



ADVANCE SHEET – ISSUE 97

2020

We have finally arrived at a year that we can be comfortable with. The twenties are here. No more hemming and hawing over what to call the decade as there is for the first twenty years of each century. I wonder if this one will be roaring? I certainly hope that it does not end the way that the twenties did a hundred years ago.

The Bar Library will turn 180 this year. It was just last week; I believe anyway, that the Library was celebrating its 175th Anniversary at a gala orchestrated by the Honorable Wanda Keyes Heard. I still cannot believe the effort she put into making the event such a huge success, or that she has retired from the bench. The one constant, whether it be 1920 or 2020, is that time keeps marching on and there is no way we can ask for a halt to it, at least one that is not of a very long duration.

Well, if we cannot slow time down, I suppose all that we have left is to use it wisely. There are two things I have always tried to impress upon my children and that is to spend their time and their money wisely. How great it is that there is a place such as the Baltimore Bar Library that enables all of you to accomplish both goals at once. The Library is one stop shopping for your informational needs. Whether you need a case for Uncle John, a statute for Aunt Sally, a regulation for Cousin Pearl, a treatise for little Jimmy, or some extensive computerized legal research for grandmother, you can find it at the Bar Library. Seasonal, or any other type of time constraints have you up against it? Phone, fax or e-mail us a request for what you need and we will transmit it to you in whatever format you might like, including the very book(s) itself. Just drop by or send a messenger.

There are two types of places that talk about their bargains. The first place sells cheap stuff cheap and the second is the place that sells good stuff but at an economically advantageous price. It does not take a great deal of examination to see that the Bar Library clearly falls into the latter category. It is a place that provides perhaps the most obvious example of economic advantage that I am familiar with. If there is any type of book that is more outrageously priced than the college text book, it is the legal treatise. As company after company has been consumed by the voracious appetites of the two behemoths that remain, that simple little text has become

that multi-volume treatise and that simple little price has become “Is that really how much it costs?” You can substitute whatever that price is for the price of a Bar Library membership. The ability to have access to everything in the Library collections, to have the ability to use that material in your very offices, to have access in the Library whether at a terminal or your own laptop, to one of the most extensive collections of Westlaw databases, which is what the Bar Library subscribes to, for only the cost of a Library membership (currently \$250), well, that would have been a bargain even in 1920.

A most Happy and Healthy New Year to everyone.

Joe Bennett

Hail To The Chief

On Monday, December 23, my wife Anita and I walked into Ceremonial Courtroom 400 of the Clarence M. Mitchell, Jr. Courthouse, for one of those bittersweet occasions that all of us of a certain age are familiar with. It was to celebrate the career, on the day of her retirement, of the Chief Judge of the Circuit Court for Baltimore City, the Honorable Wanda Keyes Heard. With the President of the Bar Library Board Mr. George Liebmann en route from a trip to Europe, and unsure of whether he would be able to attend the event, the honor had fallen to me, of accepting on behalf of the Library, a wonderful portrait of the Chief Judge that had been hanging in her chambers.

Chief Judge Wanda Keyes Heard assumed a seat on the Bar Library Board in 2010. There had been an opening to the Board with the passing of one of the Library’s longest serving directors, a man totally dedicated to the causes of the Library, Mr. Robert J. Thieblot, who had served on the Board since 1968, in the capacity of President from 1973 to 1975. The fact that Chief Judge Heard would assume the seat previously held by Mr. Thieblot was of particular significance to her, as she explains in her own words:

“First, let me give you the background. Robert Thieblot became a friend of my dad, Dr. Sterling Keyes while working in the school system in Baltimore City. Dad was Interim Superintendent of Baltimore City Public Schools - 1971. They worked with the school board and were involved in civil suits regarding the schools over the years. They became great friends. Fast forward to 1979... I go to law school. While in law school, I lived in Bolton Hill, on Bolton Street and the Thieblots lived on Park Ave (around the corner). Dad tells me to call Mr. Thieblot, his friend the lawyer. The Thieblots invited me to have dinner and of course, as a poor law student, I jumped at the opportunity for a “free dinner.” So, I went! The dinner was amazing but they also turned out to be amazing people. Mr. Thieblot was a great attorney. Both Mrs. Thieblot and I loved the same type of art. We became fast friends and that’s the story. The dinners ended once I got married in 1981 and moved away but the friendship remained.

Upon my hearing of the passing of Mr. Thieblot, my parents insisted on attending, traveling to Baltimore to the memorial service at the Bar Library. I had not seen Mrs. Thieblot in years when you called and invited me to serve on the Board in the “Thieblot seat.” And now, once a year I get to see Mrs. Thieblot at our Annual Holiday dinner.... it’s like law school all over again.”

Chief Judge Heard was a very young Wanda Keyes back in the mid-1960s when her initial foray into the legal processes took place. She was in the third grade of a then segregated school system in Freeport, Long Island. Her father, alarmed at the disparity that existed in everything from classrooms to books, filed action against the school district in a case that would soon be joined by the NAACP.

Having met and known Chief Judge Heard’s father, Sterling “Spence” Keyes, I would have expected nothing less, not just for his daughter, but for the other children of that system. Having won the battle, he would soon move his family to Northeast Baltimore to accept an administrative job with the city schools. In 1971 he would become interim superintendant, the first African-American to lead the district.

Chief Judge Heard graduated from UMBC in 1979 and the University of Maryland School of Law in 1982. Much of her career was spent in public service. She was an Assistant State's Attorney, Baltimore City, 1983-85; Division Chief, Sex Offense Unit, Office of the State's Attorney, Baltimore City, 1988-90; Assistant Attorney General, 1986-87; Assistant Federal Public Defender, 1987-88; Assistant United States Attorney, St. Croix Division, United States Virgin Islands, 1991-94; Chief, Criminal Division (1994); Executive Assistant United States Attorney, (1994-97); and Special Assistant to the Director (1997-98), Office of the United States Attorney, Middle District of Florida. Even in private practice it might be said she was in public service, becoming the first African-American and simultaneously the first woman attorney to be hired by the firm of Horn, Dressel & Bennett.

Chief Judge Heard was appointed to the bench in 1999 by Governor Parris N. Glendening. In over twenty years on the bench she would preside over many “famous” cases including that of “Serial” podcast subject Adnan Syed.

Other cases, however, of a variety not written about in newspapers, go much toward defining who Chief Judge Wanda Keyes Heard is and what she holds to be important. Over the years she opened her courtroom to schoolchildren for mock trials, trials at which she was the presiding judge. It was not a matter of here is some space, now I am going to lunch. Among the rogues brought to justice was Goldilocks for breaking and entering the home of the three bears and Jack for his unprovoked attack of the poor Giant, who I had the great honor of playing. The children played the prosecutor and defense, and sat on the jury, while their classmates observed the proceedings. Chief Judge Heard brought in members of the local legal community to give the children a better understanding of what was going on and the nature of actual court proceedings. In her words “Education is the way you open the door to a dream in the mind of a child.”

What makes Chief Judge Heard's retirement quite a bit more sweet and a whole lot less bitter is that she has consented to continue serving on the Bar Library Board of Directors. Her service on the Board has been both active and productive. She is that director who is never afraid to raise her hand even if doing so is going to entail hours of work on a project. Such was the case in 2015 when she volunteered to Chair the Committee in charge of the Bar Library's 175th Anniversary celebration. Also serving on that Committee, and rendering service above and beyond, was long time Board of Director and Partner at Wright, Constable & Skeen, Howard J. Schulman, who had the following to say about Judge Heard:

"When I think of Judge Heard's many years of service on the bench, I first think of her as a teacher and have distinct recollections of her lecturing, encouraging and incentivizing troubled young people appearing before her in court as defendants in criminal cases to improve their literacy and other life skills."

To Chief Judge Wanda Keyes Heard I say thank you for your service and I look forward to seeing you at the next Meeting of the Library Board.

Joe Bennett

IS MARYLAND'S OATH OF OFFICE INTENTIONALLY SUBVERSIVE OF FEDERAL AUTHORITY?

by John J. Connolly *

I. Pretrial Statement

Under the Maryland Constitution, state officials in all three branches of government must swear (or affirm) to "support" the Constitution of the United States, but to "be faithful and bear true allegiance to the State of Maryland" *and* to support the state's constitution and laws.¹ The obligation for state officials to support the federal constitution is a threshold requirement of the federal constitution itself,² but many states also require officials to "protect," "defend," "obey," or "bear allegiance," to the United States or the federal constitution, as well as to the state

¹ Md. Const. art. I, § 9 ("Every person elected, or appointed, to any office of profit or trust, under this Constitution, or under the Laws, made pursuant thereto, shall, before he enters upon the duties of such office, take and subscribe the following oath, or affirmation: I, _____, do swear, (or affirm, as the case may be,) that I will support the Constitution of the United States; and that I will be faithful and bear true allegiance to the State of Maryland, and support the Constitution and Laws thereof; and that I will, to the best of my skill and judgment, diligently and faithfully, without partiality or prejudice, execute the office of _____, according to the Constitution and Laws of this State, (and, if a Governor, Senator, Member of the House of Delegates, or Judge,) that I will not directly or indirectly, receive the profits or any part of the profits of any other office during the term of my acting as _____").

² U.S. Const. art. VI, § 3; *see also* 4 U.S.C. § 101 ("Every member of a State legislature, and every executive and judicial officer of a State, shall, before he proceeds to execute the duties of his office, take an oath in the following form, to wit: "I, A B, do solemnly swear that I will support the Constitution of the United States.").

government and constitution.³ In most other states, whatever obligations the oath of office imposes are applied equally to federal and state interests.⁴ Under the Maryland oath, by contrast, a state official's "faith" and "allegiance" are owed to the state alone.

The Maryland oath has not materially changed since June 1, 1867, when it was introduced at the state constitutional convention in Annapolis by the Committee upon the Elective Franchise and the Qualification of Voters. The text of the oath triggered almost no recorded debate at the convention, so direct evidence of the drafters' intent is lacking. The question presented is whether the indirect evidence suggests that the oath of office was intended to repudiate federal supremacy.

II. Prosecution Case

Loyalty oaths and state-versus-federal allegiances were deadly serious during the Civil War era, particularly in border states like Maryland, and disputes over these oaths were a major factor in Maryland's constitutional and political history. The people of Maryland adopted two state constitutions in rapid succession in the War era. The first, ratified in 1864 as the War raged and federal troops all but occupied the state, was the product of a majority-Unionist delegation that was largely aligned with President Lincoln's Republican party. The second, ratified in 1867 when federal troops had departed and the state's many Southern sympathizers had re-emerged, was *entirely* the product of the more conservative Democratic party. Because the Republican party essentially boycotted the vote for a new constitution, all 118 members of the 1867 Convention were Democrats, and many of them despised the federal government that was then dominated by a Republican Congress.⁵ The Democratic dominance at the Maryland Convention foreshadowed the "Redemption" period when Reconstruction waned and Democrats re-claimed state offices throughout the former Confederacy.⁶

The drafters of the 1867 Constitution – which survives today in amended form – left no doubt that their major purpose was to correct the 1864 "Republican" constitution and return the state as much as practicable to its antebellum legal climate. Many delegates believed the 1864 Constitution had been forced upon the state by the federal military's meddling in state elections.⁷

³ *E.g.*, Cal. Const. art. XX, § 3 ("I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California").

⁴ *E.g.*, Pa. Const. art. VI, § 3 ("I do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth and that I will discharge the duties of my office with fidelity."); Va. Const. art. II, § 7 ("I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the Commonwealth of Virginia, and that I will faithfully and impartially discharge all the duties incumbent upon me as, according to the best of my ability (so help me God).").

⁵ *See generally* John J. Connolly, *Republican Press at a Democratic Convention*, at vi-ix (2018) [hereafter, "Republican Press"].

⁶ *See* Eric Foner, *A Short History of Reconstruction* 247-53 (1990).

⁷ For a Democratic-slanted account of the events impelling the 1864 Constitution, *see* III J. Thomas Scharf, *History of Maryland from the Earliest Period to the Present Day*, at 588-98 (1879) [hereafter, "Scharf"]. Scharf

A substantial minority of delegates had bitter personal reasons to distrust federal power: they were arrested by military authorities during the War and detained without trial in federal prisons.⁸ In some cases, the military offered to release the detained officials if they would take an oath of allegiance to the United States.⁹

One of the chief motivations for a new convention in 1867, only three years after the last one, was the onerous loyalty oaths set forth in two provisions of the 1864 Constitution.¹⁰ The 1864 oath of office required “true allegiance” to Maryland *and* to the United States, and added that “I will support, protect and defend the Constitution, Laws and Government” of the United States “as the supreme law of the land, any law or ordinance of this or any State to the contrary notwithstanding.”¹¹ Those averments were relatively benign, but the 1864 oath of office further stated that “I have never directly or indirectly by word, act or deed, given any aid, comfort or encouragement to those in rebellion against the United States” and that “I will ... protect and defend the Union of the United States, and not allow the same to be broken up and dissolved” A counterpart oath that applied to both voters and office-holders included even more detailed affirmations of loyalty to the United States (e.g., “I have never expressed a desire for the triumph of said enemies over the arms of the United States”).¹² Many delegates could not have taken these oaths in 1867, and together the oaths offended such a substantial portion of the state as to impel a new constitutional convention. The delegates elected in the vote for a new convention knew their constituents wanted the loyalty oaths eliminated.

Given this background, it is hardly surprising that the 1867 Constitution was deeply reactionary to federal authority. The delegates’ treatment of slavery, for instance, contravened Radical Republican ideals for Reconstruction. By 1867, slavery had been banned by the Thirteenth Amendment, so the delegates could not reverse the pre-existing ban on slavery imposed by the state’s 1864 constitution. (And most delegates would not have favored a return to slavery although, amazingly, a few did.¹³) But substantially all delegates wanted compensation from the federal government for the state’s former slave-holders, in flagrant violation of the (not yet ratified) Fourteenth Amendment.¹⁴ The 1867 Constitution’s tepid re-affirmation of abolition was notable mostly because it expressly demanded compensation from federal funds.¹⁵

fought for the Confederacy during the War and his histories of Maryland and Baltimore, although prodigiously detailed, are comically one-sided defenses of the Southern viewpoint during the War era.

⁸ See Republican Press, *supra* n. 5, at xi-xii & n. 33.

⁹ See George William Brown, *Baltimore and the Nineteenth of April, 1861*, at 109 (1887). Brown himself was offered release if he did not “pass south of the Hudson River.” He declined the condition. *See id.*

¹⁰ See *Debates of the Maryland Constitutional Convention of 1867*, at preface by Frank A. Richardson (Philip B. Perlman, ed. 1923) [hereafter, “Perlman”]; *id.* at 523 (discussing “Test Oath in Constitution of 1864”)

¹¹ Md. Const. (1864), art. I, § 7.

¹² See Republican Press, *supra* n. 5, at 200 n.188; Md. Const. (1864), art. I, § 4.

¹³ See Republican Press, *supra* n. 5, at 169-177.

¹⁴ See U.S. Const. amend. XIV, § 4 (“neither the United States nor any State shall assume or pay ... any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void”).

¹⁵ See Md. Const. (1867), Decl. Rts. art. 24 (“That slavery shall not be re-established in this State, but having been abolished, under the policy and authority of the United States, compensation, in consideration therefor, is due from the United States.”); *compare* Md. Const. (1864), Decl. Rts. art. 24 (“That hereafter, in this State, there shall be neither slavery nor involuntary servitude, except in punishment of crime, whereof the party shall have been duly convicted: and all persons held to service or labor as slaves are hereby declared free.”).

The 1867 delegates continually decried the nascent civil rights laws emerging from Washington, including the Civil Rights Act of 1866 enacted the prior year, and the Fourteenth Amendment that was then circulating among the states (and which Maryland had declined to ratify in the preceding legislative session). They flatly refused to give African-Americans the right to vote, to hold office, to serve on juries, or to attend public schools. They congratulated themselves for giving African-Americans a right to testify in court, but they diminished the right by making it subject to elimination or modification by the General Assembly. The delegates also added provisions to the new constitution that were intended to thwart federal civil rights laws and, perhaps, federal authority in general. These included a voter registry that would be controlled by state officials and would provide ample grounds to discourage blacks from exercising a federally imposed right to vote.¹⁶

Other provisions in the new state constitution reflected a states-right subtext. A new clause that protected the right of habeas corpus – without exception for rebellion or insurrection or anything else – was almost certainly a rebuke of Lincoln’s practice of arresting Maryland officials during the War and detaining them without trial.¹⁷ If someone missed the point, a separate provision declared “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.”¹⁸ The 1867 delegates added a new and entirely superfluous provision that tracked the language of the federal Tenth Amendment.¹⁹ And they reinforced an existing provision “That the people of this State ought to have the sole and exclusive right of regulating the internal government and police thereof” by adding to the end “as a free, sovereign and independent State.”²⁰ Discussion about these provisions on the floor of the convention, although generally brief, reflected continuing fervor for states’ rights among some of the delegates.²¹

Finally, the delegates weakened a provision from the 1864 Constitution stating that “The Constitution of the United States, and the laws made in pursuance thereof, being the supreme law of the land, every citizen of this State owes paramount allegiance to the Constitution and Government of the United States, and is not bound by any law or ordinance of this State in contravention or subversion thereof.”²² The comparable provision in the 1867 Constitution maintained the supremacy of federal law but eliminated the duty of “paramount allegiance to the

¹⁶ See Republican Press, *supra* n. 5, at 361 n.284.

¹⁷ See Md. Const., art. III, § 55 (“The General Assembly shall pass no Law suspending the privilege of the Writ of *Habeas Corpus*.”); see also John J. Connolly, *Habeas Corpus in Maryland in The Maryland Constitution at 150: A Symposium and Appraisal* (John J. Connolly, ed.) (Baltimore Bar Library 2017).

¹⁸ See Md. Const. (1867) Decl. Rts. art. 44; see also Republican Press, *supra* n. 5, at 32 (introduction of provision); *id.* at 71-72 (editorial in the *Baltimore American and Commercial Advertiser* interpreting proposed Article 44 as “altogether insubordinate and revolutionary”).

¹⁹ See Md. Const., Decl. Rts. art. 3 (“The powers not delegated to the United States by the Constitution thereof, nor prohibited by it to the States, are reserved to the States, respectively, or to the People thereof.”).

²⁰ Republican Press, *supra* n. 5, at 116; compare Md. Const. (1867), Decl. Rts. art. 4 with Md. Const. (1864), Decl. Rts. art. 3.

²¹ See Republican Press, *supra* n. 5, at 118-19 & n. 126.

²² See Md. Const. (1864), Decl. Rts. art. 5.

Constitution and Government of the United States.”²³ One delegate considered the 1864 provision to be “a gross political heresy, from gross political heretics.”²⁴

In the end, the textual changes to the oath of office from 1864 to 1867 are the best evidence of the delegates’ intent. While the 1867 Constitution included a duty of *support* for the federal constitution and a recognition of the supremacy of federal law, the new Constitution eliminated a duty of *allegiance* to the federal government while simultaneously imposing a duty of allegiance to the state government. Critically, the delegates banned the General Assembly from prescribing any oath other than what the Constitution required,²⁵ which effectively prohibited legislative modification of the oath. This provision is especially significant because the 1864 Constitution allowed the General Assembly to restore full voting privileges to Southern sympathizers by a two-thirds vote of each house.²⁶ When Democrats regained control of the General Assembly in the election of 1866, they relied on the exception to re-enfranchise and re-qualify all former Southern supporters through a single bill.²⁷ The new law required oaths from would-be voters²⁸ and office holders,²⁹ and each oath required allegiance to the United States. Yet with those oaths fresh in their minds, the 1867 delegates eliminated the duty of allegiance to the United States from the new oath.

On this record, there is little doubt that the 1867 oath of office intentionally requires allegiance to the state government *over* the federal government. *Allegiance*, moreover, was not a synonym for *support*: it meant at the time, and still means, the duty a citizen owes to a government in return for protection from the government.³⁰ In modern times, it is difficult to envision the State of Maryland protecting its citizens from invasion by a foreign enemy, much less a domestic enemy in the form of the federal government. But Maryland’s oath of office was drafted only two years after the end of a war between 10 former U.S. states and the United

²³ See Md. Const., Decl. Rts. art. 2 (“The Constitution of the United States, and the Laws made, or which shall be made, in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, are, and shall be the Supreme Law of the State; and the Judges of this State, and all the People of this State, are, and shall be bound thereby; anything in the Constitution or Law of this State to the contrary notwithstanding.”).

²⁴ Republican Press, *supra* n. 5, at 102 (statement of Mr. Nelson); see also *id.* at 93 (proposed amendment by Mr. Peters that would have made the Maryland Constitution “the supreme law of this State, except when it may be in conflict with the Constitution of the United States ... and if any conflict should arise ... [it] must be submitted to and settled by the proper tribunals”).

²⁵ See Md. Const. (1867), Decl. Rts. art. 37 (“nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution”); Republican Press, *supra* n. 5, at 218-19 & n. 205.

²⁶ See Md. Const. (1864), art. I, § 4 .

²⁷ See 1867 Md. Laws ch. 17.

²⁸ See 1867 Md. Laws ch. 17 (“I, _____, do swear or affirm, that I am a citizen of the United States, and that I will bear true faith and allegiance to the United States, and support the Constitution and laws thereof as the Supreme Law of the land, any law or ordinance of any State to the contrary notwithstanding, that I will in all respects demean myself as a loyal citizen of the United States, and I make this oath or affirmation without any reservation or evasion, and believe it to be binding on me.”).

²⁹ See 1867 Md. Laws ch. 17 (“... I do further swear or affirm, that I will bear true allegiance to the State of Maryland and support the Constitution and laws thereof, and that I will bear true allegiance to the United States, and support, protect and defend the Constitution, laws and Government thereof as the Supreme law of the land, any law or ordinance of this or any State to the contrary notwithstanding and I do further swear or affir, that I will to the best of my ability, protect and defend the Union of the United States, and not allow the same to be broken up and dissolved, or the Government thereof to be destroyed under any circumstances....”).

³⁰ See *Inglis v. Trustees of Sailor’s Snug Harbour*, 3 Pet. 99, 155 (1830) (opinion of Story, J.).

States, and only six years after the Maryland General Assembly convened in special session to consider whether to secede from the United States. The session terminated irregularly when federal authorities arrested the disloyal members of the legislature, including a few who would later serve as delegates to the 1867 Convention. When those delegates provided that Maryland state officials owed “true allegiance” to Maryland, they were saying that in a belligerent confrontation between the state and federal governments, Maryland officials owed allegiance *to the state*.

III. Defense Case

The prosecution has labored to find insubordination as the motive for the 1867 oath when a simpler and happier theory is readily available. The 1867 delegates were indeed intending to eliminate the excesses of the 1864 Constitution, not because the delegates repudiated federal authority but because they reflected a majority of the state’s populace, unlike their predecessors at the 1864 Convention. The 1864 excesses assuredly included the onerous “test oaths” from a constitution drafted and ratified in the throes of a bloody rebellion. These oaths were wholly unsuited to a re-united country now at peace, as the Supreme Court had seemingly concluded earlier that year.³¹

The 1867 delegates did not draft their oath of office from scratch. They adapted the oath from the form it took in the pre-War Constitution of 1851. That version provided: “I, A.B., do swear [or affirm, as the case may be] that I will support the Constitution of the United States, and that I will be faithful and bear true allegiance to the State of Maryland, and support the constitution and laws thereof”³² The first phrase tracks the language of a federal statute.³³ The second phrase, which the prosecution finds so offensive, was relatively common in the pre-War period, when the federal government’s realm was miniscule in comparison to what it would become, and state governments were more significant in the lives of most citizens.

Before the War, the source and nature of national citizenship was uncertain. Some authorities argued that “there was no such thing as a citizen of the United States, except as that condition arose from citizenship of some state.”³⁴ The Civil Rights Act of 1866 clarified national citizenship,³⁵ but the 1867 delegates were unsure about the Act’s effect on state law.³⁶ The Fourteenth Amendment would end the uncertainty, but the amendment was not ratified until 1868. So when the 1867 delegates returned to the 1851 oath of office, they were not flouting federal law; they were re-establishing a venerable tradition in which state governments were the font of citizenship and the primary object of a citizen’s allegiance. The delegates would have understood that allegiance to the national government flowed automatically from allegiance to one of the states that had formed the national government.³⁷

³¹ See *Cummings v. Missouri*, 71 U.S. 277 (1867).

³² Md. Const. (1851), art. I, § 4.

³³ Now codified at 4 U.S.C. § 101.

³⁴ *United States v. Anthony*, 24 F. Cas. 829, 830 (C.C.N.D.N.Y. 1873).

³⁵ See 14 Stat. 27, § 1 (Apr. 9, 1866) (“all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States”).

³⁶ See, e.g., Republican Press, *supra* n. 5, at 610 (statement of Mr. Ritchie).

³⁷ See, e.g., Republican Press, *supra* n. 5, at 288 (statement of Mr. Garey).

Indeed, the focus on state allegiance in the Maryland oath is not unique. Four other states *currently* have comparable provisions.³⁸ Three of those states, Massachusetts, Rhode Island, and Vermont, could hardly be accused of Confederate sympathies.³⁹ These oaths do not repudiate the federal government; they merely articulate the historic view that state governments were the ultimate sovereigns, and that the states ceded some of their sovereignty to form the federal union.⁴⁰ That view was prominent at the time and it is not entirely stale today.⁴¹

Finally, the prosecution fails to mention sections of the 1867 Constitution that show the delegates' respect for federal law and authority. Most prominently, the delegates retained Article 2 of the Declaration of Rights, which then and now provides that "The Constitution of the United States, and the Laws made, or which shall be made, in pursuance thereof . . . are, and shall be the Supreme Law of the State; and the Judges of this State, and all the People of this State, are, and shall be bound thereby; anything in the Constitution or Law of this State to the contrary notwithstanding."⁴² Some delegates may have objected to this provision,⁴³ but it became law and still stands at the gates of the state constitution as an unequivocal acknowledgment of deference to federal law. There is nothing insubordinate or rebellious about Article 2.

To be sure, the 1867 delegates were skeptical of federal power, and with good reason given their very recent personal experiences. But they were not rebels. They were all Democrats more by coalition than by ideology, and they cannot be blamed because the Republican party, still a small minority of the state's electorate, chose not to participate. Many delegates, and probably most, had never supported secession, even if they did not advocate for war. They were prominent men representing the people of a border state, and their Constitution balanced their constituents' honest divisions about the proper sphere of state and federal governments. The oath of office they bequeathed to generations of Maryland officials may evoke the state's complex history, but it is not subversive.

³⁸ See Ky. Const. § 228 ("I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States and the Constitution of this Commonwealth, and be faithful and true to the Commonwealth of Kentucky so long as I continue a citizen thereof . . ."); Mass. Const. art. VI, cl. 3 ("I, A. B. do solemnly swear, that I will bear true faith and allegiance to the Commonwealth of Massachusetts, and will support the constitution thereof . . ."); R.I. Const. art. III, § 3 ("You . . . do solemnly swear (or, affirm) to be true and faithful unto this state, and to support the Constitution of this state and of the United States . . ."); Vt. Const. ch. II, § 56 ("You _____ do solemnly swear (or affirm) that you will be true and faithful to the State of Vermont, and that you will not, directly or indirectly, do any act or thing injurious to the Constitution or Government thereof . . .").

³⁹ The fourth, Kentucky, was a border state like Maryland. Kentucky's oath of office apparently dates from Kentucky's 1849 Constitutional Convention. By one measure, it is even more anachronistic than Maryland's: it still requires that Kentucky officials swear they have "not fought a duel with deadly weapons." See Ky. Const. § 228. Kentucky re-considered the oath in its Convention of 1890 and decided to retain it; the dueling provision was debated extensively but the author found no meaningful debate concerning the hierarchy of state vs. federal allegiance. See, e.g., IV Official Report of the Proceedings and Debates of the Convention Assembled at Frankfort 4690-98 (1890).

⁴⁰ This view, known as the "compact theory," has been reflected in every version of the Maryland Constitution and it still resides in Article 1 of the state's Declaration of Rights. Its meaning is not entirely clear, as the 1867 delegates themselves discussed. See Republican Press, *supra* n. 5, at 88-90.

⁴¹ See Federalist No. 45 (Madison); U.S. Const. amend. X; *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476-77 (2018).

⁴² See Md. Const., Decl. Rts. art. 2.

⁴³ Republican Press, *supra* n. 5, at 93, 102, 104.

IV. Verdict

The author finds by a preponderance of the evidence that the original intent of Maryland's oath of office was recalcitrant, reactionary, and rebellious. The weight of the evidence establishes that the delegates had a clear motive to advance state interests over federal whenever they could reasonably do so. They acted consistent with that motive by eliminating the duty of federal allegiance as it appeared in the 1864 Constitution's oath of office. The omission is conspicuous in light of the legislatively modified version of the oath enacted only a few months before the 1867 Convention; that version also included a duty of federal allegiance that did not appear in the 1867 text.

The defense position essentially argues that the delegates, with minimal forethought, adopted the pre-War version of the oath once the War's termination eliminated the need for public expressions of loyalty to the United States. This seems implausible. One could argue that the 1867 Convention delegates were disproportionately conservative and homogenous (or worse), but not that they were ignorant of political issues or cavalier about their Convention tasks. Over 40 delegates were lawyers. Many had served as officials or legislators in the state and federal governments. For at least a decade their lives had been dominated by questions of loyalty. All of them probably knew Marylanders who died fighting on both sides of the War.

The oath of office should have been a major issue at the 1867 Convention given the continuing divisions in the state about the proper role of Southern supporters in the post-War environment. Indeed, right at the outset of the Convention, the delegates struggled with the text of their own oath, likely because many could not legitimately take the oath written into the 1864 Constitution.⁴⁴

The delegates were astute enough to understand that the Civil War signaled a major shift in power from the states to the federal government. How far that shift would go was uncertain, but the Thirteenth Amendment and the Civil Rights Act of 1866 were on the books, the Fourteenth Amendment was well on the way to ratification, and the Fifteenth Amendment was foreseeable in spirit if not in text. The first sentence of the Fourteenth Amendment would soon establish that all persons born or naturalized in the United States "are citizens of the United States and the State wherein they reside." It would have been extraordinary if the delegates had not considered the hierarchy of allegiances to state and federal governments in these times.

For all these reasons, the 1867 delegates must have been highly sensitive to the text of the oath of office. The absence of debate likely means that the delegates uniformly supported the text as introduced, not that they failed to consider the significance of eliminating a requirement of allegiance to the federal government. And although four other states have loyalty oaths that favor state interests over federal, Maryland's is the only one that emerged immediately after the Civil War, when oath-making was a paramount issue. The delegates' bitter experience during the War with arbitrary detention, federal occupation, and military policing of the polls, combined with

⁴⁴ See Republican Press, *supra* n. 5, at 16 n.70; Perlman, *supra* n. 10, at 8-10, 49. The law authorizing the convention required its delegates to take an oath "in the form prescribed by law for members of the House of Delegates," 1867 Md. Laws ch. 327, § 5, and the oath the delegates took at the Convention was much more deferential to the federal government than the oath they would later include in the constitutional text. *See id.*

their distaste for a Republican Congress with a radical agenda, would have soured the Democratic delegates on swearing allegiance to the federal government.

In sum, the delegates knew what they were doing when they eliminated all the federal-loyalty provisions from the oath (except the one required by the federal constitution), and simultaneously required state officials to give their allegiance and faith to the state government alone. What they were doing was tweaking the federal authoritarians who had caused so much turmoil in wartime Maryland and who looked to be embracing similar tactics in reconstructing the peacetime South.

So, Newly Elected Maryland Official: please stand between the Maryland and U.S. flags, raise your right hand, and repeat after me. Palm forward and fingers together, please.

* John J. Connolly has served on the Board of Directors of the Library Company of the Baltimore Bar since 1996. John is a Partner with Zuckerman Spaeder. After graduating from the University of Maryland School of Law, J.D., with honors, 1991, he clerked for the Honorable Lawrence F. Rodowsky, Court of Appeals of Maryland.

Recollections With Rob

Rob Ross Hendrickson is a Member of Boyd, Benson & Hendrickson, which, along with its predecessor firms, began operation in 1930. Mr. Hendrickson was admitted to the Maryland Bar in 1969 and has been a member of the Bar Library Board of Directors since 2009. The following is the first in what I hope will be a continuing series of contributions by Mr. Hendrickson. When I think of Rob I think of the tag line for Farmers Insurance “We know a thing or two because we’ve seen a thing or two.” He has indeed seen a thing or two and how much fun will it be hearing about it.

A Tough Cookie

J. Cookman Boyd, Jr., known widely as “Cookie,” no little personage himself, was rated a pale version of his father of the same formal name by those who experienced both generations’ vigorous advocacy in the Courts and in civic affairs (Senior’s legendary “Mary Ann” uproar still rings in the ears of old Baltimoreans as does his building the 33rd St. stadium that brought Navy football here; Son was co-responsible for the Science Center). I did not know the father, but practiced law under, next to and with the son for 20 years. To say he had “presence” was certainly no understatement and his eloquence and trial skills were well-known.

Employment of “local counsel” was the rule, in both the Federal Courts and parochially most counties in Maryland. This was not a strict requirement by rule or convention, but good sense, as deviations, even when contrary only to custom, could result in an unhappy outcome. Also, there almost was a division among the Bar – those who never went to Court; those who did but didn’ t do appellate work; those who practiced in the State trial courts and never in the federal; and those few who appeared in all the federal and State courts, trial and appellate. Cookman did the last and thereby served as counsel and local counsel in many matters in both. In those days, local counsel appeared literally and in person at all proceedings, most times with little to do other than sign and file papers and dine with the out-of-town pro hac vices.

Our U.S. District Court had developed a reputation as a good place to try patent suits and with diversity jurisdiction, many were brought here and Cookman got his share as local counsel. These trials tended to be complex and lengthy. Cookman suffered from insomnia all his life and as he sat at counsel table in one endless case tried before his dear friend Judge Dorsey Watkins, with out-of-town lawyers arguing their complex positions at great length, it caught up to him. Discreetly, he had wandered unnoticed to the empty jury box and fallen promptly to sleep. Opposing New York counsel, on his toes pressing points to the judge with all his might and great sense-of-self, suddenly looked over and seeing this, loudly expressed his outrage at this perceived slight to his learned oration. “Look at Mr. Boyd! He’ s gone to sleep!” he howled. Cookman did not stir.

Judge Watkins merely glanced over to the jury box, smiled his little grin and in his characteristic kindly way informed indignant counsel that he needn’ t take any offense since, in the judge’ s words “Mr. Boyd has fallen asleep in better courtrooms than this. Please proceed.”

Rob Ross Hendrickson

You Want It – You Got It

Recently, a law clerk for a judge in Baltimore City (obviously it would be inappropriate to say who or what court they sit on) inquired as to whether “Gunshot Wounds: Practical Aspects of Firearms, Ballistics, and Forensic Techniques,” 3rd ed. by Vincent J.M. DiMaio M.D. was part of the collections of the Library. After being informed that it was not, they asked whether it could be obtained through interlibrary loan. A quick check found that it was unavailable in some systems and a not for loan in others. My next thought was to check Amazon where it was not only available, but with expedited delivery could be at the Library in a matter of days, which, in fact, it was.

That is who we are. We are the place that either has it or, not having it, the place that is going to get it for you. Think of the Library as a first option rather than a last resort and I guarantee that your informational needs are going to be taken care of and your case and day are going to go a whole lot smoother.

A Trip Down Memory Lane – The LSAT

How many of you remember that grand experience known as the Law School Admission Test? In one form or another, it dates back to 1948. My recollection is from 1980, although the date is about the only thing I can remember about it. I have a feeling the same will not be true of my daughter May who took her LSAT yesterday.

When I picked her up I wondered but did not ask how it went. After having picked up a great many standardized test takers over the years I knew 1) they really did not want to talk about it and 2) how does anyone really know how they did. Well, this time it was a little different. “Guess what happened, I was asked?” Love those questions, the ones where you have absolutely no possibility of knowing and where you are left to respond with the obligatory “What”? “Well, instead of a written test they gave us tablets to use, and about five questions in, I am on a roll, and my tablet goes blank. So did the tablet of another person taking the test who is crying pretty badly. After about ten minutes they get it back up, but of course the clock on the screen has been running the whole time. Not feeling real good, but, what are you going to do. The proctor says they will make it right. The rest of the test I keep waiting for it to shut down again, but, it doesn’t. It does for the other person, who is now hysterical. They leave and do not come back.”

This morning my daughter called the testing folks who assured her all would be made right and she had the option of a scoring adjustment or a retest. They said they would be in touch with her soon to evaluate everything with her.

I do not know what the end result will be, but I would like May and all of you to know how proud I am of her. She was calm in the face of tremendous adversity and soldiered on doing the best she could with the situation that she was thrust into. The sadness she expressed in the car to me was not for herself, but for her fellow test taker. Her anger was not so much directed at the providers of the test, who “did what they could and were very nice,” but at other test takers who had so very little empathy for their distraught fellow and who voiced their opinion that they were entitled to bonus points for having to endure it all.

As far as I am concerned, regardless of what happens from here, May passed the most important tests that she was faced with yesterday with the highest of grades.

Joe Bennett

You Want It – You Got It – The Sequel

One of my favorite expressions I like to use with regards to the Bar Library is “Why buy it from them when you can borrow it from us.” Recently, the Library received *Maryland Rules Commentary* (5th Edition). The following description is from the web site of the publisher:

“**Maryland Rules Commentary** is the only annotated collection of the Maryland circuit court rules by the framers who actually drafted and amended them. Expert commentary and legal analysis, historical notes, cross-references to associated rules, and relevant citations to legal authority help you navigate through Maryland's complex civil court system.”

Anyone who has ever used this marvelous work is familiar with how useful and valuable it truly is. It sells for \$199.00, so, when you consider that a Bar Library membership is \$250.00, using this work alone, say, in your own office after you have borrowed it, you will be just about there in getting your “money’s worth” out of your membership. I would like to continue talking to you about the value of a Bar Library membership, but, I have to go. More books to catalog, which, by the way, may be borrowed as well. First up, President of the Board Mr. George Liebmann’s 2019-2020 edition of *Maryland Practice: Civil Procedure Forms*. Would you believe, even before I finished cataloging *Maryland Practice*, the courier dropped off *Maryland Divorce and Separation Law*, 10th edition, which is available to MSBA members for \$295.00, and yes you are right. That one book, which may be borrowed from the Bar Library, is more than a Library membership.

Trivia Corner

I thought it might be a little fun if each issue of the *Advance Sheet* contained a trivia question dealing with the law. Being a fairly regular watcher of Jeopardy, and aware of how many lawyers the show attracts as contestants, I think that many of you might be up to the challenge. Regrettably, the only thing in it for you will be bragging rights. Whoever is first to e-mail me at jwbennett@barlib.org with the correct answer will be disclosed in the next issue of the newsletter. So, good luck to all. The question is simply - The following quoted language is from where:

“Then there are the many names, celebrated for one reason or another, that have sparked the diamond and its environs and that have provided tinder for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in-season and off-season: Ty Cobb, Babe Ruth, Tris Speaker, Walter Johnson, Henry Chadwick, Eddie Collins, Lou Gehrig, Grover Cleveland Alexander, Rogers Hornsby, Harry Hooper, Goose Goslin, Jackie Robinson, Honus Wagner, Joe McCarthy, John McGraw, Deacon Phillippe, Rube Marquard, Christy Mathewson, Tommy Leach, Big Ed Delahanty, Davy Jones, Germany Schaefer, King Kelly, Big Dan Brouthers, Wahoo Sam Crawford, Wee Willie Keeler, Big Ed Walsh, Jimmy Austin, Fred Snodgrass, Satchel Paige, Hugh Jennings, Fred Merkle, Iron Man McGinnity, Three-Finger Brown, Harry and Stan Coveleski, Connie Mack, Al Bridwell, Red Ruffing, Amos Rusie, Cy Young, Smokey Joe Wood, Chief Meyers, Chief Bender, Bill Klem, Hans Lobert, Johnny Evers,

Joe Tinker, Roy Campanella, Miller Huggins, Rube Bressler, Dazzy Vance, Edd Roush, Bill Wambsganss, Clark Griffith, Branch Rickey, Frank Chance, Cap Anson, Nap Lajoie, Sad Sam Jones, Bob O'Farrell, Lefty O'Doul, Bobby Veach, Willie Kamm, Heinie Groh, Lloyd and Paul Waner, Stuffy McInnis, Charles Comiskey, Roger Bresnahan, Bill Dickey, Zack Wheat, George Sisler, Charlie Gehringer, Eppa Rixey, Harry Heilmann, Fred Clarke, Dizzy Dean, Hank Greenberg, Pie Traynor, Rube Waddell, Bill Terry, Carl Hubbell, Old Hoss Radbourne, Moe Berg, Rabbit Maranville, Jimmie Foxx, Lefty Grove. The list seems endless.”

HOLIDAY CLOSINGS

The following is a list of upcoming holiday closings. Remember that on those days when the Bar Library closes at 6:00 P.M. the rest of the Courthouse is closed and those wishing to use the Library must enter the Courthouse through the Lexington Street door.

Monday, January 20 (Dr. Martin Luther King Day) - Close at 6:00 P.M.

Monday, February 17 (Presidents' Day) - Close at 6:00 P.M.