

# History of COA Condensed - SB666.pdf

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## A. Origins of the Maryland Court of Appeals

The Court of Appeals of Maryland is one of the oldest appellate courts in the United States,<sup>1</sup> with its origins dating back to 1638,<sup>2,3</sup> as a “...general court at St. Mary’s.”<sup>4</sup> Called first the County Court<sup>5</sup> and later the Provincial Court<sup>6</sup>, the general court functioned as the local version of the King’s Bench in England and was granted appellate jurisdiction in 1642.<sup>7</sup>

Until 1649, the Provincial Court shared judicial responsibilities with the assembly, which “functioned as an additional law court forum for freemen.”<sup>8</sup> In 1649, the assembly divided into two houses: (1) an Upper House, consisting of the governor and his council, and (2) a Lower House, known as the House of Burgesses.<sup>9</sup> The Lower House was responsible for the adjudication of “relatively unimportant disputes;” the Upper House retained the Provincial Court’s appellate jurisdiction.<sup>10</sup> When exercising appellate jurisdiction, the Upper House was sitting as a Court of Appeals,<sup>11</sup> a name that was then “merely descriptive and was not an official title,”<sup>12</sup> a term used in the royal colonies to refer to the governor and council’s appellate docket.<sup>13</sup> The formal title was not adopted until after the Revolution.<sup>14</sup>

Until 1692, the Provincial Court and the Upper House were different entities comprised of the same individuals—the governor and his council. In 1692, the Provincial Court was made a separate institution from the Upper House; consequently, a judge did not need to be on the Governor’s council to be a member of the Court.<sup>15</sup> The Provincial Court had both original and appellate jurisdiction, and its rulings could be appealed to the Upper House.<sup>16</sup>

The constitutional convention of 1776 prompted significant changes to Maryland’s judiciary. In Maryland’s first Constitution, Article 6 separated the functions of the executive, legislature, and judiciary,<sup>17</sup> and Article 56 established the Court of Appeals as the principal appellate court in Maryland.<sup>18</sup> The Court’s seal was adopted in 1783 and is still in use today.<sup>19</sup> A constitutional amendment in 1805 transferred the appellate jurisdiction of the General Court, the successor to the Provincial Court, to the Court of Appeals, formally consolidating all appellate jurisdiction in Maryland in the Court of Appeals.<sup>20</sup>

Originally, the judges on the Maryland Court of Appeals had both trial and appellate responsibilities.<sup>21</sup> In 1943, the Court was restructured to deal solely with appellate matters.<sup>22</sup> In 1960, the number of judges increased from five to the current seven.<sup>23</sup> The

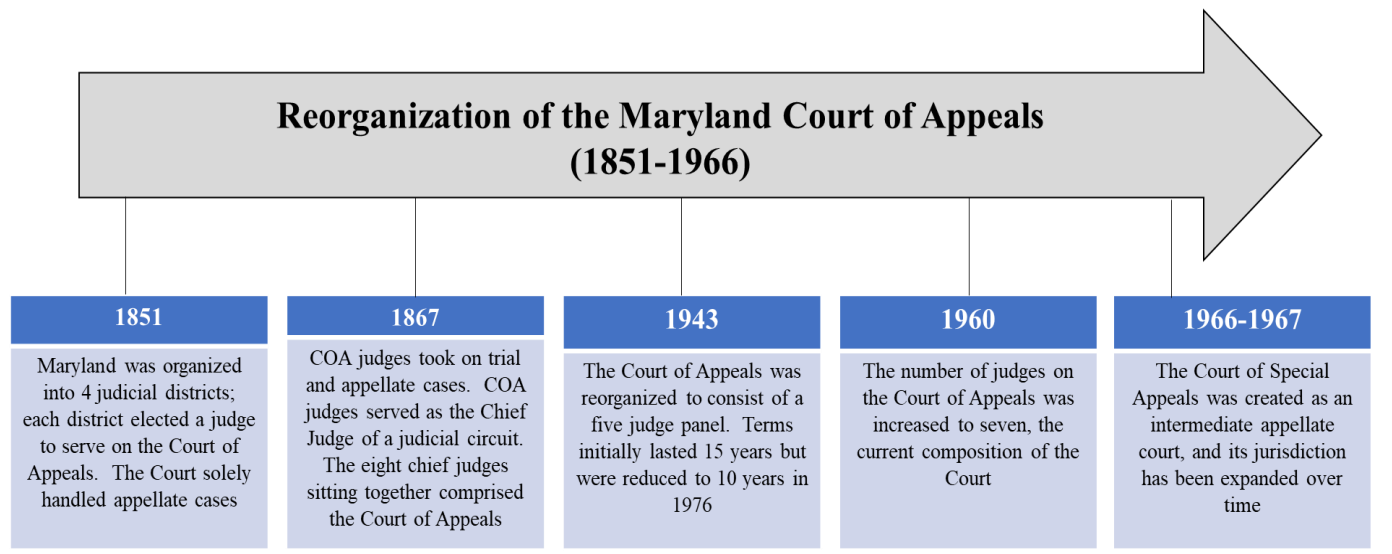
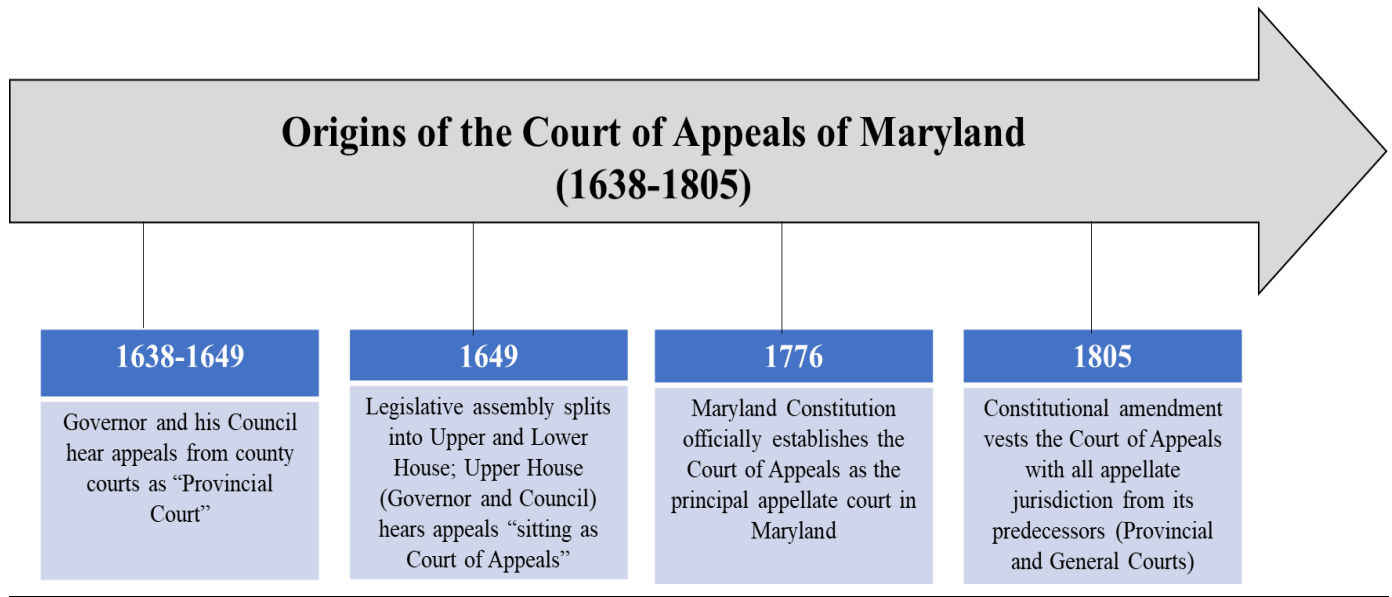
“extraordinarily heavy dockets” of the Court of Appeals<sup>24</sup> led to the creation of the Court of Special Appeals in 1967 to handle criminal and certain civil appeals.<sup>25</sup> In 1974, the legislature extended the Court of Special Appeals’ jurisdiction to include review of any action taken by a circuit or orphan’s court<sup>26</sup> to address the “daunting pace” of the growing appellate caseload.

## B. Origins of Appellate Courts in Other States

Other states took a different approach to naming their highest appellate court:

- ✦ **New Hampshire**, for example, also had a colonial “court of appeals” comprised of the governor and council; in 1776, the state discarded that title, establishing the Superior Court of Judicature (renamed the Supreme Court in 1876) as its high court.<sup>27</sup>
- ✦ **New Jersey** established an intermediate appellate court called the Supreme Court in 1844 to supplement its high court, the Court of Errors and Appeals.<sup>28</sup>
- ✦ **Pennsylvania** established its Supreme Court in 1722 to replace the Provincial Appellate Court.<sup>29</sup>
- ✦ **Massachusetts** established the Superior Court of Judicature in 1692 and renamed it the Supreme Judicial Court in its 1780 constitution.<sup>30</sup>
- ✦ **Virginia** retained its “Court of Appeals” after the Revolution but renamed it the Supreme Court in 1971<sup>31</sup> and in 1984, created an intermediate appellate court called the Court of Appeals.<sup>32</sup>
- ✦ **Kentucky**’s highest court was also called the “Court of Appeals” until 1974, when, due partially to the backlog of appellate cases, the legislature created an intermediate appellate court, the “Court of Appeals,” while renaming the highest court the “Supreme Court.”<sup>33</sup>
- ✦ **West Virginia** combined “Supreme Court” and “Court of Appeals,” calling its highest court the “Supreme Court of Appeals” from its inception in 1864.<sup>34</sup>

Currently, 49 of 54 jurisdictions in the United States call their highest court the “Supreme Court.” See attached.



| <b>STATE</b> | <b>INTERMEDIATE APPELLATE COURT</b>   | <b>COURT(S) OF LAST RESORT</b> |
|--------------|---|--------------------------------|
| Alabama      | <ul style="list-style-type: none"> <li>• Court of Civil Appeals</li> <li>• Court of Criminal Appeals</li> </ul> | Supreme Court                  |
| Alaska       | Court of Appeals  | Supreme Court                  |
| Arizona      | Court of Appeals  | Supreme Court                  |
| Arkansas     | Court of Appeals  | Supreme Court                  |
| California   | Courts of Appeal  | Supreme Court                  |

|                |   |                        |
|----------------|---|------------------------|
| Colorado       | Court of Appeals                                      | Supreme Court          |
| Connecticut    | Appellate Court                                       | Supreme Court          |
| Delaware       | None  | Supreme Court          |
| D.C.           | None  | Court of Appeals       |
| Florida        | District Courts of Appeal                             | Supreme Court          |
| Georgia        | Court of Appeals                                      | Supreme Court          |
| Hawaii         | Intermediate Court of Appeals                         | Supreme Court          |
| Idaho          | Court of Appeals                                      | Supreme Court          |
| Illinois       | Appellate Court                                       | Supreme Court          |
| Indiana        | Court of Appeals                                      | Supreme Court          |
| Iowa           | Court of Appeals                                      | Supreme Court          |
| Kansas         | Court of Appeals                                      | Supreme Court          |
| Kentucky       | Court of Appeals                                      | Supreme Court          |
| Louisiana      | Courts of Appeal                                      | Supreme Court          |
| Maine          | None  | Supreme Judicial Court |
| Maryland       | Court of Special Appeals                              | Court of Appeals       |
| Massachusetts  | Appeals Court of Massachusetts                        | Supreme Judicial Court |
| Michigan       | Court of Appeals                                      | Supreme Court          |
| Minnesota      | Court of Appeals                                      | Supreme Court          |
| Mississippi    | Court of Appeals                                      | Supreme Court          |
| Missouri       | Court of Appeals                                      | Supreme Court          |
| Montana        | None  | Supreme Court          |
| Nebraska       | Court of Appeals                                      | Supreme Court          |
| Nevada         | Court of Appeals                                      | Supreme Court          |
| New Hampshire  | None  | Supreme Court          |
| New Jersey     | Superior Court, Appellate Div.                        | Supreme Court          |
| New Mexico     | Court of Appeals                                      | Supreme Court          |
| New York       | Appellate Div. & Appellate Terms of the Supreme Court | Court of Appeals       |
| North Carolina | Court of Appeals                                      | Supreme Court          |
| North Dakota   | Court of Appeals                                      | Supreme Court          |

|          |                                  |   |
|----------|----------------------------------|---|
| Ohio     | Courts of Appeals (12 districts) | Supreme Court   |
| Oklahoma | Court of Civil Appeals           | <ul style="list-style-type: none"> <li>• Supreme Court (civil &amp; constitutional)</li> <li>• Court of Criminal Appeals</li> </ul> |
| Oregon   | Court of Appeals                 | Supreme Court   |

|                |  |   |
|----------------|--|---|
| Pennsylvania   | • Superior Court •<br>Commonwealth Court   | Supreme Court   |
| Rhode Island   | None   | Supreme Court   |
| South Carolina | Court of Appeals   | Supreme Court   |
| South Dakota   | None   | Supreme Court   |
| Tennessee      | • Court of Appeals (civil)<br>• Court of Criminal Appeals  | Supreme Court   |
| Texas          | Courts of Appeals  | • Supreme Court (civil & juvenile)<br>• Court of Criminal Appeals   |
| Utah           | Court of Appeals   | Supreme Court   |
| Vermont        | None   | Supreme Court   |
| Virginia       | Court of Appeals   | Supreme Court   |
| Washington     | Court of Appeals   | Supreme Court   |
| West Virginia  | None   | Supreme Court of Appeals  |
| Wisconsin      | Court of Appeals   | Supreme Court   |
| Wyoming        | None   | Supreme Court   |
| Guam           | None   | Supreme Court   |
| Puerto Rico    | Court of Appeals   | Supreme Court   |
| Virgin Islands | None   | Supreme Court   |
| <b>Totals</b>  | <ul style="list-style-type: none"> <li>• <b>Court(s) of Appeal(s), Appellate Court, or Appellate Div.: 40</b></li> <li>• <b>None: 12</b></li> <li>• <b>Other: 2 (Md. &amp; Pa.)</b></li> </ul> | <ul style="list-style-type: none"> <li>• <b>Supreme Court: 49 (incl. W.Va., Mass., and Me.)</b></li> <li>• <b>Two courts: 2 (Tex. &amp; Okla.)</b></li> <li>• <b>Court of Appeals: 3 (D.C., Md., &amp; N.Y.)</b></li> </ul> |

<sup>1</sup> For an interesting discussion on which state has the oldest appellate court in the nation, see Michael Wein, *What was the “First” Appellate Court in the Colonial Americas?*, Md. Appellate Blog (Dec. 28, 2017), [https://mdappblog.com/2017/12/28/whatwas-the-first-appellate-court-in-the-colonial-americas/#\\_ednref4](https://mdappblog.com/2017/12/28/whatwas-the-first-appellate-court-in-the-colonial-americas/#_ednref4). Massachusetts and Pennsylvania also claim that they hold this title; however, “if Maryland could establish that the Court of Appeals of Maryland, is traceable as ‘continuously’ formed from the appellate law system . . . [in] 1638, then there could be a claimed stake to Maryland being the oldest existing appellate court in the United States.” *Id.*

<sup>2</sup> Hon. Carroll T. Bond, *The Court of Appeals of Maryland, A History* 1 (1928)

(“[T]here has been a tribunal of last resort in Maryland known as the Court of Appeals since the seventeenth century[.]”).

<sup>3</sup> *Id.* at 1 (“To a question of the exact age of the Court of Appeals of Maryland the answer would not be easy.”); *see also id.* at 3.

<sup>4</sup> Hon. Hall Hammond, *Commemoration of the Two Hundredth Anniversary of the Maryland Court of Appeals: A Short History*, 38 Md. L. Rev. 229, 229 (1978).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 229-30.

<sup>7</sup> *Proceedings and Acts of the General Assembly January 1637/8-September 1664*, Archives of Maryland Online 183, [https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000001/html/am1](https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000001/html/am1--183.html)

--183.html (last visited Feb. 4, 2019) (“[S]o that after judgment there be power of appeal[] to either part[y] to the Provincial[] Court.”).

<sup>8</sup> *See* Hammond, *supra* note 4, at 230.

<sup>9</sup> *Id.*; *see also* Bond, *supra* note 2, at 3.

<sup>10</sup> *See* Hammond, *supra* note 4, at 230.

<sup>11</sup> Bond, *supra* note 2, at 7.

<sup>12</sup> *Id.* “[G]radually,” the trial court function—and the label of “Provincial Court”—was given to a court presided over by a chief justice with several associate justices. Erwin C. Surrency, *The Courts in the American Colonies*, 11 Am. J. Legal Hist. 253, 268 (1967).

<sup>13</sup> Surrency, *supra* note 12, at 269.

<sup>14</sup> Bond, *supra* note 2, at 33.

<sup>15</sup> *Id.* at 4.

<sup>16</sup> *Id.* at 6 (“This practice of appeals from the Provincial Court[,] presided over by the Governor and Council[,] to the Upper House of the Assembly made up of the same Governor and Council . . . seems anomalous and the wonder is increased by the fact that on such appeals reversals of the judgments rendered in the Provincial Court were proportionately numerous.”).

<sup>17</sup> Bond, *supra* note 2, at 59.

<sup>18</sup> Md. Const. of 1776, art. LVI.

<sup>19</sup> Bond, *supra* note 2, at 77.

<sup>20</sup> *In re Petition for Writ of Prohibition*, 312 Md. 280, 295 (1988).

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<sup>21</sup> *See* Hammond, *supra* note 4, at 236-38.

<sup>22</sup> Hammond, *supra* note 4, at 237-38.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 239.

<sup>25</sup> *Id.*

<sup>26</sup> Hon. Peter B. Krauser, *The Maryland Court of Special Appeals: Its Roots, History, and Future*, 50 Md. B.J. 4, 7 (2017).

<sup>27</sup> *About the Supreme Court*, N.H. Judicial Branch, <https://www.courts.state.nh.us/supreme/about.htm> (last visited Feb. 4, 2019).

<sup>28</sup> Robert A. Kagan *et al.*, *The Evolution of State Supreme Courts*, 76 Mich. L. Rev. 961, 974 (1978).

<sup>29</sup> *A Brief History of the Courts of Pennsylvania* 1, <http://www.pacourts.us/assets/opinions/Superior/out/aopchistory.pdf#search=%221684%22> (last visited Feb. 4, 2019) (explaining that appeals from the Provincial Appellate Court, established in 1684, had to be taken to England).

<sup>30</sup> *About the Supreme Judicial Court*, <https://www.mass.gov/service-details/aboutthe-supreme-judicial-court> (last visited Feb. 4, 2019).

<sup>31</sup> *A short history of the Supreme Court of Virginia*, <https://scvahistory.org/aboutthe-biographies/supreme-court-of-virginia/> (last visited Feb. 4, 2019).

<sup>32</sup> *A Short History of the Court of Appeals of Virginia*, <https://scvahistory.org/ashort-history-of-the-court-of-appeals-of-virginia/> (last visited Feb. 4, 2019).

<sup>33</sup> See Kurt X. Metzmeier, *A Constitutional Amendment to Reform Kentucky's Courts*, in *Selected Works of Kurt X. Metzmeier* 13 (2006); *Hoskins v. Maricle*, 150 S.W.3d 1, 7 n.2 (Ky. 2004), *as modified on denial of reh'g* (Dec. 16, 2004).

<sup>34</sup> Allen H. Loughry II, *Supreme Court's First Case is Still Good Law*, 2018 W. Va. Law. 18, 18 (2018).



# **Klepper Written Testimony on appellate court name**

Uploaded by: Klepper, Steven

Position: FWA

**Written Testimony of Steven M. Klepper  
In Favor of HB0885 and SB0666, With Amendments**

I am an appellate attorney appearing regularly before the Court of Appeals, the Court of Special Appeals, federal appellate courts, and other states' appellate courts. Although I do not provide this testimony on behalf of any organization, I am co-editor of the treatise, *Appellate Practice for the Maryland Lawyer: State and Federal* (5th edition 2018), co-chair of the Appellate Practice Committee of the Maryland State Bar Association's Section of Litigation, and the founder and editor-in-chief of the Maryland Appellate Blog. In addition to my law degree, I hold a master's degree in legal history from the University of Virginia.

I agree as a general matter with changing the names of Maryland's appellate courts. In nearly all states, the highest court is the "Supreme Court" and the intermediate appellate court is the "Court of Appeals." Those names are descriptive and intuitive.

Our courts' names are confusing to Marylanders and non-Marylanders alike. There's nothing intuitive about a system where we call our highest court the Court of Appeals and our intermediate court the Court of Special Appeals. I often have to remind my clients—lawyers and laypeople alike—which court is which.

Although proponents of the name-change have focused on confusion among members of the general public as to the relative roles of the two appellate courts, that confusion carries over to courts and advocates.

The development of the common law is a national conversation among appellate courts, and the confusing names for our appellate courts diminishes Maryland's voice in that conversation. When an appellate judge outside Maryland tasks a law clerk to survey decisions of state appellate courts on an issue of the common law, it is easy for a law clerk to mistake Court of Appeals decisions for intermediate appellate decisions, which carry less weight in the national conversation. For that reason, when I cite Court of Appeals decisions in federal courts or in other states' courts, I often refer to the "Maryland high court." Similarly, if non-Maryland attorneys are looking for persuasive authority to bring to a court's attention, they are less likely to cite a Court of Appeals decision if they assume it is an intermediate appellate decision.

But I have concerns about the proposed names, which, although designed to reduce confusion, could create confusion in other ways. My proposal would be to rename them as follows:

1. The Supreme Court of Appeals of Maryland
2. The Court of General Appeals of Maryland

First, I suggest the "Supreme Court of Appeals of Maryland" to mitigate one potential downside of the name change. As soon as there is a "Supreme Court of Maryland," it will become even more natural for judges, their clerks, and advocates to assume that pre-name-change Court of Appeals decisions are intermediate appellate decisions, and to give them less weight in the national conversation.

Although my proposed name is a mouthful, our neighbors in West Virginia colloquially refer to the Supreme Court of Appeals of West Virginia as the "West Virginia Supreme Court" in

conversation and court filings, without any confusion. And our neighbors in Virginia originally changed the name of their high court from the Court of Appeals of Virginia to the Supreme Court of Appeals of Virginia in 1830, before changing it to the Supreme Court of Virginia in 1971.

Perhaps future generations of Marylanders would eventually drop the “of Appeals,” as happened in Virginia, but the “Supreme Court of Appeals of Maryland” would give greater continuity and clarity in the short- and medium-term.

Second, I think it far more important to avoid changing the name of the Court of Special Appeals to the “Appellate Court of Maryland” or, as proposed in prior sessions, the “Maryland Appellate Court.” Either of these names would be too easily confused with the Court of Appeals of Maryland. For example, lawyers and judges outside Massachusetts often refer to the Massachusetts Appeals Court as the “Massachusetts Court of Appeals,” even though no court by that name exists. If there is no longer a court called the Court of Appeals going forward, it would be natural for a reader to assume that a pre-name-change decision is from the Appellate Court of Maryland.

Renaming the Court of Special Appeals to the “Appellate Court of Maryland” or “Maryland Appellate Court” would thus devalue pre-name-change Court of Appeals precedents—issued during the tenures of the great Chief Judges Murphy, Bell and Barbera—in the nationwide development of the common law.

Instead, I suggest the “Court of General Appeals of Maryland.” The acronym “COGA” would be a smooth transition from “COSA.” It would be a signal to judges, law clerks, and advocates that our appellate courts’ names are different when they are surveying nationwide decisions for persuasive value. Most importantly, “COGA” would accurately describe our intermediate appellate court’s jurisdiction to the public.

Thank you for the opportunity to present this written testimony.

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