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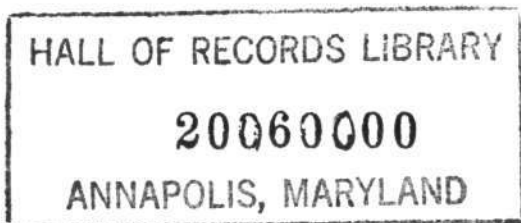
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THE MARYLAND STATE CONSTITUTION

A Reference Guide

Dan Friedman

Foreword by
Judge Robert L. Karwacki



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MARYLAND STATE ARCHIVES

Article V

Attorney-General and State's Attorneys

Article V of the Maryland Constitution provides the operating rules for the two groups of attorneys responsible for representing the State of Maryland: the Attorney General, described in §§1–6, and the State's Attorneys for each county, described in §§7–12. Although all of these provisions repeatedly use masculine pronouns to describe both officers, the feminine gender is also implied. *MD. CONST.*, Art. I, §10.

The office of Attorney General dates back to at least 1657, and the colonial Attorney General served as a principal advisor to the Governor.¹ The office was continued in Maryland's first constitution, but without a description of the duties of the office.² In 1817, the office was abolished by constitutional amendment.³ The General Assembly recreated the office by statute in 1818.⁴ The Maryland Constitution of 1851 specifically abolished the office of Attorney General and prohibited the General Assembly from reestablishing it.⁵ At that time, the duties that previously had been performed by the Attorney General were transferred to the state's attorneys.⁶ The 1864 Maryland Constitution created the modern, elected office of Attorney General⁷ and it was retained in the 1867 Maryland Constitution.⁸ The constitutional provisions regarding the Attorney General have been relatively stable since 1867.⁹

Prior to the constitutional convention in 1967–1968, the constitutional convention commission recommended deleting the Attorney General from the constitution making the office appointed, rather than elective, and thus strengthening the powers of the Governor.¹⁰ The constitutional convention considered but rejected this suggestion, recommending the retention of the elected Attorney General.¹¹ Ultimately, of course, the proposed constitution was rejected and the Office of the Attorney General remained unchanged.¹²

Article V

SECTION 1

Election, term and removal of Attorney-General. There shall be an Attorney-General elected by the qualified voters of the State, on general ticket, on the Tuesday next after the first Monday in the month of November, nineteen hundred and fifty-eight, and on the same day, in every fourth year thereafter, who shall hold his office for four years from the time of his election and qualification, and until his successor is elected and qualified, and shall be re-eligible thereto, and shall be subject to removal for incompetency, willful neglect of duty or misdemeanor in office, on conviction in a Court of Law.

Article V, §1 provides for the election of an Attorney General¹³ for the state of Maryland. The date of election and term of office for the Attorney General comport with Article XVII, thanks, in part, to a constitutional amendment in 1956.¹⁴ The Attorney General holds office for a term of four years and until the successor is elected and qualified, in order to avoid periods when there is no incumbent. There is no limit to the number of terms that an Attorney General may serve. Finally, the Attorney General may only be removed by a court proceeding for the specified grounds, not by impeachment by the legislature pursuant to *MD. CONST.*, Art. III, §26.

SECTION 2

Determining election and qualification of Attorney-General; tie vote; oath. All elections for Attorney-General shall be certified to, and returns made thereof by the Clerks of the Circuit Courts of the several counties, and the Clerk of the Superior Court of Baltimore City, to the Governor of the State, whose duty it shall be to decide on the election and qualification of the person returned; and in case of a tie between two or more persons, to designate which of said persons shall qualify as Attorney General, and to administer the oath of office to the person elected.

Section 2 provides for what appears to be a relatively straightforward election procedure: All election returns are certified by the clerks of the circuit courts to the Governor, who decides which candidate has been elected, and may resolve tie votes. The appellate courts of Maryland have only interpreted §2 once, in the case of *Groome v. Gwinn*.¹⁵ In that case, Gwinn defeated Wallis in the 1875 election for Attorney General. Wallis sought to contest the election results based on voting fraud, intimidation, and violence in Baltimore City. Wallis asked Governor Groome to review the election results pursuant to the authority granted by Art. V, §2. Groome declined to decide and did not issue a commission to either candidate, suggesting that Gwinn file a mandamus action to force the courts to rule on the issue. Gwinn complied and sought a writ of mandamus compelling the Governor to issue him a commission. Ultimately, the Court of Appeals ruled that, although Art. V, §2 gives the Governor the authority to decide contested elections

for Attorney General, this power could not be exercised because the Governor lacked the power (in the absence of a grant from the General Assembly) to take the legal evidence necessary to decide the case. The decision in *Groome* has been criticized because it makes the exercise of the Governor's constitutional power subject to authorization by the legislature.¹⁶

The legal developments subsequent to *Groome* have not conclusively resolved the question of how contested elections for Attorney General are to be resolved. For a period, the legislature specifically directed the courts to fulfill a primary fact-finding function in all contested election cases, even when another branch of government (either the legislature, or, as here, the executive) is assigned by the constitution to make the final decision.¹⁷ In *Duffy v. Conaway*,¹⁸ a case involving a contested election for register of wills, the Court of Appeals held that this arrangement, by assigning a nonjudicial fact-finding function to the courts, violated the separation of powers. In response to the *Duffy* case, the General Assembly rewrote the provisions governing contested elections giving the courts some final decision-making authority.¹⁹ While the Court of Appeals has approved this scheme in one limited scenario,²⁰ questions remain about whether this method of resolving contested elections will ultimately be held constitutional.²¹

SECTION 3

Powers and duties of Attorney-General; compensation; Governor not to employ additional counsel unless authorized by legislature.

- (a) the Attorney General shall:
- (1) Prosecute and defend on the part of the State all cases pending in the appellate courts of the State, in the Supreme Court of the United States or the inferior Federal Courts, by or against the State, or in which the State may be interested, except those criminal appeals otherwise prescribed by the General Assembly.
 - (2) Investigate, commence, and prosecute or defend any civil or criminal suit or action or category of such suits or actions in any of the Federal Courts or in any Court of this State, or before administrative agencies and quasi legislative bodies, on the part of the State or in which the State may be interested, which the General Assembly by law or joint resolution, or the Governor, shall have directed or shall direct to be investigated, commenced and prosecuted or defended.
 - (3) When required by the General Assembly by law or joint resolution, or by the Governor, aid any State's Attorney or other authorized prosecuting officer in investigating, commencing, and prosecuting any criminal suit or action or category of such suits or actions brought by the State in any Court of this State.
 - (4) Give his opinion in writing whenever required by the General Assembly or either branch thereof, the Governor, the Comptroller, the Treasurer or any State's Attorney on any legal matter or subject.

- (b) The Attorney General shall have and perform any other duties and possess any other powers, and appoint the number of deputies or assistants, as the General Assembly from time to time may prescribe by law.
- (c) The Attorney General shall receive for his services the annual salary as the General Assembly from time to time may prescribe by law, but he may not receive any fees, perquisites or rewards whatever, in addition to his salary, for the performance of any official duty.
- (d) The Governor may not employ any additional counsel, in any case whatever, unless authorized by the General Assembly.

Section 3 of Article V provides the constitutional responsibilities of the Attorney General. The Attorney General of Maryland possesses no common law powers, but "only [has] such powers as are vested in him by the [c]onstitution of Maryland and the various enactments of the General Assembly of Maryland."²² Thus, for example, in *State v. Burning Tree Club*,²³ the Attorney General brought a declaratory judgment action seeking to have a statute declared unconstitutional. The Court of Appeals of Maryland found that the Attorney General's actions exceeded his powers, stating, "the Attorney General ordinarily has the duty of appearing in the courts as the defender of the validity of the enactments of the General Assembly. Thus he may not maintain [a] proceeding which seeks to have an act of the General Assembly declared unconstitutional."²⁴

The constitutional duties and responsibilities of the Attorney General are set out in §3. Section 3(a) provides the mandatory duties. Subsection (a)(1) requires the Attorney General to represent the state in all civil and criminal cases in any federal court and in the state appellate courts, leaving to the various state's attorneys the representation of the state in state trial court criminal matters.²⁵ Subsection (a)(2) requires the Attorney General to "[i]nvestigate, commence, and prosecute or defend" any other type of legal action directed by the Governor or the legislature. This subsection was added in 1976 "primarily to permit the General Assembly to establish an office of special prosecutor to pursue allegations of political corruption, election law abuses and organized criminal activities which extend beyond local prosecutorial jurisdictions."²⁶ The provision has wider possible application, permitting the Governor or the General Assembly to direct the Attorney General to undertake virtually any legal action, in any forum, on behalf of the state. Subsection (a)(3) permits the Attorney General to prosecute criminal matters if, but only if, directed to do so by the Governor or the General Assembly.²⁷ When the Attorney General acts in this prosecutorial capacity he or she "stands in the shoes" of the state's attorney.²⁸ The Court of Appeals has described subsection (a)(3) as

susceptible of an inference that the framers of the Constitution intended to do two things: to assure that a possibly recalcitrant Attorney General would aid and assist a State's attorney who sought assistance, and to bar the Attorney General from going off on an investigation of his own in any particular county, in possible conflict with the elected State's attorney of the county, unless this action was first authorized by the Governor as the head of the executive branch or the General Assembly as the legislative branch of the State.²⁹

Although both subsections (a)(2) and (a)(3) require approval from either the Governor or the legislature in order for the Attorney General to institute legal proceedings, the Court of Appeals of Maryland has found that a Governor's "subsequent written directive to prosecute [a lawsuit is] a sufficient confirmation and ratification of the Attorney General's action in instituting the [lawsuit]."³⁰

Subsection (a)(4) requires the Attorney General to provide written legal opinions when requested by other branches of state government. The official opinions are compiled and published annually as the Opinions of the Attorney General.

Art. V, §3(b) allows the legislature to assign additional duties to the Attorney General as it sees fit. Those duties are currently codified at MD. CODE ANN., STATE GOV'T, §6-101, *et seq.* Section 3(b) also allows the Attorney General to appoint assistant and special assistant attorneys general as provided in the state budget.

Art. V, §3(c) provides that the Attorney General's salary is set by the legislature as an item in the state budget. From 1867 to 1912 the Attorney General's salary was constitutionally capped at \$3,000. A 1913 constitutional amendment provided that the Attorney General "shall receive for his services an annual salary of \$3,000, or such annual salary as the General Assembly may from time to time by law proscribe."³¹ This relieved the inflationary pressure³² and eventually the \$3,000 salary suggestion was deleted from the constitution.³³ Finally, §3(c) prohibits the Attorney General from receiving "any fees, perquisites or rewards whatever" in addition to the official salary.³⁴

Finally, Art. V, §3(d) requires that the Attorney General is the exclusive legal counsel for the Governor (which should be read broadly to encompass the executive branch), unless alternative counsel is provided by the legislature.³⁵ Once the General Assembly has approved retaining outside counsel, however, the method of paying counsel is not limited and the Court of Appeals of Maryland has allowed the Attorney General to enter into a contingency fee contract with a private law firm to represent the state.³⁶

SECTION 4

Qualifications of Attorney General. No person shall be eligible to the office of Attorney General, who is not a citizen of this State, and a qualified voter therein, and has not resided and practiced Law in this State for at least ten years.

Article V, §4 provides the qualifications for candidates for Attorney General: (1) citizenship; (2) qualified voter; (3) ten-year residency in the state; and (4) ten-year's legal practice in Maryland. The Attorney General of Maryland has noted that the third requirement, the ten-year residency requirement for eligibility to serve as the Attorney General, need not be those ten years immediately preceding election.³⁷ This was changed in the 1867 state constitution to permit attorneys "who had been absent from the State during the Civil War," *i.e.*, fighting for the Confederacy, to serve as Attorney General. In a separate opinion, the Attorney

Article V

General opined that the fourth requirement, that the Attorney General have "practiced Law" for ten years, is not constrained to the traditional practice of law as it existed in 1864 but "should be understood to require involvement in any of the contemporary forms of lawyering that entail the application of personal legal expertise to a range of issues."³⁸

SECTION 5

Vacancy in office of Attorney-General. In case of vacancy in the office of Attorney General, occasioned by death, resignation, removal from the State, or from office, or other disqualification, the Governor shall appoint a person to fill the vacancy for the residue of the term.

In the event of a vacancy in the office of Attorney General, the Governor appoints a successor Attorney General. A 1978 amendment improved the grammar but did not change the substance of this provision.³⁹ And while there have been numerous occasions requiring the Governor to appoint a replacement attorney general, none have resulted in litigation.⁴⁰

SECTION 6

Clerks of courts of appeal to notify Attorney-General of cases in which State has interest. It shall be the duty of the Clerk of the Court of Appeals and the Clerks of any intermediate courts of appeal, respectively, whenever a case shall be brought into said Courts, in which the State is a party or has interest, immediately to notify the Attorney General thereof.

This provision requires that the clerks of the Court of Appeals and the Court of Special Appeals notify the Attorney General of cases "in which the State is a party or has interest." The provision was modified in 1966 to add the reference to "intermediate courts of appeal" in anticipation of the creation of the Court of Special Appeals.⁴¹ This provision has never required the interpretation of the appellate courts.

SECTION 7

Election, term and removal of State's Attorneys. There shall be an Attorney for the State in each county and the City of Baltimore, to be styled "The State's Attorney", who shall be elected by the voters thereof, respectively, and shall hold his office for four years from the first Monday in January next ensuing his election, and until his successor shall be elected and qualified; and shall be re-eligible thereto, and be subject to removal therefrom, for incompetency, willful neglect of duty, or misdemeanor in

office, on conviction in a Court of Law, or by a vote of two-thirds of the Senate, on the recommendation of the Attorney-General.

Article V, §§7-12 provide the constitutional rules regarding the State's Attorneys, the elected prosecutors in each county, and Baltimore City.⁴² The State's Attorneys first appeared in the Maryland Constitution of 1851 but, at that time, they served as a replacement for the defunct office of the Attorney General. It was not until the constitution of 1864 that they assumed their modern prosecutorial role.

The State's Attorneys are elected by the voters to four-year terms and serve until the qualification of a successor. The elections for State's Attorney occur simultaneously with other state elections in obedience to the Quadrennial Elections Article, MD. CONST., Art. XVII, §2. State's Attorneys begin their terms of office on the first Monday in January after their election. This specific exception to MD. CONST., Art. XVII, §5 permits a "lame duck" State's Attorney to hold over from the November election until the January swearing-in. Pursuant to this provision, State's Attorneys are permitted to succeed themselves indefinitely in office. Finally, this provision provides the removal provisions for State's Attorneys. A State's Attorney can be removed from office through either judicial or legislative process. The first method is judicial conviction on the grounds specified in this section: "incompetency, willful neglect of duty, or misdemeanor in office;" or the grounds specified in §9: "receiv[ing] any other fee or reward than such as is or may be allowed by law." The second method for removing a State's Attorney is legislative, by a two-thirds vote of the State Senate. The legislative impeachment for State's Attorneys differs from the ordinary impeachment provisions of MD. CONST., Art. III, §26 in that the proceedings are initiated "on the recommendation of the Attorney-General," rather than by the House of Delegates.⁴³

SECTION 8

Determining election and qualification of State's Attorney; tie vote; oath. All elections for the State's Attorney shall be certified to, and Returns made thereof, by the Clerks of the said Counties and City, to the Judges thereof, having criminal jurisdiction, respectively, whose duty it shall be to decide upon the elections and qualifications of the Persons returned; and, in case of a tie between two or more Persons, to designate which of said persons shall qualify as State's Attorney, and to administer the oaths of office to the Person elected.

The election returns for State's Attorney are certified to the circuit court judges for each jurisdiction. The judges then determine who is to be qualified as the State's Attorney based on the election returns and the qualifications of the candidates. Judge Niles has noted the similarity of language between this process and that laid out in MD. CONST., Art. V, §2, which requires the Governor to "decide on the election and qualification" of the candidates for Attorney General.⁴⁴ Niles

speculates that because judges have the common law power to receive evidence, this provision would be considered self-executing, in contrast to Art. V, §2, which was found to require an enabling statute.⁴⁵

Although the provision indicates that the circuit court judges are to administer the oath of office to the State's Attorneys, the Attorney General has opined that the oath may be administered either by the Governor, a circuit court judge, or a circuit court clerk.⁴⁶

SECTION 9

Duties and compensation of State's Attorneys; deputies and assistants; expenses. The State's Attorney shall perform such duties and receive such salary as shall be prescribed by the General Assembly. If any State's Attorney shall receive any other fee or reward than such as is or may be allowed by law, he shall, on conviction thereof, be removed from office; provided, that the State's Attorney for Baltimore City shall have the power to appoint a Deputy and such other Assistants as the Supreme Bench of Baltimore City may authorize or approve and until otherwise provided by the General Assembly, the said State's Attorney, Deputy and Assistants shall receive the following annual salaries: State's Attorney, seven thousand five hundred dollars; Deputy State's Attorney, five thousand dollars; Assistant State's Attorneys, four thousand dollars each; said salaries, or such salaries as the General Assembly may subsequently provide and such expenses for conducting the office of the State's Attorney as the Supreme Bench of Baltimore City may authorize or approve shall be paid by the Mayor and City Council of Baltimore to the extent that the total of them exceeds the fees of his office, or as the General Assembly shall otherwise provide, and the Mayor and City Council of Baltimore shall not be liable for appearance fees to the State's Attorney.

Article V, §9 has been substantially transformed in the time since its predecessor first appeared in the Maryland Constitution of 1851.⁴⁷ The transition of State's Attorneys from fee-dependent to a salaried system of pay occurred slowly over time and differently in Baltimore City than elsewhere in the state. The result of these changes is a poorly drafted amalgamation filled with historical remnants of little continuing significance in the operation of modern prosecutorial offices. For all its twists and turns, the function of §9 is now to entrust the determination of both the duties and salaries of the State's Attorneys throughout the state to the legislature.

Originally, in 1851, the State's Attorneys were created as local replacements for the defunct statewide office of Attorney General. These new officers were fee-dependent, like their predecessor, and they were given the right to collect the fees previously dedicated to the Attorney General.⁴⁸ The 1864 Maryland Constitution made clear that the legislature could determine the fees to support the State's Attorneys.⁴⁹ The State's Attorneys were still fee-dependent and the only salary permitted was for the deputy State's Attorney for Baltimore City,

who was allowed a \$1,500 annual salary from the fees received by the State's Attorney.

A constitutional amendment, ratified in 1901, changed the pay structure for the State's Attorneys. The amendment permitted, for the first time, that the State's Attorneys in the various counties, who evidently worked alone, be paid a salary not exceeding \$3,000. The amendment also created a separate system for the State's Attorney's office in Baltimore City where more staff was required. The amendment created three classes of attorneys in the Baltimore City State's Attorney's Office: the State's Attorney, who received a salary of \$4,500; the deputy State's Attorney, who received a salary of \$3,000; and a number of assistant State's Attorneys, who each received \$1,500. The number of assistant State's Attorneys was determined, not by the State's Attorney, but by the judges before whom they practiced. All of the salaries in the Baltimore City State's Attorney's Office were paid out of fees received by the office.⁵⁰

A major change in the system as it relates to Baltimore City was adopted in 1924. The State's Attorney for Baltimore City was specifically given the discretion to select the deputy and assistant State's Attorneys but the power to determine the number of such assistants was left to the judges. The salaries of all of the personnel were increased and made subject to legislative control so that future increases would not require constitutional amendment. Finally, for the first time, it was anticipated that fees might not generate sufficient revenue to fund the salaries of the Baltimore City State's Attorney's Office. In such a situation, the City government was required to pay any budgetary shortfall. In exchange, the amendment provided that Baltimore City would not have to pay the appearance fees for the State's Attorneys.⁵¹

Finally, by a 1944 amendment, the salaries for the State's Attorneys in the various counties was converted from fee-dependent to a salary determined by the General Assembly.⁵² Today the salaries of the State's Attorneys are set by statute, codified as MD. ANN. CODE, Art. 10, §40.

The State's Attorney was assigned the duties that had previously been assigned to the Attorney General.⁵³ In *Murphy v. Yates*,⁵⁴ the Court of Appeals of Maryland determined that the State's Attorneys have inherited the common law duties of the Attorney General with respect to criminal prosecutions and that, therefore, the legislature lacked the power to reduce the powers of the State's Attorneys. A 1976 constitutional amendment, intended to reverse the decision in *Murphy v. Yates*, made it clear that the General Assembly could modify the powers of the State's Attorneys and thereby enabled the legislature to create an office of the State Prosecutor.⁵⁵

SECTION 10

Qualifications of State's Attorneys. No person shall be eligible to the office of State's Attorney, who has not been admitted to practice Law in this State, and who

Article V

has not resided, for at least two years, in the county, or city, in which he may be elected.

Article V, §10 provides the minimum qualification for election as a State's Attorney: (1) a license to practice law in Maryland; and (2) two year's residency in the jurisdiction.⁵⁶ Judge Niles dryly commented that these requirements "do not seem to err on the side of too great strictness."⁵⁷

SECTION 11

Vacancy in office of State's Attorney. In case of a vacancy in the office of State's Attorney, or of his removal from the county or city in which he shall have been elected, or on his conviction as herein specified, the Judge or Judges resident in the county or, if there be no resident Judge, the Judge or Judges having jurisdiction in the Circuit Court of the county in which the vacancy occurs, or by the Supreme Bench of Baltimore City for a vacancy occurring in Baltimore City, shall appoint a person to fill the vacancy for the residue of the term.

This section provides that vacancies in the office of State's Attorney for any county or for Baltimore City are to be filled by a person appointed by the circuit court judges resident in that jurisdiction. Of course, the judges are not permitted to nominate or appoint a new State's Attorney until a vacancy actually exists.⁵⁸

SECTION 12

Collection of money in name of State; bond. The State's Attorney in each county, and the City of Baltimore, shall have authority to collect, and give receipt, in the name of the State, for such sums of money as may be collected by him, and forthwith make return of and pay over the same to the proper accounting officer. And the State's Attorney of each county, and the City of Baltimore, before he shall enter on the discharge of his duties, and from time to time thereafter, shall give such corporate surety bond as may hereafter be prescribed by Act of the General Assembly.

The first sentence of Art. V, §12 enables the various State's Attorneys to collect money on behalf of the State of Maryland and to turn over those funds to the Comptroller's office. The second sentence of §12 requires the State's Attorneys to provide a surety bond as described by the General Assembly. Until 1946 this was a more stringent bonding requirement,⁵⁹ and now the legislature has all but abrogated this constitutional bond requirement by setting the bond amount at a minimal amount—\$5,000—and making the premium payable from the office budget, rather than by the State's Attorney, individually. MD. ANN. CODE, Art. 10, §35.