work at 9:00 or if you get in at 8:30.

We're going to have an 18 hour rush hour in 2015 if we don't do something. Eighteen hours a day we will have rush hour in this county. All we have is 270 and the Beltway as our only limited access freeways.

MR. ORSKI: The problem is the unpredictability of the accidents. I mean, if you have an accident at 7:30 when the traffic is still light, you may have a gigantic back-up just as easily as at 8:00. So really the ITS, intelligent transportation information systems, are aimed not so much at predicting delays. They're also used to compel local authorities to clear up accident scenes more quickly. They are useful, but as far as the influence on the personal driving is concerned, I have some doubts.

MR. SAMUEL: I think the Connecticut turnpike's traffic has increased very seriously since tolling was eliminated and congestion is much worse. Many people in Connecticut say it was a mistake that they lost a valuable revenue source and now they're debating possibly how they are going to finance the widening of it or managing it better. Its flow is much worse than the New Jersey Turnpike or the Garden State Parkway.

It's a mess and I think they made a mistake.

You know, sometimes these decisions are taken in a very emotional climate.

MR. LIEBMANN: On Glendening's point, do you feel that any common studies comparing the gasoline tax and tolling systems, in terms of their impact on income groups? It strikes me that the tolling system in Montgomery County where people commute from farthest out and who tend to be wealthier than the average individual might be more progressive in impact than gasoline taxes. Do you know if there are studies along those lines?

MR. UTT: I know of one which is about 12 or 13 years ago when there was talk of using the gas tax to reduce the deficit. If anybody remembers Ross Perot's proposal to raise it $0.50 per gallon. There was some studies a couple of years before which show that states that would be most heavily impacted, I know that Tennessee and Texas would be the most heavily impacted because people tend to drive further distances and I think states like New York and most of them on the East Coast would be less impacted. At least at that time, states like Tennessee and Texas

certainly had a lower standard of living, certainly lower wages, but I don't know about, you know, within a state or within a city having an impact.

All taxes are unfair. Every tax is based on who wouldn't pay. Property taxes are extremely progressive in New Jersey and some other states.

MR. LIEBMANN: So if such a study were done, the result would probably show the tolls are less regressive than the gasoline tax and that would be a point in your favor.

MR. SAMUEL: The other question relates to the impact the gasoline tax in light of new automobile technology which are really categories of driver who aren't going to be paying a gasoline tax either because they aren't using gasoline, they use some other fuel or they're using much less gasoline. So the impact of the gasoline tax is going to be more and more arbitrary in terms of the people who pay for the revenue.

As to progressiveness across income groups there are studies you can pick up in Los Angeles. It's very easy to do those studies about who pays, who is paying or not and as you mentioned the gasoline tax is very simple. It costs about $0.08, $0.10, $0.30 divided by miles per gallon.

MR. SAMUEL: Except for the very poor who drive big old cars with horrible fuel mileage.

AUDIENCE MEMBER: I think the reason why Gov. Glendening killed the HOT lane thing was because he doesn't like roads. He doesn't want to add lanes, he doesn't want to add bridges–

MR. SAMEL: Well, he actually said that in some of the things he wrote in USA Today, he actually added in the smart growth argument. Saying that we shouldn't be reducing congestion because what we want to do is get people on the trains. He actually said that in USA Today.

AUDIENCE MEMBER: He has bought into this very, very extreme philosophy which not all the environmental groups want necessarily that you have to have only trains, you have to have only transit, and he is programmed to just don't believe in fine reality and how the world really works. Maryland is becoming more and more suburban, less and less urban under his administration. More and more people are driving and less people are living in the city of Baltimore and using transit. In Maryland, especially in Maryland, when you have rail up in Baltimore, there are a lot of people who think that we can get by with rail. Whereas in California, everyone has to drive. Therefore, that's probably why you see that kind of support here.

You tried to add a road, like the Montrose Parkway which was like two miles long, you have to go through 20 alternatives and five years of facility planning to get the road through.

So people are willing to fight roads and in that whole debate in 2001 on this, there was incredible outcry on talk radio about the idea of converting the HOV lanes on 270 to toll lanes. So he got that message that nobody wants it and he has used opposition as the vehicle to cancel road projects. Unless the politicians and civic groups, and the citizens step forward and say they want something, these politicians just aren't going to move.

MR. LIEBMANN: To what extent would deregulation of taxis increase the mass transit capacity in the Washington area? We still have a medallion system for taxis in Baltimore City. It's like the system in New York, and San Francisco. In Washington, there is open entry.

MR. SAMUEL: They're not really competively based, I mean, you know, the DC cabs cannot pick up in Montgomery County and I think Virginia. Your Virginia cabs can't pick up in Maryland either. So it's very much the old style of essentially preserving a monopoly. There is a monopoly in Montgomery County pretty much. While all taxis are not considered mass transit, it makes sense that they're now considering people who take taxis to work as mass transit users

AUDIENCE MEMBER: I've been doing a lot of study on taxis. To answer your question, Montgomery County has Chapter 53 of the Montgomery County Code which regulates taxicabs and the executive sets the number of taxis. They're set to fund 600. It hasn't changed in six or eight years. Barwood has about 80% of those. There are three other companies, Action, Montgomery and Regency, which have about the other 20%. Barwood has bought this monopoly because the other companies went out of business.

Nobody could make money, so he just bought the licenses for them. He has about 20 or30 sitting in a lot that aren't running because they can't get drivers. So the 600, he can't even get out of the road because there's no drivers. It's an interesting point. I would like to talk about it because I'm interested in the taxi system which we haven't talked about as an alternative, everybody ignores it.

I did a little study for the County, the Committee on Aging asked me to compare senior buses which take them from their home to the senior center versus ride sharing where you can run four people in a cab. I showed it's cheaper for the County to pay for a cab ride than to take a bus and run them to the center. It costs $6.00 a seat. Government is no longer competent to manage our transportation. They don't have the political will, they don't have the technical competency, and it looks like the taxis are a regular failing. The other alternative is for civil engineers, private enterprise, the transportation technologists, they have the will, they have the competency but they don't have the money and so tolls are a natural topic to be talking about by a group with these kinds of characteristics. Also, tolls could raise money as a business profit. Make more money than taxes, New York City urbanized by taking transportation and putting it under an authority which is out of politics. It not only pays for itself it provided for additional expansion of roads. Somehow this County which is going through urbanization, or a denser suburbia, needs to find a non-profit, private agency outside of politics, get those incompetents out of it and then the people can solve the problem, solve it and pay for it with tolls and other means.

MR. JERRY KRESGE: In New York, the IRT, which is a 1904 construction, was private. The BMT, the Brooklyn-Manhattan Transit Company was private. Most of their construction in New York City was done privately. After the depression the stuff fell apart, that's when the city took it over and the amount of miles built since the city took it over, I think is actually negative. They've actually torn out miles and miles of track.

You take all of that, coupled with a total lack of interest in the things that drive up the costs of rail and mass transit. The labor union contracts, the provisions making it impossible to discontinue unused bus lines and all the other things that riddle mass transit.

MR. REID: Well, I guess that my feeling is that the reason environmental groups in this area are so fenced in on a fixed rail solution is because one, they want an inflexible system, I think that they sort of think that the good old days of the bus going around and trolleys was great because we live in the cities and we all knew each other. They have a sort of mythical vision of how life should be and you know, we should preserve all these rural lands and put everybody in urbanized settings.

One of the hidden agendas actually is to rob the trust fund because they know these projects are expensive and they know that if they can take more and more money away from highways and fixed rail solutions then they will supposedly stop sprawl. It ain't going to happen. If anything, if we don't invest in highways in urban and the older suburbs, people are going to move further and further from there, out into Frederick County, further out where I live, in Leesburg. I mean, people are going to move, to get away from the traffic, to get away from the congestion.

That's why, unfortunately, they are better organized and in some cases better funded. The business groups go from one subject to the other. The Montgomery County election was the first time that businesses teamed up with civic activists, like Jerry, to actually throw the congestion coalition out of office.

MR. LIEBMANN: Let me raise another topic of discussion that hasn't been discussed much and that is, degradation of roads through curb cuts to the point where new parallel roads have been built.

Ritchie Highway is one classic example, but I suspect that Route 355 is another one.

`The Maryland law on curb cuts hasn't changed much since the 1930s. As long as you are not totally landlocking someone, he has no God given right because he owns property on a new road, to cut to get into it. The underlying premise the highway departments seem to operate under is a different one. Unless it's a expressway, almost anyone can enter if anybody wants to and the cumulative impact on the road is a matter of indifference. Do any of you have comments on that?

MR. REID: Yes, if I could comment. Montgomery County has what they call an adequate public facilities law. The adequate public facilities says you can't build additional units of housing or offices or jobs if they don't meet the standard. The standard is such an impossible standard to meet that basically, even if you had half, you will not exceed their requirable limits. I proposed that they change and state that if you can't cross an intersection through light cycles, then you have congestion. They refuse to make any changes.

They are on the books, they sound nice, but in reality they don't work.

In Montgomery County, 355 was always meant to be a freeway. In 1964, Montgomery County adopted Regis and Carter's plan and 270 was always intended, it was called 240 back then, or

Route 50, it was intended to be a freeway. I-95 was another corridor in Prince George's County and we were supposed to have the inter-county connector and our Beltway to connect these suburban areas. What happened was it never happened. 270 was deemed the only corridor through development. But it's still a limited access freeway and 355 did get those curb cuts, true, but so did other routes. Now we have a situation where they think that they can build roads with curb cuts and intersections and that will solve the problem. It won't. It's a limited access freeway that we're thirsting for in the Washington area and we don't have it —

MR. SAMUEL: There is a technique, the frontage road, seen in the appearance of Route 50 from Annapolis to the Bay Bridge. Texas is the land of the frontage road. Every highway in Texas has to provide, if it doesn't provide direct assess, there has to be a frontage road alongside of it. They've developed a whole freeway system based on slip ramps from the main lanes of the freeway onto the frontage road and then the frontage roads go into intersections.

For a long time Texas built very few freeway and freeway interchanges. They simply used frontage roads and the intersections to the frontage roads from the cross streets. Now they're in a terrible mess because the frontage roads don't carry the volumes of traffic so the whole highway establishment in Texas is turned against the frontage roads because of the mess they have inherited as a result of that. They are very heavily entrenched in practice there. It's very interesting.

AUDIENCE MEMBER: These are some figures I've heard. I'm wondering if you could confirm them. One was that the number of registered cars increases faster than the population and for each car, the number of miles driven increases faster than the number of cars. So there's sort of a step function. I'm not sure on that, and would like your response.

MR. SAMUEL: I think that was true up until the mid '90s.

One of the reasons for the continual decline in transit over that period is that from an income perspective, people no longer would probably use it if they have a car. Has filling in the inventory of people who need cars pretty much come to an end? I think you're just seeing something that was more stable in the past.

As I said, looking at the numbers over the 1990's, the economy has year after year continually advanced faster than has usage of the automobile and you're just seeing some of this. Driving is not peaking but not increasing as fast as it had been.

As people become more prosperous they get more cars for different purposes but you can only drive one at a time.

You've got your SUV for you weekend adventures and hunting trips and then your more modest size car for your commuting but you are only in one of them at a particular time.

MR. REID: Well, let's go back to the policy report where the environmental groups like to tout , that in 2050 with their vision of the future of Montgomery County with a transit and land use oriented scenario, that there would be a 37% reduction in vehicle miles traveled. The problem is,

is that the Council of Governments has determined that there's going to be 78% increase in VMT, vehicles miles traveled, just through 2025. What are you really getting?

In 1968 only 30% of the people in this country owned two cars or more. It's now up to about 70%. Women, mothers in particular, or should I say parents who stay home with their kids or don't work full-time are heavy users of cars and vehicles. They cannot depend on transit. As Jerry Garson has discovered, when school is out of session, in Montgomery County traffic flows very well. Why? Because more and more parents are driving their kids to school. They're driving their kids to school because they are afraid to let them walk or they are afraid of the distances. I think the amount of kids who walk to school is down to 10% in this country.

A lot of traffic is because of non-work related issues. That is 75% of the trips we take are non-work related. Only 25% of the trips in the Washington area goes to commuting. This is why we need more road capacity. If you don't build the roads here, people are just going to move further and further out. That's what creates the sprawl problem that the environmentalists want stopped.

AUDIENCE MEMBER: I heard a figure that of the increase in demand for transportation, however you calculate it, transit and pick out exactly what you mean by it, is only 3% of that increase in passenger miles or any other measure of transit demands. Does that sound about right?

MR. UTT: MR. SAMUEL: That would probably be in the range as the numbers we've talked about today. About 4.5% of the people, they have been riding transit to get to work. Today there are only two metropolitan areas where transit use is above 10% . It's been declining since the numbers began to be calculated in 1960. Including transit used for all trips, transit is about 1.9%.

The share of all trips is now 1.9% and capturing 3% of the net increase sounds a little high.

MR. ORSKI: The figure Ron has given you is perfectly right. There is however the danger in talking about statistics, national statistics, because transit is concentrated in a few major urban areas. In some areas, especially with the trip to downtown, transit plays a very important role. Even in Washington where something like 40% of the commuter trips to downtown are made on the metro. Yes, you can talk about national statistics but really in order to understand the politics of transit, you have to look at major, major metropolitan areas. There transit has, does, and always will, I think, play an important role.

MR. SAMUEL: Well, half the transit in the country is in New York. Seventy-five percent of all to-work transit trips occur in several metropolitan areas. 42% of all transit is inner city.

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MADAM ROSA

There is a fortune-teller's shop on Connecticut Avenue, and when I walk by it several thoughts come to mind. First, my wonderment that people still believe in fortune-telling, clairvoyance, palmistry, psychic powers, and astrology in these days of scorching skepticism. Second, I think once again of Joseph Duvall (that is not his real name). Joseph looked like he was somebody: He was tall and well-dressed, and he spoke in the authoritative tones of a politician. He had been elected to various offices in his hometown before he decided to practice law here in Washington. When we worked on cases together, I learned that Joseph's main source of business was Madam Rosa, an astrologer/ fortune-teller. She sent him more legal work than he could handle. Much of it involved the problems of elderly people proud to say their wealth was based on Madam Rosa's advice.

If a case that Madam Rosa power-steered to Joseph ended up in court, Madam Rosa conducted a pretrial conference/focus

group in her chambers. The usual props were there, incense, the crystal ball, the cards, the other bric-a-brac of the trade. I would not have been surprised to see a law book, perhaps *Dobbs on Remedies* or somebody on *Future Interests*. Joseph presented the facts and law. Thereafter Madam Rosa asked questions and then gave her opinion on whether to settle or go to trial. She had a good record. The cases she sent to trial were winners. She was especially gifted in predicting the high/low verdict range in cases against target defendants like the transit company.

Joseph said he met Madam Rosa when she appeared in his office one day with a problem concerning her storefront lease. When he asked who recommended him, she said he was recommended by the position of the stars.

Joseph liked to tell this story. He was representing a fortune-teller friend of Madam Rosa's charged with driving while drunk. A police reporter friend of Joseph's spotted him in court and asked what his case of the day was all about. Joseph said he was representing a fortune-teller. Joseph then said the judge would knock the case down from driving while under the influence to reckless driving and fine the woman fifty dollars. The reporter asked Joseph if that was what the fortune-teller predicted. Not only was that what she predicted, Joseph said he would bet ten dollars on it. Joseph appeared with his client and the judge did reduce the charge to reckless driving but fined the client only twenty-five dollars. Joseph stood up at his client's urging and said, "Judge, can you make that fifty dollars?"

Joseph divided fortune-tellers into the true believers and the competent frauds. The true believers sincerely believe they have the gift. They take themselves seriously. One of them explained the gift this way. Evolution gave to the animal kingdom a lot of

instinct and little intelligence. A lot of instinct can do things that intelligence can never do. A very small, vulnerable butterfly by instinct finds its way year after year from Canada to an isolated spot in Mexico, a navigational feat beyond human comprehension. In such a flight the butterfly, flying only by instinct, makes thousands of computations concerning weather, wind, smoke, and changes in forestry that human intelligence could never do.

Evolution gave humans a lot of intelligence and little instinct. Intelligence involves comparison, analysis, induction, and deduction. It takes intelligence hours, days, years to figure out what intuition does in a flash. In rare cases a human is born with animal-like instinct that carries with it knowledge beyond intelligence, beyond cause and effect. It is this that explains the fortune-telling gift.

The true believer can be dangerous. He does not hesitate to predict misfortune or sudden death. The competent fraud does not have the intuitive gift. He picks up clues from the customer that make it appear that he knows things about the customer that could only come through some mysterious power. I have worked with lawyers who have this talent in selecting jurors and in conducting a cross-examination.

The competent fraud makes no dire predictions. He gives a balanced view of life's ups and downs, falling in love, falling out of love, and the possibility of inherited wealth.

Joseph said that the high-profile true believers and the competent frauds, both of them, have something in common—they vote the straight Republican ticket. Joseph's political sophistication and the popularity of Jean Dixon, the well-known astrologer in the 1950's and 1960's, corroborated his statement. Jean Dixon did a good business during the presidential election years predicting comfortable margins for Nixon and Eisenhower.

Perhaps the reason high-profile astrologers tend to vote Republican is that they take their cue from their up-market clientele. It may be what a Madam Rosa has on offer does not attract liberal intellectuals who contend their beliefs are always entirely high-minded, virtuous, and reasonable and therefore uninfluenced by abracadabra.

My reaction to fortune-tellers is negative simply because I don't want to know what's next. Although the predictions of most psychics, fortune-tellers, clairvoyants, tarot card readers, and palmists are harmless, I am apprehensive that I may run into a true believer who will predict bad news ahead. Therefore I am never tempted to have a Madam Rosa give me a reading. The French writer Alain says it very well:

> I know someone who showed his palm to a fortune-teller in order to know his future. He told me he did it just for fun, and didn't really believe in it. Even so, I would have advised him against it, if he had asked me, because it is a dangerous way to have fun. It is very easy not to believe, as long as nothing has yet been said; for then there is nothing for you or anyone else to believe. Disbelief is easy at the outset, but soon becomes difficult; fortune-tellers know this very well. "If you don't believe in it," they say, "what are you afraid of?" And thus the trap is set. As for me, I am afraid of believing, for who knows what they will tell me.

There you have it.

Jacob Stein took part in the Bar Library Lecture Series on January 21, 2009 with a presentation on "Perjury, False Statements & Obstruction of Justice." Generous with his time, Mr. Stein was generous in other ways as well as indicated by the language in the preface to the third volume of *Legal Spectator* from which the following was taken. Mr. Stein wrote "This book is not copyrighted. Its contents may be reproduced without the express permission of, but with acknowledgement to, the author. Take what you want and as much as you want." The works featured in the *Legal Spectator*, originally appeared in the *Washington Lawyer*, the *American Scholar*, the *Times Literary Supplement*, the *Wilson Quarterly*, and the ABA Litigation Section's publication. I want to thank Bar Library Board of Director Henry R. Lord for his time and efforts in reviewing the writings of Mr. Stein for inclusion in the *Advance Sheet*.