The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: N. Houston Parks

Office Address: (including county) 816 South Garden Street, Columbia, TN 38401 (Maury County)

Office Phone: 931-380-8245   Facsimile: 931-380-8328

INTRODUCTION

The State of Tennessee Executive Order No. 41 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit original (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with electronic or scanned signature via email to debra.hayes@tncourts.gov, or via another digital storage device such as flash drive or CD.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Senior Trust Officer, First Farmers and Merchants Bank, Columbia, TN

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

1975

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Tennessee. BPR number 007780. Date of licensure: October 18, 1975. My license is still active.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Law Clerk for U. S. District Judge Harry W. Wellford, Memphis,TN (1975-76); Private Law Practice, MacFarland, Colley, Blank & Jack, Columbia, TN (1976-1982); Private Law Practice, Trabue, Sturdivant & DeWitt, Columbia, TN (1982-1997); Senior Trust Officer, General Counsel, and Chief Operating Officer (at different times), First Farmers and Merchants Bank, Columbia, TN (1997-2015). My two brothers and I own real property in Maury County, as a general partnership named Parks Properties, that is sometimes marketed for sale for commercial uses. Between college and law school, I taught English in grades 9, 10, 11, and 12 at Santa Fe High School in Maury County, Tennessee (1971-72).

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not Applicable

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

I am the Senior Trust Officer of First Farmers and Merchants Bank. I manage a community bank trust operation consisting of 1,128 fiduciary and investment accounts totaling over $4.0 billion. Out of that total, I manage a portfolio of $3.14 billion in 126 accounts. I spend roughly one-half of my time in managing the department with its staff of eleven full-time and two part-time persons, and one-half of my time in managing my portfolio of accounts. The accounts managed include estate administrations, testamentary trusts, personal trusts, investment agency accounts, employer benefit plans for employees, individual retirement accounts, guardianships, conservatorships, irrevocable life insurance trusts, and cemetery trusts. I have informed the bank of my intention to retire from bank fiduciary work this year when my successor as Senior Trust Officer is designated, and a search is in process to find that successor. My intention in preparing to resign from financial and fiduciary services is to devote the rest of my career exclusively to work that engages my legal experience and skills.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

As first a law clerk to a federal district judge (1975-76), I analyzed and researched issues raised in both civil and criminal cases before the trial court, drafted memoranda to aid the judge in deciding upon motions, interim matters, and final judgments, and drafted opinions to aid the judge's disposition of matters before him in litigation. Litigation before the judge during my one-year clerkship was quite varied, including black lung claims handled on special assignment in West Virginia, Social Security disability claims, white collar criminal cases, a criminal

prosecution of some notoriety involving the production of a movie, business-related civil litigation, and personal injury and property damage civil litigation.

Then, as a private practitioner for 21 years in Columbia, Tennessee (1976-1997), I was first associated in varying firm arrangements with attorneys Lon MacFarland, Jerry Colley, Ed Blank, and Billy Jack, then during my last 15 years in practice, as an associate attorney and then a partner in the Nashville-based law firm of Trabue, Sturdivant & DeWitt (most of whose attorneys later associated with Miller & Martin and then with Butler Snow). I was a partner in Trabue, Sturdivant & DeWitt when I went into an in-house arrangement as Senior Trust Officer of a community bank. In private law practice, I was a general practitioner, with my representation of clients focused in southern middle Tennessee, primarily in the 22nd Judicial District. I handled a large number of legal representations, including significant experience in transactional business matters, partnerships and corporations, corporate dissolution, litigation of issues under the Uniform Commercial Code, estate planning, estate administration, will contests, guardianships and conservatorships, workers' compensation claims, employment discrimination claims, unemployment benefit claims, education law cases, divorces, child custody and support cases, domestic abuse cases, adoptions, juvenile delinquency cases, child neglect cases, defense in appointed criminal prosecutions, landlord-tenant cases, boundary line disputes, real property title searches and insurance, real property title disputes, personal injury cases, property damage cases, individual and corporate bankruptcies, and arbitrations. I had, relatively speaking, more transactional law matters than I did lawsuits, and more lawsuits heard non-jury than by jury trial. Nonetheless, my trial experience was extensive, including Juvenile Court, City Court, General Sessions Court, Circuit Court, Tennessee Court of Appeals, Tennessee Court of Criminal Appeals, Supreme Court of Tennessee, U. S. District Courts of the Middle and Eastern Districts of Tennessee, and U. S. Court of Appeals for the Sixth Circuit. Toward the end of my time in private practice, I was an early adopter of alternative dispute resolution (ADR) methods of conflict disposition, receiving training in mediation and helping found a community nonprofit mediation center. At the time I left practice to become a bank trust officer, my practice included serving as (part-time) city attorney for the Town of Spring Hill, and serving as outside counsel for the Maury County Board of Education.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

I was counsel of record in *Spalding v. Spalding*, which determined on appeal a particular definition of alimony *in solido* in a post-divorce proceeding. I was counsel of record in *Adam v. Adam*, a highly-contested interstate child custody case. I was counsel of record in *State of Tennessee v. Brown*, my only criminal defense case to go to the Tennessee Court of Appeals (decided 08/17/1983). I was counsel of record *In re Frosty Morn Meats, Inc., Bankrupt*, a contest between banks and farmers for payment in bankruptcy (see my appellate brief attached). I was counsel of record in *Storey v. Hedgepeth and City of Fayetteville*, a case alleging injuries caused by a police officer during the hot pursuit of a suspect (a favorable decision for the City, my client, on an immunity defense). These were among my notable cases.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

I received training in mediation from the American Arbitration Association (AAA) and at the Harvard Law School. I helped start a community mediation nonprofit, The Mediation Center, in Columbia, TN in 1994; it is still in operation. I served as mediator in a handful of cases, mostly through The Mediation Center, before I left law practice to work at a bank. I was an AAA-approved arbitrator but the one case in which I was called to arbitrate, the parties settled right before the arbitration was to commence. Early in my career practicing law, I had a few opportunities to serve as a 'General Sessions Court Judge for the Day,' by designation of the elected General Sessions Judge during his temporary non-availability. As chairman of the Maury County Board of Education (I served on the Board from 1980 to 1994), I presided in an administrative due process hearing involving a claim of disparate treatment of an African-American student who had been subjected to school discipline; this case ended up being tried in the U. S. District Court for the Middle District of Tennessee, with a judgment rendered in favor of the claimant.

11. Describe generally any experience you have of serving in a fiduciary capacity such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

I have served as executor of estates, and as guardian ad litem, while in the practice of law. I have, as senior trust officer of a bank, served many times, in my representative capacity, as executor of estates; trustee of testamentary and personal trusts; irrevocable life insurance trusts; guardianships; and conservatorships.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

My service as a Hearing Officer for the Board of Professional Responsibility of the Supreme Court of Tennessee, on the Tennessee Commission for Continuing Legal Education, on the Tennessee Bar Association House of Delegates, on the Tennessee Bar Foundation Board of Trustees, and on the Legal Aid Society of Middle Tennessee and the Cumberlands Board of Trustees.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor commission or body.

Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

None

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

Bachelor of Arts, with Distinction, Rhodes College (then, Southwestern at Memphis), major-History, Phi Beta Kappa, 1971; University of North Carolina School of Law, 1972-73 (left for UT Law and in-state tuition); Doctor of Jurisprudence, University of Tennessee College of Law, 1975; Vanderbilt Divinity School, 1989, classes in theology during an eight-month sabbatical from law practice.

PERSONAL INFORMATION

15. State your age and date of birth.

65 years of age. Date of birth: May 27, 1949.

16. How long have you lived continuously in the State of Tennessee?

Since birth.

17. How long have you lived continuously in the county where you are now living?

Since birth.

18. State the county in which you are registered to vote.

Maury County

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state

whether you received an honorable discharge and, if not, describe why not.

Not Applicable.

20. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

No

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No

22. Please state and provide relevant details regarding any formal complaints filed against you with any supervisory authority including, but not limited to, a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you.

None

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

As a member of the Maury County Board of Education, I was, in that representative capacity, a named party in the student discipline lawsuit mention in my response to question #10 above. My father, two brothers, and I were parties to a lawsuit in the Circuit Court of Maury County, TN, to partition real estate on Saturn Parkway in Maury County we owned in equal parts with Central Transport, a company chartered in Michigan; the case settled before trial with an amicable splitting of the property, with an exchange of deeds.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

Board of Trustees, Maury Regional Hospital d/b/a Maury Regional Medical Center, 2009-Current (Committees: Chair of Pension/Human Resources Committee; Member of Finance Committee, Professional Contracts Committee, Joint Conference Committee); Board of Trustees, Martin Methodist College, 2006-Current (Committees; Chair of Academic Policy and Programs Committee; Member of Strategic Planning Committee, Provost Search Committee; Columbia First United Methodist Church (Certified Lay Speaker; Member, Administrative Board, Worship Committee, and Lay Membership Committee).

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

a. If so, list such organizations and describe the basis of the membership limitation.

b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

Not to my knowledge. As a college freshman at Southwestern at Memphis, I pledged membership in the fraternity of Alpha Tau Omega. An African-American sophomore was "black-balled" from membership by a senior. Fraternity rules, as I understood it, did not bar membership on race or religion, but nonetheless, the issue became one of broad concern, and the college administration required national fraternities and sororities to amend practices to remain on campus. Near the end of my freshman year, Dr. Martin Luther King, Jr. was assassinated

while I was on campus in Memphis. This freshman year had a profound effect on my awareness and understanding of issues of civil rights.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

American Bar Association (Section on Real Property, Probate, and Trust); Tennessee Bar Association; Maury County Bar Association (former President); Fellow, Tennessee Bar Foundation (Member of Board of Trustees, Audit Committee, Investment Committee); Tennessee Commission on Continuing Legal Education and Specialization (appointed by the Supreme Court of Tennessee on January 2, 2015; serving as Commission Treasurer); Hearing Committee Member, Board of Professional Responsibility of the Supreme Court of Tennessee (1989-1995); Board of Trustees, Legal Aid Society of Middle Tennessee and the Cumberlands (former President).

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

Invited to become a Fellow with the Tennessee Bar Foundation. Plaques for serving two-year term as president of the board of the Legal Aid Society of Middle Tennessee and the Cumberlands, and one-year term as president of the Maury County Bar Association.

30. List the citations of any legal articles or books you have published.

I have not done a search for any citations of my law review article and case note published during or right after law school.

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

None in the last five years; some seminar presentations before that.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

Maury County Board of Education, from 1980 to 1994; eight of those years as chairman; appointive office.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No.

34. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

1. Appellees' Brief, *In Re Frosty Morn Meats, Inc., Bankrupt*, filed 09/02/1980 in the United States District Court for the Middle District of Tennessee; 2. Brief of Appellees, *Richardson v. Graham & Hardison Hardwoods, Inc.*, filed April 1993 in the Supreme Court of Tennessee; 3. *Judicial Selection – The Tennessee Experience*, in *Memphis State University Law Review*, vol. 7, no. 4, 1977; 4. *Labor Law: NLRB Declines to Assert Jurisdiction over Law Firms*, in *Tennessee Law Review*, vol. 41, no. 4, 1974.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

My most meaningful achievements in life have been marriage, parenthood, and a career since 1975 directly or indirectly in the legal profession. I am immensely proud of being a lawyer. I wanted since childhood to have a career in law, for the aspirational reason that so many of our country's leaders have been lawyers, and the practical reason that I viewed law as offering varied career opportunities. My own career illustrates the versatility of a legal training, as I have practiced law twenty-one years and worked in financial services seventeen years. My peers have for several years, through Martindale-Hubbell, conferred upon me the highest professional and ethical rating of AV. I believe I earned the respect of judges, fellow attorneys, and clients when I practiced law. I know I have always held judges in the highest regard. I think my experience as a general practitioner at law ideally prepares me for the caseload faced by a trial judge in the district. I think my experience in business, in both management and as a senior trust officer, gives me a broad perspective in matters such as business law, employment law, probate law, and fiduciary law. I think I have, and I have been told I have, a judicial temperament, both naturally and matured through long and broad experience. I can think of no better opportunity to utilize my experience and passion for the justice system than to serve the people of the judicial district as a trial judge, hearing and deciding cases impartially and as a servant following established law as enacted by legislative bodies and enunciated by judicial precedent.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

I was appointed by the Maury County Bar Association to be on the board of Legal Services of South Central Tennessee. Shortly after I joined that board, that organization, and Rural Legal Services based in Oak Ridge, merged into the Legal Aid Society of Middle Tennessee and the Cumberlands. The executive director, Ashley Wiltshire, and board member Charlie Warfield asked me to join the Legal Aid Society board. I served several years, two of those years as board president. Those organizations are fully dedicated to providing legal services to persons of lower income and to the elderly.

Serving on the board of the Tennessee Bar Foundation, and being a sustaining fellow of the Foundation, allows me the opportunity to work in behalf of nonprofit organizations throughout the state that receive funding through the Foundation derived from interest on lawyers' trust accounts (the IOLTA program).

During my practice of law, I often took pro bono cases from Legal Services or from trial judges. At one time, Legal Services maintained a formal program under which attorneys in private practice took quite a number of pro bono cases. I do not recall ever turning down a request for pro bono representation unless there was a conflict of interest.

While working for the bank, I volunteered pro bono legal services to a fellow employee who was seeking to become a naturalized U. S. citizen. She was an immigrant from the Philippines. Her application had been denied, and I represented her at an appeal hearing before an immigration authority in Memphis. After the hearing, the denial was reversed, and she is now a proud U. S. citizen.

After the 2010 flood in Nashville, I volunteered two days of pro bono legal services and counseling to flood victims through a program of the Tennessee Bar Association.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

The 22nd Judicial District comprises the counties of Giles, Lawrence, Maury, and Wayne, as it has since I began my law practice in 1975. The trial judges in courts of record hear both criminal and civil cases, as judges of the Circuit Court and the Chancery Court. At present there are four such trial judges: the Hon. Jim T. Hamilton, the Hon. Stella L. Hargrove, the Hon. Robert L. Jones, and the Hon. J. Russell Parkes. There are also the public offices of District Attorney General and Public Defender. I have been in private law practice at the bar with Judges Hamilton, Hargrove, Jones, and Parkes, as well as the Hon. Robert L. Holloway who was recently elevated from the district judgeship to the Court of Criminal Appeals, and Public Defender Claudia S. Jack. I have tried cases before Judges Hamilton and Jones. I believe my selection would positively impact the court. My experience would allow me to 'hit the ground running' from day one. I have a collegial history with the other judges and with the lawyers whose practices overlapped my time in practice and many who have begun their practices since then. I believe I enjoy the professional respect of judges, lawyers, and others in the field, e.g.,

clerks, who know me.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

I have for all of my adult life been heavily involved in community service and organizations. I am a former Kiwanis Club president, and a recipient of the Paul Harris Award from Rotarians and a Distinguished Service Award from Jaycees. In 1988, I helped start Leadership Maury, sponsored by the Chamber of Commerce, graduating from the first class and serving as President (the program is still in operation). I served fourteen years as an appointed member of the Maury County Board of Education, eight of those years as chairman, and received awards from the Tennessee School Boards Association and a Friend of Education Award from the Maury County Education Association of professional educators. I served on the board of the Maury County Historical Society. In 1994, I helped start The Mediation Center, a community mediation program that is still in operation. I served a term on the board of Centerstone, a provider of behavioral health services. I served terms on the boards of Neighbors Concerned – Harvest Share Food Pantry, and Community United Youth Resource Center. At the present time, as stated elsewhere in this application, I am serving on the boards of Maury Regional Medical Center and Martin Methodist College.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

My service on, and leadership with, the Maury County Board of Education, followed by serving as outside counsel to the board, gave me enormous exposure to and experience with difficult public issues. Education is vitally important and parents quickly engage a school system when matters arise that impact their children's educational experience. In my time on the board, we heard presentations and appeals involving such matters as busing, student discipline, curricula, and athletics. We also continually addressed the how to meet the need for diversity in employment, including in the classroom and at the administrative level. We approved the hiring, transfer, and dismissal of staff, including professional staff. Many, although not all, of these issues became disputed or contested. I believe that during my tenure on the board, the board dealt with these public matters with a notable degree of competence and fairness.

Moreover, my service on numerous other nonprofit boards, which often found me in positions of leadership, has given me vast opportunities to deal with difficult issues, often with contending parties or interests, and to find appropriate solutions.

I found in college that I had skill in studying a lot of material, identifying and analyzing key points, and then synthesizing the whole into coherent narratives. That analytical skill served me well in law school and in law practice. Writing is a particular interest of mine. I have studied the arts of writing and rhetoric for many years. I think I am an apt writer and communicator.

Among my deepest beliefs is the value and virtue of treating people with respect. I believe each

person is of sacred worth and entitled to being heard and viewed with dignity, patience, and fairness.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Yes. It is absolutely essential, in the administration of justice, for judges to know their proper roles and to fulfill those roles with consistency and fairness. Those roles, for a trial judge, are to manage, or preside over, the cases of parties in their courts; to give all parties a fair, impartial hearing; to show dignity to all parties, witnesses, attorneys, court personnel, and the public; to carefully consider the parties' positions and arguments; and to render decisions based on a weighing of the issues and arguments and in a manner that applies existing, controlling law. The law as enacted in statutes by the General Assembly, as promulgated in rules and regulations by state agencies, and as previously decided in opinions of the appellate courts, must be understood and followed by a trial judge. Where federal law is applicable, the same consideration and deference is to be given to controlling law. In a case of first impression, the trial judge is to discover all relevant, existing law and to apply that law, by analogy and as guidance, to the facts of the case.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. The Hon. Robert L. Jones, Judge, 22nd Judicial District, P. O. Box 462, Columbia, TN 38402; telephone 931-540-2458
B. The Hon. Harry W. Wellford, Judge (Retired), U. S. Court of Appeals for the Sixth Circuit,
C. Mr. Edward K. Lancaster, General Counsel, Tennessee Farm Bureau Federation, 147 Bear Creek Pike, Columbia, TN 38401, telephone 931-840-8626
D. Mr. Waymon L. Hickman, Senior Chairman, First Farmers and Merchants Bank, P. O. Box 1148, Columbia, TN 38402,
E. Mr. H. Alan Watson, CEO, Maury Regional Medical Center, 1111 Trotwood Avenue, Columbia, TN 38401

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] 22nd Judicial District of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: February 25, 2015.

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Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS
511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

N. Houston Parks
Type or Print Name

N. Houston Parks
Signature

02/25/2015
Date

007780
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

IN RE:	)	NOS. 78-3455-NA-CV
	)	78-3510-NA-CV
FROSTY MORN MEATS, INC.,	)	78-3511-NA-CV
	)	78-3512-NA-CV
BANKRUPT	)	78-3539-NA-CV
	)	78-3540-NA-CV
	)	78-3541-NA-CV
	)	78-3542-NA-CV
	)	79-3003-NA-CV
	)	79-3016-NA-CV
	)	79-3019-NA-CV
BK NO. 77-31707	)	79-3105-NA-CV
	)	79-3123-NA-CV
	)	79-3124-NA-CV
	)	79-3125-NA-CV
	)	79-3183-NA-CV
	)	79-3184-NA-CV
	)	79-3198-NA-CV
	)	79-3199-NA-CV
	)	79-3298-NA-CV
	)	80-3303-NA-CV
	)	80-3304-NA-CV

APPELLEES' BRIEF

I. INTRODUCTION:

These appeals are taken by Irwin A. Deutscher, Trustee, from various Orders of Bankruptcy Judge Clive W. Bare, upholding and enforcing Public Law 94-410 (7 USC §196), enacted as an Amendment to the Packers & Stockyards Act of 1921. The appellees represented by undersigned counsel are listed in Appendix No. 1 to this Brief, along with the pages in the transcript of the hearings of August 31 - September 1, 1978, wherein each claimant was dealt with by the Bankruptcy Court at the hearings.

II. THE APPLICABLE STATUTE:

The Packers & Stockyards Act of 1921 is codified at 7 USC §181 et seq. Ruling upon an early challenge to the Act, the Supreme Court upheld the constitutionality of the Act as a valid exercise of congressional power under the Commerce clause of Article I, Section 8, of the Constitution:

> "Whatever amounts to more or less constant practice, and threatens to obstruct or unduly burden the freedom of interstate commerce is within the regulatory power of Congress under

the Commerce clause and it is primarily for Congress to consider and decide the fact of the danger and meet it."

-Stafford v. Wallace, 258 U. S. 495, 66 L. Ed. 735, 42 S. Ct. 397 (1922)

Two significant events in the livestock industry precipitated Congressional enactment on September 13, 1976 of Public Law 94-410, amending the Packers & Stockyards Act, which Amendment is the subject of these appeals. First, the Supreme Court in Mahon v. Stowers, 416 U. S. 100, 40 L. Ed. 2d 79, 94 S. Ct. 1626 (1974), a case which generated considerable differences of opinion in the lower Courts, held that a Congressional intention to grant sellers of livestock a priority position regarding assets of an insolvent packer could not be inferred from the general regulatory scheme of the Packers & Stockyards Act, particularly from the unlawful packer practices enumerated in 7 USC §192.

Secondly, as noted by Judge Bare at page 3 of his Memorandum of August 31, 1978:

"In January 1975, American Beef Packers went into bankruptcy, leaving producers in 13 states unpaid for a total of over $20 million in livestock sales. Other packer failures between 1958 and 1975 have resulted in losses to livestock producers of an additional $23 million."

The legislative history of Public Law 94-410 indicates the concerns that Congress had as it considered the 1976 legislation. Congress clearly saw a changing pattern in the livestock marketing industry and a trend away from the former situation where regulated stockyards served as a buffer between the livestock seller and the packer to the present situation where well over 80% of all slaughter livestock is purchased by packers directly from producers and feed lots. This situation left sellers of livestock more directly at the mercy of packers, 167 of which financially failed between 1958 and early 1975. U. S. Congressional and Administrative News, 94th Congress, 2d Session, 1976, pages 2270 - 2271.

Regarding Public Law 94-410, the Committee report states:

"USDA figures show that in 1973 some $31 billion worth of livestock and $4 billion worth of poultry were marketed in the United States, representing approximately one-third of all farm income. Livestock is probably the single most important source of protein in the American diet. Thus, livestock producers occupy a position of unique national importance. No individual is engaged in a riskier endeavor or one more vital to the national interest than the producer, and no entrepreneur is so completely at the mercy of the marketplace. The livestock producer, if he successfully combats the vicissitudes of weather, financing, and skyrocketing costs, must sell when his cattle are ready, irrespective of the market. His livestock may represent his entire years output. If he is not paid, he faces ruin.

"The meat packing industry is, of course, an integral part of our nation's agricultural marketing system. What is needed to prevent future producer tragedies, as occured following the ABP bankruptcy, is legislation that will afford a measure of protection to the livestock producer and feeder and yet not be so restricted as to reduce competition in the livestock slaughtering business. H. R. 8410 accomplishes this dual objection." Id. at 2272.

That portion of the remedial provisions of Public Law 94-410, which is at issue in these appeals, is the Congressional establishment of a statutory trust designed to insure that livestock sellers would receive full and prompt payment for livestock delivered to packing plants. This provision is codified at 7 USCA §196:

"196. Statutory trust established - Protection of public interest from inadequate financing arrangements. (a) It is hereby found that a burden on and obstruction to commerce in livestock is caused by financing arrangements under which packers encumber, give lenders security interest in, or place liens on, livestock purchased by packers in cash sales, or on inventories of or receivable or proceeds from meat, meat food products, or livestock and that such arrangements are contrary to the public interest. This section is intended to remedy such burden on and obstruction to commerce in livestock and protect the public interest.

Livestock, inventories, receivable and proceeds held by packer in trust for benefit of unpaid cash sellers; time limitations; exempt packers; effect of dishonored instruments; preservation of trust benefits by seller

(b) All livestock purchased by a packer in cash sales and all inventories of, or receivables or proceeds from meat, meat food products, or livestock products derived therefrom, shall be held by such packer in trust for the benefit of all unpaid cash sellers of such livestock until full payment has been received by such unpaid sellers: Provided, That any packer whose average annual purchases do not exceed $500,000 will be exempt from the provisions of this section. Payment shall not be considered to have been made if the seller receives a payment instrument which is dishonored: Provided, That the unpaid seller shall lose the benefit of such trust if, in the event that a

payment instrument has not been received, within thirty days of the final date for making a payment under Section 22βb of this title, or within fifteen business days after the seller has received notice that the payment instrument promptly presented for payment has been dishonored, the seller has not preserved his trust under this subsection. The trust shall be preserved by giving written notice to the packer and by filing such notice with the Secretary.

Definition of cash sale
(c) For the purpose of this section, a cash sale means a sale in which the seller does not expressly extend credit to the buyer."

The basic purpose of this Section, as stated by the Committee report, is:

"Section Eight of H. R. 8410 creates a statutory trust for unpaid sellers of livestock to packers.

"Under this provision, no specific identification of the livestock or the carcasses, meats, proceeds, or receivables derived therefrom is required. Instead, they are held in a pool in trust for the benefit of all unpaid cash sellers. Each cash seller would be entitled to a pro rata share in settlement of his account.

"It is the Committee's belief that the trust provision offers producers the best protection against packer bankruptcies. They would now receive their money, the money they expected to receive when they sold their livestock, before secured creditors. This provision, together with the bill's provisions on packer prompt payment practices and packer bonding, should avoid the recurrence of the effects of the American Beef Packers bankruptcy."

-U. S. Congressional and Administrative News, 94th Congress, 2d Session, 1976, Page 2279

Therefore, from the foregoing, the following propositions are offered as a premise for consideration of the Trustee's appeals:

1. 7 USC §196, enacted in 1976, stands in a long line of Congressional regulatory provisions regarding the livestock, packing and stockyards industry, going back to 1921.

2. 7 USC §196 was enacted by Congress with a clear sense of public policy and pursuant to Congressional power to regulate interstate commerce.

3. 7 USC §196 by its terms, and by Congressional intent, creates a "trust" for the protection of cash sellers of livestock to packers.

4. 7 USC §196 was not enacted in a vacuum, but rather with a realization that its operation would be in the realm of packer insolvency or bankruptcy, and with clear intent to protect cash sellers of livestock in the event of a packer bankruptcy.

5. 7 USC §196 does not contemplate tracing of the trust corpus in the sense of specific identification of livestock sold or its proceeds, but rather establishes "a pool in trust for the benefit of all unpaid cash sellers."

III. CONSTITUTIONALITY:

In the Bankruptcy Court, the Trustee attacked the constitutionality of 7 USC §196. Apparently, by failing to brief this issue, the Trustee has now abandoned this position. The Trustee's argument in this respect had been based upon the alleged subordination of the security interests of Frosty Morn's term lender banks to the interest of unpaid livestock sellers established by 7 USC §196.

The issue of constitutionality was addressed thoroughly by Judge Bare in his Memorandum of August 31, 1978, pages 12-24. Judge Bare noted therein that the term lender banks had entered into a settlement with the Trustee by Order No. 139, by the terms of which the term lender banks subordinated their security interests to the extent of lawful trust fund claims of livestock sellers under 7 USC §196. It is further noted that term lender banks have withdrawn from the Frosty Morn bond suit styled Fidelity & Deposit Company of Maryland v. Frosty Morn Meats, Inc., Et Al., No. 78-3133-NA-CV, (Item No. 430, Record on Appeal).

Judge Bare concluded that 7 USC §196 is constitutional. Similarly, the District Court in Fillippo v. S. Bonaccurso & Sons, Inc., 466 F. Supp. 1008 (E. D. Pa. 1978), upheld the constitutionality of 7 USC §196.

IV. BANKRUPTCY OF THE TRUSTEE:

On November 4, 1977, Frosty Morn Meats, Inc., a packer, filed a Chapter XI bankruptcy petition. At that time, Frosty Morn was a trustee under 7 USC §196, the beneficiaries of the statutory trus being the unpaid cash sellers of livestock to Frosty Morn as of that date. Order No. 75, entered by Judge Kinnard on March 28, 1978, established an escrow of $2,743,122.00 to protect the rights of "potential beneficiaries of the statutory trust" under 7 USC §196. On May 10, 1978, this case was converted to straight bankruptcy and an adjudication in bankruptcy was entered.

Mr. Deutscher, Trustee, argues that 7 USC §196 does not mean what it says, and that it does not really establish a trust, but rather a statutory lien invalid under Sections 67c(1)(B) of the Bankruptcy Act, or, in the alternative, conflicts with Section 64a of the Bankruptcy Act and is therefore invalid.

Article I, Section 8, of the United States Constitution, confers upon the Congress the power to regulate commerce "among the several States", from which power we have the Packers & Stockyards Act, as amended, and also the power to establish "uniform Laws on the subject to Bankruptcies throughout the United States", from which power we have the Federal Bankruptcy Act. If the Court accepts the Trustee's argument on this appeal, the Court will have to hold that Congress, in enacting 7 USC §196, enacted a nullity, for the Trustee's argument in this respect would completely emasculate 7 USC §196, render it null and void, and completely defeat Congressional purpose.

Before accepting the Trustee's position that "both the Congress and the Bankruptcy Court erred" (Trustee's Brief, Part I, page 20), some salient rules of statutory construction must be considered.

> "It may be presumed to have been the intention of the Legislature that all its enactments which are not repealed should be given effect. Accordingly, all statutes should be so construed, if possible, by a fair and reasonable interpretation, as to give full force and effect to each and all of them. In conformity with

this principle, it is not to be assumed that one or the other of related statutes is meaningless; rather, such statutes will be so construed as to give each a field of operation.

"In the absence of a showing to the contrary, all laws are presumed to be consistent with each other. Where it is possible to do so, it is the duty of the courts, in the construction of statutes, to harmonize and reconcile laws and to adopt that construction of a statutory provision which harmonizes and reconciles it with other statutory provisions."

-73 Am Jur 2d "Statutes",
Sections 253 - 254

Where a statute has two possible interpretations, it is reasonable to accept an interpretation which serves the purpose of the statute and to reject an interpretation which defeats it. Equal Employment Opportunity Commission v. Louisville & Nashville R. Co., 505 F. 2d 610, 616 (C. A. 5, 1974); Stella v. Graham Paige Motors Corp., 104 F. Supp. 957 (D. C. N. Y., 1952). A statute susceptible of either of two opposed interpretations must be read in a manner which effectuates rather than frustrates the major purpose of the Legislative draftsman. Shapiro v. United States, 335 U. S. 1, 92 L. Ed. 1787, 68 S. Ct. 1375 (1948). The cardinal principle of statutory construction is to save, not to destroy. United States v. Menasche, 348 U. S. 528, 99 L. Ed. 615, 75 S. Ct. 513 (1955). Construction of a statute nullifying its effectiveness is to be avoided if possible. Trenton Chem. Co. v. United States, 201 F. 2d. 776 (C. A. 6, 1953), cert. denied, 345 U. S. 994.

"In the interpretation of statutes, the legislative will is the all-important or controlling factor. Indeed, it is frequently stated in effect that the intention of the legislature constitutes the law. Accordingly, the primary rule of construction of statutes is to ascertain and declare the intention of the legislature, and to carry such intention into effect to the fullest degree. A construction adopted should not be such as to nullify, destroy or defeat the intention of the legislature."

-73 Am Jur 2d, "Statutes",
Section 145

"Courts should be slow to impart any other than their commonly understood meaning to terms employed in the enactment of a statute, and it is the policy of the courts to avoid giving statutory phraseology a new, curious or peculiar, distorted, hidden, unusual, unnatural, strange, or forced, artifical, refined, metaphysical or subtle meaning. To the contrary, it

is a general rule of statutory construction that words of a statute would be interpreted in their ordinary application and significance, and the meanings commonly attributed to them. The rule is that such words are to be given their natural... meaning.

"...Rather than using terms in everyday sense, the law uses familiar legal expressions in their familiar legal sense."

-73 Am Jur 2d "Statutes, Section 206

Mr. Deutscher seeks to persuade the Court that a trust is not a trust, but is rather a lien.

However, a trust is not a lien, and a lien is not a trust. A trust is defined as 76 Am Jur 2d "Trusts", Section 2, as:

"the legal relationship between one person having an equitable ownership in property, and another person owning the legal title to such property, with the equitable ownership of the former entitling him to the performance of certain duties in the exercise of certain powers by the latter, which performance can be compelled in a court of equity. As stated slightly differently, a trust is a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with it for the benefit of another. It has been said that under a trust, perfect ownership is decomposed into its constituent elements of legal title and beneficial interest, which are vested in different persons at the same time."

On the other hand, a lien was defined in Shipley v. Metropolitan Life Ins. Co., 25 Tenn. App. 452, 158 S. W. 2d 739, 741, (C. A. Tenn., 1941), quoting from Corpus Juris, as follows:

"The word 'lien' as used in law is a technical term, and has a fixed and well understood meaning. In a narrow and limited sense, as defined at common law, it signifies the right by which a person in possession of personal property holds and retains it against the owner until a demand due to the party retaining it is satisfied.

"In its broadest sense and common acceptation it is understood and used to denote a legal claim or charge on property, either real or personal, as security for the payment of some debt or obligation; a hold or claim which one person has upon the property of another as a security for some debt or charge, although the property is not in the possession of the one to whom the debt or obligation is due. It includes every case in which personal or real property is charged with the payment of a debt."

Thus, while a lien is a charge upon the property of another, a trust necessarily involves a bifurcation of title or interest in property, a separation of the equitable and the legal interest or title in a res. See 76 Am Jur 2d "Trusts", Section 36.

The plain language, the purpose and the legislative history of Public Law 94-410 (7 USC §196 in particular) show that Congress intended to create a statutory trust for the benefit of unpaid cash sellers of livestock to packers. A statute should be enforced according to its plain meaning. Hilliard v. United States, 310 F. 2d 631, 632 (C. A. 6, 1962). A reading of 7 USC §196 reveals a reference to assets to be held "in trust", not assets subject to a lien. The legislative history shows that Congress intended to create a statutory trust giving livestock sellers a priority in bankruptcy, and not to create a lien which could be defeated by a bankruptcy trustee. During the Committee meetings on this legislation, it was stated:

> "Inasmuch as this is a trust as opposed to a lien, it falls in a different category, and therefore, it does not substantially affect the Bankruptcy Act. A lien would fall more in the category of affecting priorities, such as secured transactions as they are recognized under the Uniform Commercial Code and then take or assume a priority under the Bankruptcy Act.
>
> "But a trust relationship such as that that would arise as a result of Section 8 [7 USC §196], I think falls outside of the purview of the Bankruptcy Act. The trust property does not become an asset in the bankruptcy proceeding. Business meetings of Packers & Stockyards Act of 1921, as amended, Committee on Agriculture, U. S. House of Representatives, 94th Congress, 2d Session (December 1976), pages 130-131."

Congress did not legislate Public Law 94-410 in a vacuum. The law's operation in conjunction with the Bankruptcy Act was specifically considered. The "trust" mechanism was utilized, and the "lien" alternative was rejected, for the specific purpose of regulating interstate commerce by providing protection for unpaid cash sellers of livestock in the event of the bankruptcy of a packer. House Rep. No. 94-1043, 94th Congress, 2d Session (pp. 9-10-11) (April 14, 1976).

It is well established that property held by a Bankrupt in trust, which can be identified in its original or substituted

form, belongs to the trust beneficiary, and not to the trustee. Elliott v. Bumb, 356 F. 2d 749 (C. A. 9, 1966), cert. denied 385 U. S. 829. The Bankruptcy Act does not authorize a bankruptcy trustee to distribute other people's property to the bankrupt's general creditors, and property rights existing before bankruptcy in other persons must be respected in the bankruptcy proceeding. Pearlman v. Reliance Ins. Co., 371 U. S. 132, 9 L. Ed. 2d 190, 83 S. Ct. 232 (1962). The bankruptcy trustee succeeds only to such rights as the bankrupt possessed and is subject to all claims and defenses that could be asserted against the bankrupt. Bank of Marin v. England, 385 U. S. 99, 17 L. Ed. 2d 197, 87 S. Ct. 274 (1966).

The doctrine of the validity of trusts in a bankruptcy proceeding has been extended to an implied trust under state law in the case of In Re Gaites, 466 F. Supp. 248 (M. D. Ga. 1979), and to a resulting trust in the case of In Re Clemens, 472 F. 2d 939 (C. A. 6, 1972). In the latter case, it was stated, at page 942:

> "A trustee in bankruptcy takes title to the property of the bankrupt subject not only to specific existing liens, but also to equities in favor of third persons. Zartman v. First National Bank, 216 U. S. 134, 30 S. Ct. 368, 54 L. Ed. 418 (1910); 11 USC §110. The Trustee is not in the position of a purchaser in good faith but, in fact, he 'holds about the lowest form of security'. In Re Alikasovich, 275 F. 2d 454, 457 (C. A. 6, 1960) [Affirmed 364 U. S. 603]."

It has been further held in a case where a bankrupt agreed to buy cattle feeders for cash and got possession of the feeders but never paid for them, that title to the cattle feeders never passed to the bankrupt's trustee, on the principle that there was never a completed contract. In Re Smithdale Industries, Inc., 219 F. Supp. 862 (D. C. Tenn. 1963).

The statutory lien provisions of the Bankruptcy Act, codified at 11 USC §107, refer to liens claimed on property or assets of the Bankrupt. In Re Franklin, 151 F. 642 (D. C. N. C. 1907). These provisions are not applicable to the trust claims of the unpaid livestock sellers in this case. The trust of these claimants attached

before the bankruptcy of Frosty Morn, and the trust fund or res never became an asset of the bankrupt's estate, the trustee in bankruptcy taking the property of the bankrupt subject to all equities under which the bankrupt "held" the property. Scott on Trusts, Volume 3, Section 307 (1956).

Moreover, under 11 USC §107c(1)(B), a statutory lien effected or enforceable as of the date of bankruptcy as against one acquiring the rights of a bona fide purchaser on that date, is valid. In this case, the trust attached at the time of the sale by cash sellers of livestock to Frosty Morn and the trust was valid as against a bona fide purchaser in this case as of November 4, 1977.

The Trustee's reliance upon the case of Elliott v. Bumb, supra, is misplaced. That case did uphold a statutory trust established under state law in a bankruptcy proceeding. The Court, however, was not persuaded that the full commingling of trust fund principle of the state law should be enforced in bankruptcy, and the Court's concern clearly was with the extent to which a state legislature could encumber the assets of a bankrupt under federal law. As stated at 356 F. 2d 755, the Court's ultimate concern in this regard was:

> "If state law is contrary to federal bankruptcy law, the state law must yield."

This was the basis upon which the Federal Court, under the supremacy cla contained in Article XI of the Federal Constitution, invalidated certain provisions of the state trust statute. That principle is clearly not applicable to the statutory trust established by the very Congress which also has authority over bankruptcy law.

Clearly of significance in the instant case is the decision of the Sixth Circuit Court of Appeals in the case of Selby v. Ford Motor Co., 590 F. 2d 642 (C. A. 6, 1979). The Sixth Circuit Court, in that case, upheld in bankruptcy the validity of the "Michigan Builder's Trust Fund Act." This state act created a "trust fund" for the benefit of the owner and subcontractors on construction projects. The Trustee in Bankruptcy in Selby as in

Frosty Morn attacked the validity of the "statutory trust."

In Selby, the Court stated that the Michigan Builders Trust Fund statute could be viewed in any one of three ways: "(1) as imposing a traditional trust on the contractors funds for the benefit of subcontractors, laborers, and materialmen; or, (2) as creating a security arrangement in the nature of a statutory lien; or (3) as creating no security or other interest recognizable under the Bankruptcy Act."

The Court distinguished the trust from a lien, and then stated:

> "Although there is authority to the contrary with respect to statutory tax trusts, the few cases on the question characterize other statutory trusts as traditional trusts for the purposes of bankruptcy. Commentators have criticized this result, however. They say that statutory trusts should be treated as statutory liens because statutory trusts function as a security device and 'the application of a national bankruptcy statute to legal interests diversely defined' by the states requires classification 'on the basis of function rather than nomenclature'. But no cases have adopted this approach, and this criticism overlooks the traditional role of the states in creating and defining the underlying property interests and commercial arrangements to which the Bankruptcy Act applies."

By this analysis, the Sixth Circuit Court rejected the reliance upon United States v. Randall, 401 U. S. 513 (1971) and Collier on Bankruptcy, which is the argument of the Trustee in these appeals.

The Court goes on to cite Aquilino v. United States, 363 U. S. 509 (1960), wherein the Supreme Court upheld the New York Builders Trust Fund statute. See, by analogy, the upholding of the New York lien law in bankruptcy in the case of In Re Heintzelman Construction Co., 34 F. Supp. 109 (W. D. N. Y. 1940).

The Court further analyzed the remedial purposes of the Michigan Builders Trust Fund Act, designed to remedy serious problems in the building and construction industry. Similarly, the Packers & Stockyards Act is remedial legislation and should be construed liberally so as to effectuate the purpose of Congress. Stafford v. Wallace, supra., Bowman v. Dept. of Agriculture, 363 F. 2d 81, 85

(C. A. 5, 1966).

The Court in Selby perhaps most significantly for present purposes examined the new Bankruptcy Act as well (Public Law 95-598). The Court states:

> "In addition, the Senate report on the new Bankruptcy Act and the statements of the floor managers of the Act in both the House and Senate demonstrate that the Bankruptcy Act 'will not affect various statutory provisions... that create a trust fund for the benefit of a creditor of the debtor'. The Senate report and the floor managers cite several examples of statutory trust funds. They cite statutes impressing a trust on withholding and other taxes in the hands of the employer or person who collects the tax for state or federal governments. They also cite the federal statutory trust created in favor of farmers who sell livestock to meat packers under the Packers & Stockyards Act, Section 206, 7 USC §196 (1976). The legislative purpose is clear. Statutory trust funds are not the property of the debtor and are not subject to the statutory lien (Section 545) and preference (Section 547) provisions of the new Act."

It is therefore submitted that 7 USC §196 establishes what it says it does, a statutory trust, not a statutory lien, that to hold otherwise would be to indict Congress for enacting a nullity, that the plain language, the purpose and the legislative history of 7 USC §196 should be upheld, that no inconsistency between 7 USC §196 and the Federal Bankruptcy Act appear, and that 7 USC §196 is entirely valid and effective in a bankruptcy proceeding under the authority, inter alia, of Selby v. Ford Motor Co., supra.

V. TRACING THE TRUST RES:

The Trustee argues that the burden is upon the trust beneficiaries, the unpaid cash sellers of livestock, to trace and specifically identify the corpus of the trust.

The Act does not require specific identification or tracing. 7 USC §196 (b) provides, in part:

> "All livestock purchased by a packer in cash sales, and all inventories of, or receivables or proceeds from meat, meat food products, or livestock products derived therefrom, shall be held by such packer in trust for the benefit of all unpaid cash sellers of such livestock until full payment has been received by such unpaid sellers...."

The legislative history indicates that the Congress did not intend that the trust beneficiaries have the burden of specific identification or tracing. The Senate report states:

> "Under this provision, no specific identification of the livestock or the carcasses, meats, proceeds, or receivables derived therefrom is required. Instead, they are held in a pool in trust for the benefit of all unpaid cash sellers. Each cash seller will be entitled to a pro rata share in settlement of his account."
>
> -U. S. Congressional and Administrative News, 94th Congress, 2d Session, 1976, page 2279

Other relevant portions of the legislative history in this respect are discussed at pages 42-49 of Judge Bare's Memorandum of August 31, 1978.

The "Trust Pursuit Rule" has been defined as follows:

> "It is a fundamental rule having great practical application, particularly in all those fields of law involving fiduciary relationships, that equity will pursue property that is wrongfully converted by a fiduciary, or otherwise compel restitution to the beneficiaries. The rule is actually one of trusts, since the wrongful conversion gives rise to a constructive trust which pursues the property, its product, or proceeds, in accordance with the rules. Hence, the rule well may be called 'the trust pursuit rule', or 'the rule of trust pursuit'. Under the rule, a trust will follow property through all changes in its state and form, so long as such property, its product, or its proceeds, are capable of identification."
>
> -76 Am Jur 2d "Trusts", Section 251

It is another rule of the law of trusts that substantial, rather than specific identification of the trust property, or of the proceeds or product from a conversion thereof, is sufficient. 76 Am Jur 2d "Trusts", Section 252.

Where the Trustee commingles funds, it is held:

> "The trust pursuit rule that a trust follows the trust property or funds through all the changes in their state and conditions so long and only so long as they can be traced fully applies where trust property or funds are commingled by a Trustee with other property or funds. It is sufficient, for the purposes of the requirement of tracing trust property

or funds, that they can be traced into a specific mass in which they have been commingled by a trustee with his other property or funds and in which mass the trust property or funds still exist....

"The commingling of trust property or funds with other property or funds does not in itself destroy the identity of the trust property or funds. Indeed, it is a broad and fundamental rule that equity will follow money and take out of an indistinguishable mass the amount involved....

"In endeavoring to ascertain how much trust property or money went into the commingled mass, and how much was the trustee's own, every reasonable intendment should be made against the trustee through whose fault the truth of the matter has become obscured. Indeed, the rule has been followed that where the commingling is through the fault of the trustee, the entire mass will be treated as trust property or funds, except insofar as the trustee may be able to distinguish what is his. Where a commingled mass of trust property or funds and other property or funds, commingled by a trustee wrongfully, increases in value, the beneficiaries should share in the increase at least in proportion to his contribution to the mingled mass in its original condition."

-76 Am Jur 2d, "Trusts", Section 259

Other general rules of the law of trusts, particularly applicable in a court of equity, are:

(1) Withdrawals from a mass or fund in which trust property has been commingled, where such withdrawals were made by a trustee for other than trust purposes, are presumed to be made from other property and funds before they are made from the trust property commingled therein.

-76 Am Jur 2d, "Trusts", Section 263

(2) Where a Trustee of different trusts commingles the properties of the several trusts, a court of equity will order restitution to the trust beneficiaries in proportion to the commingling out of the property or fund into which the trusts have been commingled.

-76 Am Jur 2d, "Trusts", Section 266

(3) A trustee has a duty to hold, manage, and apply trust property to effect the purposes and objects of the trust and to make payments and distribution to beneficiaries in accordance with the terms of the trust, to preserve and protect the trust property from

diminution, and to act at all times with reasonable diligence.

-76 Am Jur 2d "Trusts",
Sections 342-343

In the present case, Frosty Morn, and its Receiver and Trustee in bankruptcy, permitted the deposit of trust assets into a bank account at Citibank with other assets. In such a case of commingling, the Courts have indicated that if the "...general funds... did not fall below the amount of the trust fund, upon insolvency,... the trust fund was a preferred claim against the general fund... and if the amount of the general fund fell below the total trust fund, the whole amount so remaining would be preferred as a part of the trust fund." In Re: Franklin Savings & Loan Co., 34 F. Supp. 661 (E. D. Tenn. 1940).

> "The Bankruptcy Court will follow the trust fund and decree restitution where the amount of the deposit has at all times since the intermingling of funds equaled or exceeded the amount of the trust fund. 4A Collier on Bankruptcy (14th Ed. 1978), ¶70.25 at 359-360."

The "tracing" required of a trust claimant in a bankruptcy proceeding is to identify the trust fund or any property into which the Bankrupt had converted the trust fund, or any part of said fund, and, once identified, the burden is upon the Bankruptcy Trustee to identify and segregate out of the commingled fund what he claims is not subject to the trust. Gulf Petroleum S. A. v. Collazo, 316 F. 2d 257 (C. A. 5, 1963); Rodi Boat Co. v. Provident Tradesmans Bank & Trust Co., 236 F. Supp. 935 (E. D. Pa. 1964).

As noted before, the Packers & Stockyards Act is remedial legislation, Stafford v. Wallace, 258 U. S. 495, 521 (1921), which should be construed liberally so as to effectuate the purpose of Congress, Bowman v. Dept. of Agriculture, 363 F. 2d 81, 85 (C. A. 5, 1966). To construe 7 USC §196 to require specific identification or tracing would make that statute completely unworkable, and a Court should, where possible, construe a statute to make its various parts administratively workable. NLRB v. John S. Barnes Corp., 178 F. 2d 156 (C. A. 7, 1950).

In the present case, after the issuance of almost three million dollars in worthless checks, Frosty Morn filed a Petition for Chapter XI bankruptcy reorganization, after which Citibank continued to receive various funds of Frosty Morn, including the daily collection of accounts receivable and proceeds from the sale of inventory. Citibank received, after November 4, 1977, a total of $7,711,014.47.

On March 10, 1978, by Order No. 75, Bankruptcy Judge Kinnard approved a stipulation of settlement between the Receiver and Citibank. In this stipulation, Citibank was paid its claim against Frosty Morn in full, and returned sufficient monies to the hands of the Receiver that the Court therein ordered the Receiver to establish an escrow of $2,743,122.00 to protect the rights of potential beneficiaries under the statutory trust under 7 USC §196. All told, approximately $8 million was derived from the liquidation of inventory and receivables of Frosty Morn after the filing of the Chapter XI Petition. The figure escrowed was established by the accounting firm of Touche-Ross, at the direction of the Court, as the reported figure owing to unpaid livestock sellers, and was corroborated by audits for the Packers & Stockyards Administration.

It is submitted that the record, including the various valuation reports submitted by the Receiver/Trustee, support Bankruptcy Judge Bare's findings that:

> "The Court finds and concludes that the value of the assets derived from livestock for which no payment was made to the unpaid cash sellers, i.e., livestock converted to meat or meat food products, converted to accounts receivable, and converted to cash, at a value greater than 2.7 million.
>
> "The Court finds that the value of the livestock, inventory, proceeds and receivables of Frosty Morn on and after November 4, 1977, subject to the trust, was at all times equal to or greater than the amount owed to valid trust fund claimants."
>
> -Memorandum and Order, October 10, 1978, page 9

The other basis for the Bankruptcy Court rulings regarding the "tracing" issue, was the neglect and delay on the part of the Receiver/Trustee in the enforcement of 7 USC §196 in this bankruptcy proceeding. It is submitted that the record on appeal amply supports the Bankruptcy Court's conclusions that the Receiver/Trustee made no

effort to enforce 7 USC §196 in this proceeding until forced to do so by the Court.

After appointment as Receiver, Mr. Deutscher had possession of all of the records of the Bankrupt. Mr. Deutscher did not, however, even seek to audit the record for the purpose of enforcement of 7 USC §196, did not seek an early determination of what were cash sales and what were credit sales of livestock to Frosty Morn, did not institute a declaratory relief or other suit for determination of these issues, and did not recognize the priority status of the trust fund claimants, choosing instead to negotiate and settle the claims of secured banks first.

By Order entered January 9, 1978, Bankruptcy Judge Kinnard ordered that trust fund claimants be notified to file promptly claims in this proceeding. Nonetheless, it was not until ordered to do so by Judge Bare in August, 1978, that Mr. Deutscher interposed his objections to the trust fund claims. In the interim, Mr. Deutscher undertook a strategy of delaying and obstructing all efforts by the trust fund claimants to bring these issues to a head, resisting the class action instituted by the trust fund claimants, and successfully opposing Judge Kinnard's effort to appoint an independent escrow agent to administer the escrow account and make a determination of the rights of the parties under 7 USC §196. Despite the availability of the Packers & Stockyards Administration, charged with administration of the Packers & Stockyards Act, the Trustee did not utilize said agency to expedite this matter. The Trustee may now take great offense at the Bankruptcy Judge's findings that he did not act properly or diligently in this regard, but the record speaks of delay, obstruction, and misplaced priority.

It is submitted that the issue of "tracing", as presented by the Trustee, is another effort on his part to thwart Congressional intent. The trust corpus at all times remained in an identifiable form, and even if commingled with proceeds from credit sales of livestock, substantial identification is still possible and the burden would be on the Trustee to first segregate out of the commingled

fund those non trust assets he claimed.

VI. PROCEDURE:

It is ironic to find the Trustee now complaining of the procedure whereby the trust fund claims were heard on August 31 - September 1, 1978, in light of the fact that the Trustee takes credit for establishing the basic procedure. See pages 56-57, Part I, Brief of the Appellant Trustee.

In fact, the Bankruptcy Court did order the Trustee to file written objections to each trust fund claim and to notify the claimants of hearing dates. In response, the Trustee prepared a list of fourteen specific objections, not all of which applied to each claimant, and sent notice to 344 claimants that hearings would be scheduled at specified time on August 31 or September 1, 1978. The Trustee scheduled 344 hearings for those two days. Now the Trustee complains that the Court handled said hearings expeditiously and in a summary fashion.

Bankruptcy Courts are essentially courts of equity designed to proceed in summary fashion to deal with assets of the bankrupt and other related issues. Katchen v. Landry, 382 U. S. 323, 15 L. Ed. 2d 391, 86 S. Ct. 467 (1966). In that case, the Supreme Court stated:

> "It is equally clear that the expressly granted power to 'allow', 'disallow', and 'reconsider' claims, Bankruptcy Act Section 2, sub. a (2), 11 USC §11, sub. a (2) (1964 Ed.), which is of 'basic importance in the administration of a bankruptcy estate', Gardner v. State of New Jersey, 329 U. S. 565, 573, is to be exercised in summary proceedings and not by the slower and more expensive processes of a plenary suit." (Citations omitted.) 15 L. Ed 2d at 397 .

In a court of equity, substantial right and justice, rather than technical form, control. ITT-Industrial Credit Co. v. Hughes, 594 F. 2d 384, 386 (C. A. 4, 1979); In Re Amador, 596 F. 2d 428, 431 (C. A. 10, 1979).

That the Bankruptcy Court operates by means of summary proceedings, see also In Re Enyart, 509 F. 2d 1058 (C. A. 6, 1975),

and Willyerd v. Buildex Co., 463 F. 2d 996 (C. A. 6, 1972).

It has been held that in regard to the adequacy of notice and opportunity for hearing, a Bankruptcy Court must balance the individual's interest in adequate procedure against the overall interest of efficient, final resolution of claims. In Re DCA Development Corp., 489 F. 2d 43 (C. A. 1, 1973). It has been held that creditors' claims in bankruptcy are not to be considered as independent and separate suits at law or in equity. In Re Ira Haupt & Co., 289 F. Supp 966, 971 (S. D. N. Y. 1968), citing Wiswall v. Campbell, 93 U. S. 347 (1876).

The need for speedy resolution of bankruptcy cases has been held to be secondary in importance only to the equitable distribution scheme of the Bankruptcy Act. Bailey v. Glower, 88 U. S. 342, 22 L. Ed. 636 (1874).

In the case of Solari Furs v. United States, 436 F. 2d 683 (C. A. 8, 1971), it was held that the Bankruptcy Referee properly could refer to the bankrupt's records which were not introduced into evidence at a hearing in order to make meaningful and to verify the evidence that was presented at the hearing.

Of course, as proofs of claims in bankruptcy, the trust fund claims were presumed to be valid. In Re Estrada's Market, 222 F. Supp. 253 (D. C. Cal. 1963). Broad discretion should be left to the Bankruptcy Judge, and he should not be reversed unless there appears to be an error of law on his part, or it satisfactorily appears that he failed to properly review the record or failed to use sound discretion. In Re Romano, 196 F. Supp. 954 (E. D. Tenn. 1961).

Under Rule 810, Bankruptcy Rules, "the court shall accept the referee's findings of fact unless they are clearly erroneous...." It was held in McDowell v. John Deere Industrial Equipment Co., 461 F. 2d 48, 50 (C. A. 6, 1972), that the District Court should not disturb the findings of fact of the Bankruptcy Judge unless there is most cogent evidence of mistake or miscarriage of justice. It was further held in In Re Steiker, 380 F. 2d 765 (C. A. 3, 1967),

that the ultimate findings or conclusions of the Bankruptcy Judge should be undisturbed on appeal where they are supported by underlying facts or determinations which cumulatively satisfy the applicable standard of proof.

The Trustee, in his objection to what he calls an en masse treatment by the Bankruptcy Judge of the claims, cites Ohio Valley Bank Co. v. Mack, 163 F. 155 (C. A. 6, 1906). However, the proposition for which that case is cited by the Trustee was dictum, and a close reading of that opinion would indicate that even that dictum was meant to be a rule for the reviewing or appellate court and not a directive for the Bankruptcy Judge hearing the claim. It does not appear from that opinion what hearing procedure the Bankruptcy Judge or Referee there had followed. It is significant, also, that the Bankruptcy Judge was affirmed by the Appellate Court in that case.

The Trustee also cites the case of In Re Tower Magazine, Inc., 16 F. Supp. 894 (D. C. Pa. 1936). In that case, however, the focus of the opinion was not upon the treatment of various cases en masse, but rather the fact that no objections had even been filed to the claims before the Referee simply disallowed the claims, apparently without findings for his decision.

The Trustee scheduled the hearings on August 31 - September 1, 1978, and he could have had any witnesses available to testify that he wanted. No error would appear from the fact that the Bankruptcy Court, dealing with 344 claims in two days, decided to consider the cumulative effect of all of the testimony presented. To have required each Frosty Morn buyer, agent or man working the weigh scale who dealt with each claimant in each instance, to testify in regard to each particular claim would obviously have been unreasonabl burdensome and time consuming. The real objection of the Trustee would appear to be to the conclusion of the Bankruptcy Judge, considering the cumulative effect of all of the testimony in the record, that a pattern of intentional conduct on the part of Frosty Morn appeared, which could not be condoned.

The Trustee cites as an example of alleged procedural

error, the treatment of the claim of Billy Gilmore, Claim No. 201. That objection will be addressed in the next section of this Brief.

VII. THE WAIVER SCHEME:

The Trustee, relying upon the scheme whereby Frosty Morn undertook to obtain so-called "waivers" from livestock sellers of rights under 7 USC §196 to appease Citibank, interposed objections to numerous trust fund claims based upon an alleged waiver of rights under the statute.

The statute should be examined closely first. Subsection (c) of 7 USC §196 provides:

> "For the purpose of this section, a cash sale means a sale in which the seller does not expressly extend credit to the buyer."

Only cash sellers of livestock are protected by the statutory trust provisions. Under the statute, a sale is a cash sale if, in the course of the particular sale, the seller does not expressly extend credit to the buyer, in this instance, Frosty Morn. It is clear that the statute directs the focus inquiry to each particular sale, and the circumstances surrounding each sale. Therein relies a fallacy in the Trustee's reliance upon the so-called "blanket waivers", which purported to waive all rights of a seller for any transaction with Frosty Morn. This is contrary to the directive of the statute to look at the circumstances of each sale. The statute also directs that only an express not an implied, extension of credit in each sale would take a sale out of the category of a cash sale.

Frosty Morn, in order to "get us by the P & S Act", (Transcript of the hearing at 100), undertook a "crash program" to get waivers signed by livestock sellers in order to retain funding by Citibank. Tr. at 73. The waivers can be categorized as either "weigh bills" or "blanket waivers".

SUBSECTION A. WEIGH BILLS:

Most of the claimants represented by the undersigned

counsel either signed no waiver or extension of credit document at all, or signed "weigh bills". Judge Bare dealt with and invalidated the weigh bills in a Memorandum of September 14, 1978.

The method of obtaining signatures on weigh bills is explained by the testimony of various claimants at the hearings, and by the testimony of Mark Dortch, weigher, scale boy, and assistant bookkeeper for Frosty Morn. Mr. Dortch's testimony appears at pages 245-254 of the Transcript. After his testimony, at pages 255-261, the Court found the weigh bill scheme invalid.

Mr. Dortch testified that he was instructed by superiors to get persons delivering livestock to the Clarksville facility to sign waiver language on the weigh bills or tickets. Tr. at 245. Mr. Dortch told those delivering livestock nothing about what they were being requested to sign unless they asked. Tr. at 249. Often he would get the person delivering livestock to sign waiver or extension of credit language even while simultaneously handing the delivering person a check in payment for the livestock. Tr. at 250.

The transcript reveals many instances where a trucker without authority of the livestock owner signed the waiver language, (e.g. Tr. at 370-372), many instances where extension of credit language was signed even though a check was simultaneously given by Frosty Morn, clearly involving no extension of credit (e.g., Tr. at 657), and many instances where waiver language was signed on a grade and yield sale (explained at Tr. 98, 184-185), where payment could not be determined and a check mailed for a matter of some days after delivery (e.g. Tr. at 539-540).

Jerry Caldwell, Comptroller and Secretary-Treasurer of Frosty Morn, testified that neither Frosty Morn nor Citibank considered the weigh bill as valid credit extensions or waivers. Tr. at 74-75.

The purpose and method of obtaining the weigh bill "waivers" is indicative of the overreaching and deceptive scheme of Frosty Morn to obviate the impact and intent of the Federal

statutory trust provision by any devious means that could be conceived. The Bankruptcy Judge properly found these weigh bills to be completely invalid.

SUBSECTION B - BLANKET WAIVERS:

Frosty Morn utilized three different forms for so-called "blanket waivers", whereby Frosty Morn tried to obtain open-ended credit extensions from livestock sellers applicable to any sales, contrary to the directive of 7 USC §196(c) that the cash or credit nature of a sale must be determined from the circumstances of each particular transaction.

The first form was developed in August or September 1976, the second in the Spring of 1977, and the third form later in the year 1977. Tr. at 65-66.

Jerry Caldwell of Frosty Morn testified that after April 1977, Citibank required that 80-85% of all sales be on credit, and Citibank was instrumental in requiring new waiver forms to replace older forms. Tr. at 68, 72.

In the fall of 1977, Frosty Morn and Citibank undertook a crash program to get waivers signed by livestock sellers or there would be no further funding by Citibank. Tr. at 73. Check kiting and delays in payment were an intentional scheme of Frosty Morn. Tr. at 81-82. It was not uncommon to have between $300,000.00 and $600,000.00 floating at any given time. Tr. at 83. Of course, at the time it filed for bankruptcy, Frosty Morn had over $2,000,000.00 in worthless checks outstanding to livestock sellers.

Mr. Caldwell testified that Frosty Morn did not tell sellers of livestock of the precarious financial condition of Frosty Morn. Tr. at 87. Between August and early November, 1977, Frosty Morn was losing approximately $75,000.00 per week. Tr. at 92.

Mr. Rusty Whitfield, a livestock buyer for Frosty Morn, testified that he did not tell sellers of livestock that he was asking them to sign a credit extension, that he was not instructed

to tell the livestock sellers the purpose of the instrument. Tr. at 99-100. Mr. Whitfield testified that he understood that the agreement did not change the way Frosty Morn had been doing business with sellers, but was just for the purpose to "get us by the P & S Act". Tr. at 100. He understood that the third waiver form completely replaced the first two. Tr. at 101.

Mr. Whitfield testified that sellers of livestock in order to continue doing business with Frosty Morn were told that they had to sign the waiver form, and that the sellers really had no other market in that area that paid Frosty Morn's premium on livestock, and that Frosty Morn killed between 75 and 80% of all cattle sold within a 100 mile radius of Clarksville, Tennessee. Tr. at 101-102.

Mr. Whitfield further testified that he, as a buyer, was instructed by Mr. Caldwell to "say as little as we could to get them signed", referring to the waivers. Tr. at 103.

Sam Bailey, a Frosty Morn buyer, testified that he told sellers to sign the instrument or Frosty Morn could not continue to do business with them, that nothing about their business arrangement would change by signing the agreement, and that the business arrangement typically had been for Frosty Morn to make payment by the next day after delivery, or one day after grade and yield was determined, and further testified that, contrary to what sellers were told, Frosty Morn continued to do business with those sellers who refused or failed to sign the agreements. Tr. at 181-190.

The transcript is littered with instances where Frosty Morn buyers either misrepresented or failed to disclose material facts regarding the real purpose of the instruments sellers were being asked to sign. (See e.g. Tr. at 415, 112-120, 491-497)

The undersigned represents only three claimants who signed a so-called "blanket waiver" form: Junius A. Radford, Billy Gilmore, and Cumberland City Stockyard.

1. Junius A. Radford:

The testimony regarding the claimant, Junius A. Radford, is found at pages 442-445 of the transcript. Edgar Gene Stahlings, the Frosty Morn buyer at Kinston, North Carolina, testified that on October 25, 1977, he talked with Mr. Radford over the telephone and agreed on a price for purchasing hogs from Mr. Radford. On October 26, Mr. Radford delivered the hogs to the Frosty Morn plant. When the hogs were weighed, Mr. Stahlings got Mr. Radford to sign a so-called waiver and extension of credit agreement. This was the so-called Option b Agreement. Frosty Morn in fact put Mr. Radford's check in the mail the date of delivery of the hogs, October 26. This was not an extension of credit sale. The terms of the agreement do not relieve Frosty Morn of the obligation to pay promptly, i. e., before the close of the next business day. Payment was to be made within the prompt payment provision required of Frosty Morn under the Packers & Stockyards Act. 7 USC §228b provides:

> "(a)...each packer...purchasing livestock for slaughter shall, before the close of the next business day following purchase of livestock and transfer of possession thereof, actually deliver at the point of transfer of possession to the seller or his duly authorized representative a check or shall wire transfer funds to the seller's account for the full amount of the purchase price; or, in the case of a purchase on a carcass or 'grade and yield' basis, the purchaser shall make payment by check at the point of transfer or possession or shall wire transfer funds to the seller's account for the full amount of the purchase price not later than the close of the first business day following determination of the purchase price: Provided further, that if the seller or his duly authorized representative is not present to receive payment at the point of transfer of possession, as herein provided, the packer...shall wire transfer funds or place a check in the United States mail for the full amount of the purchase price, properly addressed to the seller, within the time limits specified in this subsection, such action being deemed compliance with the requirement for prompt payment.
>
> "(b) Notwithstanding the provisions of subsection (a) of this section and subject to such terms and conditions as the Secretary may prescribe, the parties to the purchase and sale of livestock may expressly agree in writing, before such purchase or sale, to effect payment in a manner other than that required in subsection (a). Any such agreement shall be disclosed in the records of any market agency or dealer selling the livestock, and in the purchaser's records and on the accounts or other documents issued by the purchaser relating to the transaction."

These prompt payment provisions required that Frosty Morn make payment for livestock before the close of the next business day following the purchase of livestock and the transfer of possession thereof. This clearly was a situation where Frosty Morn met the prompt payment provision under the Packers & Stockyards Act, this was a cash sale, and the waiver form was obtained only as part of the scheme to appease Citibank.

In 67 Am Jur 2d "Sales", Section 194, it is pointed out that Uniform Commercial Code Sections 2-310(a) and 2-507(1) and 2-607(1) together mean that unless otherwise expressly agreed, delivery of goods and payment of the price are concurrent obligations and conditions. This was also true under pre-code law. See In Re Smithdale Industries, Inc., 219 F. Supp. 862 (E. D. Tenn. 1963), holding that the fact that the buyer did not immediately make payment did not convert a cash sell into a credit sale. In the foregoing volume of Am Jur 2d, at Section 186, it is stated:

> "On the sale of personal property, such as cattle, where it was assumed in the conversation at the time of weighing them, that payment was to be immediate, no presumption of credit arises because of the slight delay, after the actual delivery of the property, in computing the price and making payment."

The Bankruptcy Judge, by Order entered October 2, 1978, properly overruled the Trustee's objections to the claim of Junius A. Radford.

2. Billy Gilmore:

The presentation of this claim at the hearings is found at page 285-289 of the transcript (the undersigned is mistakenly designated as "Mr. Vinson"). Mr. Gilmore died before the hearing. Tr. at 286. Mr. Gilmore signed no weigh bills when his livestock was delivered to Frosty Morn and those unsigned weigh bills were put into evidence. Tr. at 289. Counsel requested that the Court rule upon the Trustee's objections to this claim as a matter of law, based primarily upon the fact that the so-called "agreement" relied upon by the Trustee is obviously incomplete on its face.

Subsequently, counsel submitted a "Brief in Support of Trust Fund Claim No. 201 Filed By Claimant, Billy Gilmore". This Brief is designated as Item No. 414 in the Record on Appeal. Counsel then submitted to accompany the Brief an Affidavit of Frosty Morn buyer, Roger Carter, which is designated as Item No. 415 of the Record on Appeal. Rather than reciting the Brief again herein, the Court is referred to said Brief with Affidavits, and to Order No. 260 wherein Judge Bare disallowed the Trustee's objections to this claim for the argument on behalf of said claim. It is still submitted by the undersigned that as a matter of law, based upon the so-called credit agreement relied upon by the Trustee, and even disregarding the Affidavits submitted by counsel after the hearing, the "Credit Agreement" is incomplete and ineffective.

3. Cumberland City Stockyard:

The testimony regarding this claim is found at pages 488-499 of the transcript. Apparently, one representative of Cumberland City signed the form in November 1976, an Option c form. Then, on October 1, 1977, another representative of Cumberland City signed an Option d form, providing for payment by Frosty Morn by check in the mail two days following delivery. Judge Bare held in Order No. 288 that the latter form was intended to replace the former. The testimony at the hearing was that Cumberland City representatives were informed they had to sign these forms, that the Packers & Stockyards Administration was allowing 72 hours to get checks back from Frosty Morn, that both Frosty Morn and the Packers & Stockyards Administration were requiring these forms, and that they were particularly required in regard to Cumberland City because their auction sale was on Saturday and Frosty Morn needed more time to comply with the Packers & Stockyards payment provision. Tr. at 491-292. These representations obviously were false and misleading. The Bankruptcy Judge properly overruled the Trustee's objections to this claim.

The Packers & Stockyards Act is concerned with unlawful trade practices. See, e. g., 7 USC §192. By analogy, in cases under

the regulatory scheme of the Federal Trade Commission, it has been held that intent to deceive need not be proven to show a violation of that Act, but merely proof that deception is possible by the violator's actions or omissions. Regina Corp. v. Federal Trade Commission, 322 F. 2d 765 (C. A. 3, 1963). In Federal Trade Commission v. Sterling Drug, Inc., 317 F. 2d 669 (C. A. 2, 1963), it was stated that a Court must look to the public interest as it was viewed to be protected by the Congress, and that a true statement might not disclose its context or may have more than one meaning, one of which is deceptive, and that deception may be accomplished by innuendo, rather than by outright false statement.

One case cited by Judge Bare was Simmons v. Evans, 185 Tenn. 282, 285, 206 S. W. 2d 295 (1947):

> "This Court held as early as 1813 'it to be a sound principle of equity that each party to a contract is bound to disclose to the other all he may now respecting the subject matter materially affecting a correct view of it, unless common observation would have furnished the information'." Perkins v. McGavock, 3 Tenn. 415, 417."

Applying Tennessee law, the Sixth Circuit Court in Shell Oil Co. v. State Tire & Oil Co., 126 F. 2d 971 (C. A. 6, 1942), stated

> "Where a party intentionally or by design produces a false impression in order to mislead another, or to obtain an undue advantage of him, there is positive fraud in the fullest sense of the term. Rose v. Foutch, 4 Tenn. App. 495, Cert. denied by the Supreme Court of Tennessee May 7, 1927 and cases cited. Where there are 'acts, omissions, or concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another', there is actionable fraud. Smith v. Harrison, 2 Heisk 230, 49 Tenn. 230; Bennett v. Mass. Mutual Life Ins. Co., 107 Tenn. 371, 64 S. W. 758."

See also Belcher v. Belcher, 18 Tenn. 120 at 131, (1836). It has further been held:

> "A lawful act does not become unlawful merely because it may be done by agreement between two parties; but if the purpose and result of the act is to defeat and destroy a right guaranteed by law to another, the act becomes fraudulent in its nature. Taylor v. McCool, 183 Tenn. 1, 189 S. W. 2d 817, 822 (1945)."

The Packers & Stockyards Act, in all its aspects, is a deliberate Congressional regulatory device for the protection of seller

of livestock in the marketplace. The prompt payment provisions of the Act are an integral part of the legislative purpose. That principle is set forth in the case of Van Wyk v. Bergland, 570 F. 2d 701 (C. A. 8, 1978), a case in which the Court found a deceptive practice proscribed by the Packers & Stockyards Act in a situation where dealers in livestock by "a deliberate course of conduct", not an isolated event, failed to pay for cattle being purchased from livestock sellers. This was a situation of thirty-one purchases of cattle over a period of time resulting in a loss of over $500,000.00 to livestock sellers. See also Bowman v. United States Dept. of Agriculture, 366 F. 2d 81, 85 (C. A. 5, 1966).

Similiarly to the situation in Van Wyk v. Bergland, supra, the actions of Frosty Morn in the present case are not an isolated event, but "a deliberate course of conduct", and a failure to pay for livestock purchased from approximately 350 purchasers resulting in losses of over $2,000,000.00. The obtaining of waiver or extension of credit forms was part of this "deliberate course of conduct", a deceptive practice which should not be permitted by a court of equity under the remedial purposes of the Packers & Stockyards Act.

The Court in Fillippo v. S. Bonaccurso & Sons, Inc., 466 F. Supp. 1008, 1019 (E. D. Pa. 1978), did correlate the prompt payment provisions of the Act with the definition of "cash sale" under the Act:

> "7 USC §228b(a) required full payment for cattle bought on a 'grade weight,' 'dressed weight' or 'grade and yield' basis by the close of the next business day following slaughter, grading, weighing and pricing of the live cattle transferred by plaintiff to SBI's possession. Ordinarily, this postpones the date for payment for a few days longer than purchases made on a 'live weight' basis where payment is due by the close of the next business day following mere transfer of live cattle to SBI's possession. Id. The delay in payment for purchases on a 'grade weight' basis does not convert a 'cash sale' into a sale on credit as defendants contend. Just as for sales on a 'live weight' basis, the only way a 'dressed weight' seller can forego his right to the Act's guarantees of payment for 'cash sales' is by executing an 'express agreement in writing' waiving his right to next day payment, which agreement must be 'disclosed in' the records of the seller and those of the purchaser and on the accounts or other documents

issued by the purchaser relating to the transaction. 7 USC §§ 228b(b), 196(c); 1976 U. S. Code Cong. and Adm. News at 2278."

It is submitted that a reading of the transcript of the hearing and of the analysis of Judge Bare in his memoranda dealing with the issue, amply support the conclusion that Frosty Morn was engaged in a deceptive, misleading, and indeed illegal scheme to obtain waiver forms, not related to the circumstances of individual transactions, but obtained by any means possible to "get by" the Packers & Stockyards Act and Citibank. Such a scheme should not be given effect in this Court, just as it was not in the Bankruptcy Court.

VIII. STOCKYARDS AND DEALERS:

The Trustee takes the position that stockyards and dealers, so-called "middlemen", are not entitled to the statutory trust protection under 7 USC §196. Again, the Trustee would read a limitation into the statute which Congress did not express or contemplate. The statute is clear and unambiguous in this point:

> "All livestock purchased by a packer in cash sales, and all inventories of, or receivables or proceeds from meat, meat food products, or livestock products derived therefrom, shall be held by such packer in trust for the benefit of all unpaid cash sellers of such livestock until full payment has been received by such unpaid sellers...." 7 USC §196(b) (Emphasis added.)

Where the meaning of a statute is plain, it is the duty of a Court to enforce the statute according to its obvious terms. Thornley v. United States, 113 U. S. 310, 28 L. Ed. 999, 5 S. Ct. 491.

The industry practice and the legislative intent were described thusly in the "Brief with Respect to Objections to Trust Fund Claims" dated September 8, 1978, and filed by the United States Department of Agriculture in this case:

> "In the livestock industry, livestock are sold by producers either directly to the packer or through middlemen. Such middlemen are regulated under the Packers & Stockyards Act (see 7 USC 201 and 213(a)) and such middlemen are either 'market agencies' or 'dealers' as those terms are defined in the Packers

and Stockyards Act. 7 USC 201(c) defines a market agency as 'any person engaged in the business of (1) buying or selling in commerce livestock on a commission basis....' The term dealer is defined at 7 USC 201(d) and 'means any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser.' In the trade certain firms operating as market agencies or dealers may never see the livestock which they buy or sell. For instance, if a feedlot in Iowa wants cattle for feeding purposes, a local dealer or market agency may be contacted by phone and requested to buy a certain type of livestock for the feedlot. This dealer or market agent may in turn contact a dealer or market agent in Texas who in turn contacts a local dealer who procures the cattle and ships them directly to the feedlot in Iowa. Each dealer or market agency in this chain is a buyer or seller of the livestock for purposes of the Act.

"Whether a middleman takes title to the livestock, handles them for only 5 or 6 hours or does not even see them is immaterial.

"Middlemen perform a necessary function in the marketing process and, with respect to slaughter livestock, often times sell producers' livestock to packers. Without their efforts many producers would have fewer or no economically feasible markets for their livestock. Middlemen will not be able to continue functioning if the burden of packers' non-payment for livestock is shifted to them. Over the long run, the ability of middlemen to pay producers is directly dependent upon their ability to obtain payment from packers. The Congress recognized that the supply of meat for the American consumer is dependent upon a safe, reliable, and honest outlet for producers' livestock. In discussing the Amendments to the Packers and Stockyards Act on the floor of the House of Representatives, Congressman Hightower noted:

> 'this is not an anti-packer bill or pro-producer bill, it is a bill that we believe is carefully balanced, addressing the problem to provide for a good, safe market and a safe market is what will best serve the consumer.' Congressional Record, May 6, 1976, p. H. 3011.

"Congressman Hagedorn speaking in support of the bill noted that 230 million head of livestock with an aggregate value of 30 to 45 billion dollars are sold each year and that this legislation was designed 'to establish basic ground rules which insure confidence among trading partners....' Cong. Rec. May 6, 1976, p. H. 4014.

"In the Senate, Senator McGovern urged passage of the Amendments, including the trust provision, and noted that failure to pass the legislation would result in sanctioning 'ruthless practices...which will continue to endanger the legitimate efforts of farmers and livestock producers who seek only a safe, reliable, and honest marketplace for their products.' Cong. Rec., Senate, June 17, 1976, p. S. 9702.

"Failing to accord the trust benefits to middlemen-sellers would only serve to provide a less safe and reliable marketplace for livestock producers.

"Attorneys for the Trustee, in objecting to the trust claims of various middlemen, seek to limit the meaning

of the term sellers to owner-producers. However, it is clear from the definition of the term dealers and market agencies, set forth above, that middlemen, regardless of whether they own the livestock, may buy and sell it. Thus, they are sellers. A seller is not necessarily an owner. In Cady v. Murphy, 113 F. 2d 988 (1st Cir. 1940), cert. den., 311 U. S. 705, a statute imposing liability on any person who sells a security under certain circumstances, it was held at 990, that the statute

> 'imposes a liability for misrepresentation not only principals, but also upon brokers when selling securities owned by others. This is not a strained interpretation of the statute, for a selling agent in common parlance would describe himself as a "person who sells" though title passes from his principal not from him.' (emphasis added).

"See Katz v. Amos Treat & Co., 411 F. 2d 1046 (2d Cir. 1969).

"'A vendor is one who negotiates a sale and disposes of property for a consideration.' Canavan v. Coleman, 216 N. W. 292, 293, 204 Iowa 901 (1927).

"There is no requirement that a 'seller' be the owner of the property. To narrowly construe the term 'seller', as suggested by the Trustee would serve to defeat the remedial purposes of the Packers & Stockyards Act and would result in a narrow construction of a statute which is to be liberally construed."

The tesimony of George Copley of Mid-South Livestock Commission Company, a trust fund claimant, found at pages 520-527 of the transcript of the hearings, is instructive in this regard. As Mr. Copley testified, a middleman such as the livestock auction company is a seller with a definite interest because he has sold through his auction livestock to a packer, and in turn, on the date of sale, has paid the seller at the auction for the livestock less the auction company's commission. Tr. at 521-522. Mr. Copley further testified that he considered that he (the livestock auction company) owned livestock after they were run through his auction sales, and that on his invoices to buyers at the auction sale, he guarantees title and weight to the buyer. A copy of his invoice was attached as an Exhibit to the claim filed by Mid-South Livestock Commission Company. Tr. at 521-522.

Finally, in Fillippo v. S. Bonaccurso & Sons, Inc., 466 F. Supp. 1008, 1022 (E. D. Pa. 1978), the Court held that middlemen such as auction houses are "sellers" of livestock entitled to the protection of 7 USC §196.

In his Memorandum and Order No. 159, entered September 14, 1978, Judge Bare correctly held that middlemen were entitled to protection as sellers of livestock under 7 USC §196.

IX. CONCLUSION:

For the reasons set forth herein, it is submitted that Bankruptcy Judge Bare committed no reversible error in his disposition of the trust fund claims of the undersigned identified in the Appendix to this Brief, and that the challenged orders of the Bankruptcy Court should be in all respects affirmed.

Respectfully submitted this 2nd day of September, 1980.

N. Houston Parks
N. HOUSTON PARKS, ESQ.
P. O. Box 1004
Columbia, Tennessee 38401

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of this document has been served on the following counsel of record by United States Mail, First Class, postage prepaid, addressed to said counsel at their respective addresses as shown on the Master Mailing List maintained for the caption cases by the Clerk of the Court:

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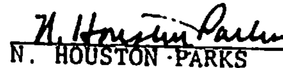
This 2nd day of September, 1980.



N. HOUSTON PARKS

	CLAIM NO.	CLAIMANT	ORDER(S) ALLOWING	LOCATION IN 5 VOLUMES OF TRANSCRIPT OF AUGUST 31-SEPTEMBER 1, 1978
1.	288	Sam Moore	261	576-581
2.	153	Junius A. Radford	___, 10-2-78	442-445
3.	213	Roy E. Brame	167	541-543
4.	203	Allen H. McGregor	167	389-390
5.	214	Meador Brothers	167	667-670
6.	50	Mid-South Livestock Commission Co.	236	520-527
7.	190	Russell G. Maness, d/b/a High Galls Livestock Market	167	405
8.	89	FCX, Inc. (Mt. Olive)	249	419-420
9.	271	FCX, Inc. (Lenoir)	248	419-420
10.	87	George Miller, d/b/a Tennessee Farmer, Inc.	167	568-574
11.	196	Jim Harrison	167	554-556
12.	197	P. O. Harrison	167	554-556
13.	219	Jamie Fussell	167	280-285
14.	220	Sherry Fussell	167	280-285
15.	221	Beverly Fussell	167	280-285
16.	134	C. E. Powers, Trustee	167	693-697
17.	131	Elese Holland	167	693-697
18.	48	W. D. Wall	167	678-679
19.	53	G. E. Hunt	167	662-663
20.	84	Richard Anderson	167	24-25
21.	262	Allen & Lynn Bone	167	539-541
22.	290	Head & Albright	167	557-558
23.	205	E. H. & Bryce Brinkley	167	370-372
24.	143	Doyle Moore	167	574-576
25.	54	Cumberland City Stockyards	288	488-499
26.	201	Billy Gilmore	260	285-289
27.	194	Bobby Wright	167	594-596
28.	141	H. C. Coleman	167	655-658
29.	142	Burr Coleman	167	655-658
30.	311	George E. Justice	247	727
31.	312	Jeff Justice	167	723
32.	266	Griffie D. Black	167	26
33.	209	Robert L. Smith	167, 254	729
34.	81	Steve Powell	290	670,731
35.	314	Melvin Burr	167,	727
36.	171	Jamie Bowie	167, 289	726

APPENDIX "1"

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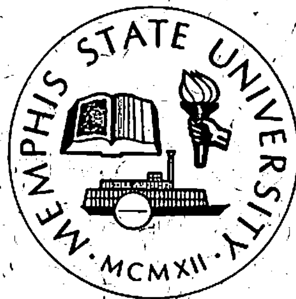
APPENDIX "2"

MEMPHIS STATE UNIVERSITY LAW REVIEW



ARTICLES

DEATH AND DYING IN TENNESSEE .... *Edward J. McKenney, Jr.*

DISQUALIFICATION OF CLERGY FOR CIVIL OFFICE .... *Frederic S. Le Clercq*

JUDICIAL SELECTION—THE TENNESSEE EXPERIENCE .... *N. Houston Parks*

NOTES

COPYRIGHT—THE DOCTRINE OF INDIVISIBILITY: THE FINAL CHAPTER

THE TENNESSEE JENCKS ACT—AN EFFECTIVE IMPEACHMENT TOOL FOR CRIMINAL LAW

DEPENDENTS UNDER THE TENNESSEE WORKMEN'S COMPENSATION ACT

UNEMPLOYMENT COMPENSATION—WAIVER AND RECOUPMENT OF OVERPAYMENTS

CASE COMMENTS

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VOLUME 7 SUMMER, 1977 NUMBER 4

Judicial Selection—The Tennessee Experience

N. Houston Parks*

On June 19, 1972, Judge Larry Creson of the Tennessee supreme court died, setting in motion the first implementation of the recently enacted merit selection plan[1] for filling vacancies on the appellate courts. The ensuing events were unfortunate. The governor failed to make a timely appointment of a successor, a former appeals court judge waged a write-in candidacy in a general election for the position, and in the ensuing litigation the Tennessee supreme court upheld the constitutionality of the merit selection plan and ordered the governor to start over again in selecting a new judge.[2] This inauspicious first step crippled the merit selection plan, and its opponents made the plan an issue in the bitter partisan battle between the Democratically controlled legislature and the Republican governor. Prior to the 1974 general election the merit selection plan for supreme court judges was repealed, and a new court was elected under the banner of the majority political party.

Recent experience has thus served to heighten local interest in the judicial selection process. The partisan manner in which the immediate issue was resolved and the superficiality of the debate on the part of both sides have, however, tended to obfuscate rather than illuminate the significant and difficult questions posed by various methods of selecting judges. These questions reflect tensions inherent in representative government. The systemic goal is to attract to the bench persons of the highest ability and character. In government based upon the principle of separation of powers, it is thought that judges should be politically independent, dedicated to the rule of law and the dispensation of justice, and detached from interference by the executive, the legislature, or momentary majoritarian impulses. Yet the legitimacy of democratic institutions rests in public confidence, and some would go further than others in recognizing the function of the

* Associate, MacFarland, Colley, Blank and Jack, Columbia, Tennessee. For a complete history of the Tennessee Constitution *see* Laska, *A Legal and Constitutional History of Tennessee, 1772-1972*, 6 Mem. St. U. L. Rev. 563 (1976).

1. Act of 1971, ch. 198 [1971] Tenn. Pub. Acts 510, *as amended* in 1974, Tenn. Code Ann. §§ 17-701 to 716 (Supp. 1976).

2. State *ex rel.* Higgins v. Dunn, 496 S.W.2d 480 (Tenn. 1973).

judiciary in formulating public policy and in allowing the expression of direct popular sentiment in the selection of judges.[3]

In crystallized form, the issue of selection is whether accession to the bench should be by executive or legislative appointment or by popular election. Intertwined with the issue of selection is the concomitant question of whether tenure in office should be for a term of years or for life, and if for life, under what conditions. Judicial selection and tenure, however, are only parts of the larger concern of maintaining an able, accountable judiciary. In seeking that goal other important considerations include: (1) codified standards of judicial ethics and conduct, including the means for their enforcement, (2) procedures for the removal of physically or mentally incompetent judges regardless of tenure, and (3) adequate compensation and retirement benefits for judges.[4] These interwoven considerations are, however, subordinate to the institutional problems of establishing a judicial selection process which satisfies society's legitimate expectations and interests.[5] Theoretically at least, if the selection process improves such that only well qualified judges are chosen, tenure and other considerations will become less important.

American state government has been the laboratory for experiment in diverse judicial selection systems. The constitutions of most early states eschewed the English and federal models of executive appointment and provided for appointment by the legislature. Subsequently, the Jacksonian democratic movement induced many states to change to selection by direct popular election with tenure reduced from life to a term of years. During the Progressive era, some states switched from a partisan to a non-partisan ballot. In recent years, many states have adopted the merit selection plan which attempts a compromise between elective and appointive methods.[6]

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3. *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 110-11 (1973) [hereinafter cited as FRIEDMAN]; H. GLICK & K. VINES, STATE COURT SYSTEMS 38 (1973) [hereinafter cited as GLICK & VINES]; 84 HARV. L. REV. 1002, 1005 (1971).

4. *See* Winters, *Judicial Compensation and Retirement*, SELECTED READINGS ON THE ADMINISTRATION OF JUSTICE AND ITS IMPROVEMENT 15 (1971).

5. "Too much thought has been given to the matter of getting less qualified judges off the bench. The real remedy is not to put them on." R. Pound, quoted in Hyde, *Judges: Their Selection and Tenure*, 30 J. AM. JUD. SOC'Y 152, 154 (1947).

6. *See* GLICK & VINES, *supra* note 3, at 39-41, in which is printed an illustrative table from which the following is adapted. The numbers reflect not the percentages of states which had a particular judicial selection system but rather the percentages of adoption or change to each system.

Tennessee has followed the general pattern. The first state constitution in 1796 provided for legislative appointment with life tenure; the second constitution in 1834 maintained the appointive selection procedure but reduced tenure to a term of years. In 1853 the constitution was amended to provide for direct popular election. The merit selection plan was adopted by statute in 1971, applicable to appellate but not to trial judges. This study traces the institutional evolution in the state and suggests societal and intellectual currents which may have been the unarticulated premises of lawmakers as they devised and modified the judicial selection system.

I. The Frontier Judiciary

The history of judicial selection and tenure in Tennessee began two hundred years ago with the efforts of early settlements to institute local government.[7] The first settlers along the Watauga River were uncertain whether they fell under the jurisdiction of Virginia or North Carolina. In any event, their remoteness from Williamsburg and Hillsborough precluded either colony from providing them with courts, administrators, or military organizations. The exigency of the situation provided the impetus for self-government. Accordingly, a compact, which served both as a constitution and a local code of laws, was drafted and signed by all adult male settlers.[8]

In its failure to separate legislative, executive and judicial functions, the Watauga Compact of 1772 reflected the immediate necessity for simple, efficient government. The settlers convened

Initial Adoption and Change of Judicial Selection Systems in the American States by Historical Periods

Method	1776-1831	1832-1885	1886-1933	1934-1968
By legislature	48.5%	6.7%	0.0%	0.0%
Gubernatorial appointment	42.4%	20.0%	10.7%	5.6%
Partisan election	9.1%	73.3%	25.0%	11.1%
Nonpartisan election	—	—	64.3%	11.1%
Merit selection plan	—	—	—	72.2%

7. *See* Burch, *Important Events in the Judicial History of Tennessee*, 15 Tenn. L. Rev. 220, 220-24 (1938) [hereinafter cited as Burch].

8. *See* J. Caldwell, Studies in the Constitutional History of Tennessee 6-12 (2d ed. 1907) [hereinafter cited as Caldwell]; 1 J. Moore & A. Foster, Tennessee, The Volunteer State 1769-1923, at 63-80 (1923) [hereinafter cited as Moore & Foster].

and elected a court of five members to serve as the single governing body. The court held sessions at regular intervals and adopted the law of Virginia as its guide. It settled disputes among the settlers, tried and sentenced criminals, supervised the recording of deeds and wills, issued marriage licenses, and handled whatever other problems the settlement engendered. Although it possessed broader powers, it was essentially Tennessee's first court; its members were elected and evidently served as long as they were willing.[9]

A second Tennesse experiment in self-government occurred a few years later in a settlement farther west on the Cumberland River. James Robertson, leader of the Watauga settlement and a member of its court, led a band of settlers to the Cumberland in 1780. Although North Carolina had preempted the Watauga government by asserting its jurisdiction over the Tennessee territory, the Cumberland settlers, in their initial remoteness, followed the example of the Wataugans and formed a local government through a constitution signed by all adult male settlers.[10]

Like the constitution of Watauga, the Cumberland Constitution provided for no separation of powers. The settlers elected a twelve-member court of "Judges, Triers, or General Arbitrators," presided over by Robertson. Although this court, like the Watauga court, exercised all governing powers, its primary functions were to settle private disputes and to act as a criminal court.[11] The Cumberland Constitution, however, reflected an express concern for the accountability of its judges:

> [A]s often as the people in general are dissatisfied with the doings of the Judges or Triers so to be chosen, they may call a new election at any time . . . and elect others in their stead, having due respect to the number now agreed to be elected at each station, which persons so to be chosen shall have the same power with those in whose room or place they shall or may be chosen to act.[12]

The third experiment in self-government was dissimilar to both the Watauga and Cumberland efforts. In 1785, John Sevier, a former member of the Watauga court and fresh from service in the Revolutionary War, led the movement for an independent

9. *See* CALDWELL, *supra* note 8, at 15-18, 23-25; MOORE & FOSTER, *supra* note 8, 68-70, 76-77; Burch, *supra* note 7, at 220-23.

10. *See* CALDWELL, *supra* note 8, at 32-38; MOORE & FOSTER, *supra* note 8, at 103-04, 108-15; Burch, *supra* note 7, at 223.

11. *See* MOORE & FOSTER, *supra* note 8, at 108-13.

12. *Id.* at 110.

state in East Tennessee. A constitution and declaration of independence for the State of Franklin was drafted at a convention in Jonesboro. This document expressly provided for separation of legislative, executive, and judicial power into three branches of government. Provision was made for judges to be elected by joint ballot of the two legislative houses. Judges were to serve during their good behavior, subject to the legislature's impeachment power.[13] The judicial provisions, like the entire constitution, were taken from the North Carolina Constitution,[14] a fact that probably indicates recognition by Tennessee leaders that their separatist movement would gain respectability if founded upon a constitution patterned after those of the existing states.

The Franklin government, like its predecessor, was short-lived. Following an interlude as a territory of the federal government, Tennessee became the sixteenth state of the Union in 1796.[15] In January of that year, fifty-five delegates convened in Knoxville to draft a constitution for statehood. This document, as was the Franklin constitution, was modeled on the constitution of North Carolina with which the delegates were most familiar.[16] Resembling other early state constitutions,[17] it made the popularly elected legislature, or general assembly, preeminent. This was accomplished in part by granting the legislators the power to elect most major state officials.[18]

The convention delegates apparently never doubted that judges would be selected by the legislature. The original draft of the constitution established one superior court of three judges, a court of pleas and sessions, and such inferior courts of law and equity as the legislature might establish, but the draft made no reference to judicial selection and tenure.[19] On the motion of James Robertson, these provisions were stricken in favor of provisions based directly on the North Carolina Constitution. Article V vested the judicial power of the state "in such superior and inferior courts of law and equity" as the legislature might there-

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13. *See* CALDWELL, *supra* note 8, at 46-76; MOORE & FOSTER, *supra* note 8, at 118-28; Burch, *supra* note 7, at 225.

14. *See* MOORE & FOSTER, *supra* note 8, at 122.

15. *See id.* at 144-54, 276-77.

16. *See id.* at 155-56.

17. *See* R. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 7-8 (1971) [hereinafter cited as ELLIS]; FRIEDMAN, *supra* note 3, at 106.

18. The legislature appointed all major state officials except the governor. The governor was popularly elected, but given little authority. TENN. CONST. art. II (1796); *see* L. GREENE & R. AVERY, GOVERNMENT IN TENNESSEE 13-14 (2d ed. 1966).

19. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF 1796, at 16.

after establish.[20] The article further provided that: "[t]he general assembly shall, by joint ballot of both houses, appoint Judges of the several courts of law and equity; also an attorney or attorneys for the state, who shall hold their respective offices during good behavior."[21] Judicial tenure was made subject to the legislature's power of impeachment.[22]

The most serious defect of the first state constitution was that it made the courts dependent upon the legislature not only for the appointment of judges but for their organization and very existence.[23] There were no constitutionally specified courts, only those "as the legislature shall from time to time direct and establish,"[24] a fact that subsequently led to instability.[25] Although this defect and others in the Constitution would soon become apparent, the delegates presumably were well pleased with their efforts. At least provision had been made for a court system and the expectation was that the judiciary would remain in the realm of private dispute settlement, detached from matters of public controversy. As a result, the method of judicial selection and tenure was not the subject of much concern in 1796.[26]

II. Jacksonian Democracy and the Judiciary

During the early 1800's, the legislature labored to establish sufficient courts to accomodate the state's rapidly growing population and vested property interests.[27] The task was not accom-

20. *Id.* at 23; *see* Sanford, *The Constitutional Convention of 1796*, 15 Proceedings of the Bar Ass'n of Tenn. 92, 117-18 (1896).

21. Tenn. Const. art. V, § 2 (1796).

22. *Id.* art. IV.

23. *See* Caldwell, *supra* note 8, at 148-50.

24. Tenn. Const. art. V, § 1 (1796).

25. *See* Caldwell, *supra* note 8, at 150, 164-73; White, *The Legislative Fathers of our Judiciary*, 23 Tenn. L. Rev. 8 (1953).

26. Tennessee's method of judicial selection was consistent with that of most of the other states in 1796. Seven states—Connecticut, New Jersey, North Carolina, Rhode Island, South Carolina, Vermont and Virginia—provided for appointment of judges by the legislature. Gubernatorial appointment, most often with the consent of a legislative body or council, was employed in Delaware, Kentucky, Maryland, Massachusetts, New Hampshire, New York, and Pennsylvania. It is not clear what method was in effect in Georgia. In 1796, there was little if any support evidenced for popular election of judges. Tenure in almost every state was "during good behavior." E. Haynes, The Selection and Tenure of Judges 101-35 (1944)[hereinafter cited as Haynes].

27. *See* Caldwell, *supra* note 8, at 164-73; Moore & Foster, *supra* note 8, at 275, 334, 337, 395; Broemel, The Beginning of a Court System, A Study of Tennessee Courts, (published by the Executive Secretary of the Tennessee supreme court). Regarding Tennessee's rapid population growth and transformation from a frontier to an agricultural economy, *see* Caldwell, *supra* note 8, at 186-89, 200-01.

plished smoothly. In addition to the recurring problem faced by the legislature of allocating equity jurisdiction among courts,[28] the courts themselves were becoming politically controversial.[29] Allegations of judicial misconduct and threats of impeachment were a recurring problem.[30] The distrust of the citizenry for lawyers and their alien common law grew as the populace became more confused by a complex makeshift court system.[31]

As a natural result of the changing conception of the judicial function, the role of the judiciary was becoming a politically sensitive issue in the early 1800's. The drafters of the first Tennessee constitution in 1796 gave little thought to the judiciary because they perceived the judicial function as apolitical. The eighteenth-century view of the common law was that of a static body of precedent based on widely-held assumptions of natural law. Judges were fond of drawing a rigid distinction between the respective roles of the legislature and the courts. The frequently articulated dogma was that judges did not make law but merely applied pre-existing legal rules to litigated fact situations.[32]

The conception of the apolitical judge could not survive the realities of experience. Judges in the American states did not invariably follow common law precedent, but adapted it to new conditions.[33] Men appointed to the bench usually had political backgrounds and were not always willing to purge partisanship from the reasoning of their decisions or the phrasing of their court opinions.[34] Drawn from the first generation aristocracy of the fron-

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28. *See* MOORE & FOSTER, *supra* note 8, 334, 337, 395. The lack of uniformity in equity-law allocation remains a source of confusion and complaint even today. *See* THE INSTITUTE OF JUDICIAL ADMINISTRATION, THE JUDICIAL SYSTEM OF TENNESSEE 51-57 (1971); Overton, *The Judicial System in Tennessee and Potentialities for Reorganization*, 32 TENN. L. REV. 501, 524-34 (1965).

29. *See* CALDWELL, *supra* note 8, at 149-50.

30. *See id.* at 173-76. Judge David Campbell of the state's highest court was impeached, but acquitted, in 1803 on a charge of accepting a bribe from a litigant. MOORE & FOSTER, *supra* note 8, at 309-10. In 1812, a circuit judge, William Cocke, was impeached and removed from office. *Id.* at 337.

31. *See* CALDWELL, *supra* note 8, at 169-75. *See generally* ELLIS, *supra* note 17, at 112-14; FRIEDMAN, *supra* note 3, at 81-82, 265; HAYNES, *supra* note 26, at 95-97; Horwitz, *The Emergence of an Instrumental Conception of American Law*, 1780-1820, LAW IN AMERICAN HISTORY 287, 305, 310 (D. Fleming and B. Bailyn eds. 1971) [hereinafter cited as Horwitz].

32. *See* Horwitz at 287, 297-98.

33. "By the . . . common law I mean our own precedents, practice and reports, and the English reports and other books usually considered the depositories of the common law before the Revolution, making in all cases the necessary allowances for its applicability and suitableness to our situation." Stump v. Napier, 10 Tenn. (2 Yer.) 35, 48 (1921). *See* FRIEDMAN, *supra* note 3, at 146.

34. *See* FRIEDMAN, *supra* note 3, at 113, 116, 121; Horwitz, *supra* note 31, at 146.

tier, judges zealously promoted an orderly system of law and mores. They began to give instructions to jurors, to declare certain matters as questions of law for the court, not the jury, to decide, and to set aside jury verdicts as contrary to law.[35]

The single most significant manifestation of the changing conception of the judicial function was the emergence of the doctrine of judicial review.[36] The power to invalidate a legislative act as unconstitutional was recognized by Chief Justice Marshall in 1803 in the case of *Marbury v. Madison.*[37] State judges quickly adopted Marshall's view of the scope of judicial power.[38] In the early Tennessee cases of *Williams v. Register*[39] and *Bristoe v. Evans,*[40] Judge Overton reviewed and sustained acts of the legislature, but in dictum he endorsed the power of courts to invalidate statutes. In the *Bristoe* case he stated:

> [C]ourts presume that every act of the legislature is constitutional. In deference to the legislative organ of the government, this presumption necessarily arises. Legislators are under the same obligation to observe the provisions of the Constitution, that is incumbent on this court. But so long as the judiciary is a separate and independent branch of the government, it must result that, if a legislative act should be plainly and obviously opposed to the Constitution, the judiciary is incapable of observing the injunctions of the law and disregarding the constitution at the same time. One or the other must be dropped, and, as the Constitution is paramount to any law the legislature can make in opposition to it, the Court is left without any alternative. . . . So far as [constitutional] authority is exceeded, the act is void. . . .[41]

The rationale offered by the early courts in support of the doctrine of judicial review was that in republican government, sovereignty resided in the people and not in any single branch of government. Through a constitution the people delegated limited powers to government, and when a branch, particularly the legis-

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35. *See* Horwitz, *supra* note 31, at 323-24, 326. Regarding the aristocratic status of the bench and bar, *see* A. de Tocqueville, 1 Democracy in America 282-90 (Vintage Books edition 1945); L. Hartz, The Liberal Tradition in America 102-03 (1955); R. Hofstadter, The American Political Tradition 44-47 (2d ed. 1973) [hereinafter cited as Hofstadter].

36. *See* Ellis, *supra* note 17, at 8-9; Friedman, *supra* note 3, at 107; Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860,* 120 U. Pa. L. Rev. 1166 (1972) [hereinafter cited as Nelson].

37. 5 U.S. (1 Cranch) 137 (1803).

38. *See* Nelson, *supra* note 36, at 1167-70.

39. 3 Tenn. (1 Cooke) 213 (1812).

40. 2 Tenn. (2 Overt.) 341 (1815).

41. *Id.* at 345-46.

lature, acted contrary to the constitutional will of the people, that action had to be declared void. Given their power to interpret the law, the courts took it upon themselves to negate statutes they construed as violating the constitution.[42] Although at first they sidestepped the review of politically sensitive statutes, inevitably courts found themselves in the political thicket.[43] In 1831, the Tennessee supreme court voided a statute which had granted the state bank special remedies in suits against defaulting debtors.[44] Three years later the court struck down a statute which had denied equitable remedies to manumitted slaves in their attempt to secure their freedom.[45] These decisions brought the court into the two most important class controversies of the period, debtor versus creditor and black versus white.[46]

Finding themselves exposed to controversy, judges enunciated new justifications for their newly discovered power.[47] In 1831 the Tennessee supreme court declared that judicial review was needed "to secure to weak and unpopular minorities and individ-

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42. *See* Nelson, *supra* note 36, at 1170-71.

43. *See id.* at 1173-78.

44. Bank v. Cooper, 10 Tenn. (2 Yer.) 529 (Special Court 1831), a unique case in which a court declared itself unconstitutional and void. Each of the three judges wrote an opinion and several grounds were offered for holding unconstitutional the statute which created both the court and special remedies for the state bank. Among the grounds were that the act operated retrospectively, that it denied litigants a jury trial, that it was partial, not general, in application and thus an improper legislative act. Ten years earlier, in Townsend v. Townsend, 7 Tenn. (1 Peck) 1 (1821), the state's highest court had held unconstitutional a statute delaying judgment executions unless the plaintiff agreed to satisfaction by notes on the state banks.

45. *See* Fisher's Negroes v. Dabbs, 14 Tenn. (6 Yer.) 78 (1834).

46. The actions of the court in striking down the statutes in the state bank and the manumitted slaves cases were not the only assertions in the 1830's of its power and independence from the legislature. Illustrative is Jones' Heirs v. Perry, 18 Tenn. (10 Yer.) 44 (1836) in which the plaintiffs were minors whose guardians had secured a special act of the legislature authorizing the sale of a tract of the deceased Jones' land to pay debts allegedly owed by Jones. The court held the statute unconstitutional on grounds (1) that the legislature had invaded the judicial province by adjudicating that Jones had been in fact indebted and by ordering a sale of his land to pay the debts, and (2) that such a statute was outside the proper function of the legislature, which was to enact statutes of general, not special, applicability. The court took special pains to refute the argument that the legislature was the sovereign constituent of a dependent judiciary:

> Sovereignty resides in the people. . . .
>
> The fact that the constitution may prescribe that the mode of appointing the judges shall be by the legislature does not constitute the legislature the [courts'] constituent. . . . [T]he legislature is not sovereign, . . . it is not the constituent of the courts, nor are they its agents. . . .

Id. at 55.

For other instances in which the court voided statutes of limited applicability, *see* Officer v. Young, 13 Tenn. (5 Yer.) 263 (1833); Tate v. Bell, 12 Tenn. (4 Yer.) 167 (1833); Wally's Heirs v. Kennedy, 10 Tenn. (2 Yer.) 489 (1831).

47. *See* Nelson, *supra* note 36, at 1181-84.

uals equal rights with the majority. . . ."[48] That declaration is illustrative of a fundamental change in the judiciary's conception of its function. Its function was no longer considered to be limited to private dispute settlement, but encompassed responsibility for broader societal interests. At its inception judicial review represented a revolutionary perception of the judicial role. The judge's robe no longer cloaked his political interests or his personal aspirations for the society of which he was a member. Decisions were sometimes based on partisan considerations, and often were of weighty impact on the body politic. Judges, legislators, and the public were becoming conscious of the fact that judges did indeed make law and did so with increasingly explicit reliance on expediency and public policy.[49]

With this background of change, it is not surprising that in 1834 when a convention was called to rewrite the Tennessee constitution, the delegates viewed in a new light the question of judicial selection and tenure. This time the drafters of the constitution included many who thought judges ought to be directly accountable to the electorate if they, like the governor and legislators, were to exercise significant political power. Five unsuccessful resolutions were introduced to provide for the popular election of judges.[50] There were also numerous efforts to erode the security of tenure. Proposals to compel mandatory retirement of judges at age sixty[51] and to limit judges to one term of a specified number of years[52] were not adopted, but the delegates did reduce tenure from life to a term of twelve years for members of the newly established supreme court and eight years for other judges.[53] Although it had previously held the power of impeachment, the legislature was given further control over the judiciary by addition of the power to remove judges by a two-thirds vote of both houses. Unlike impeachment, this removal could be for whatever cause the legislature deemed sufficient.[54]

The newly asserted power of the judiciary to make law was not the only reason judicial terms in office were being given closer

48. Wally's Heirs v. Kennedy, 10 Tenn. (2 Yer.) 489, 491 (1831). *See also* Jones' Heirs v. Perry, 18 Tenn. (10 Yer.) 44, 52 (1836).

49. *See* Nelson, *supra* note 36, at 1179-80, 1184-85.

50. Journal of the Constitutional Convention of 1834, at 27, 34, 39, 53-54, 96-97, 229 [hereinafter cited as Journal of 1834].

51. *Id.* at 49-51, 232-33.

52. *Id.* at 233-34.

53. Tenn. Const. art. VI, §§ 3, 4 (1834); Journal of 1834 at 163-77.

54. Tenn. Const. art. VI, § 6 (1834).

scrutiny. An additional ingredient of the time was the rising spirit of Jacksonian democracy.[55] Heirs of Jefferson's ideological struggle against a government controlled by the aristocratic, mercantile elite, the democrats of the 1820's and 1830's were seeking the political power necessary to advance the economic expectations of the emerging agrarian and laboring middle class.[56]

The reforms which these democrats promoted were designed to broaden public participation in the machinery of government and make government accountable to popular will. Conceiving democracy as a weak government directly controlled by a political majority of white males, they advocated liberal suffrage, reduction or elimination of property qualifications for holding public office, frequent popular elections, short terms of office and legislative supremacy.[57] These political measures were adjunctive to the predominant motives of the Jacksonians, which were to undercut the economic power of the eastern elite and bureaucracy, destroy special privilege, restrict governmental restraint of business enterprise and remove perceived obstacles in the path of enterprising farmers and laborers who desired to become prosperous capitalists.[58] To gain economic hegemony, the political process had to be brought under popular control.

Jacksonian democrats saw judges as politicians whose powers were largely unrestrained. Impeachment had proven to be a difficult and ineffective mechanism for the removal of unpopular judges.[59] The very notion of life-tenured public officials who could overturn acts of popularly elected legislatures was inconsistent with the democratic philosophy. Tenure, thus, was the first attribute of the judicial office to be successfully restricted in the states.[60] Andrew Jackson himself best expressed the democratic antipathy toward elitism and long tenure in public office in his first annual message to Congress in 1829:

> The duties of all public offices are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance, and I can not but believe that

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55. *See* Caldwell, *supra* note 8, at 230-40; Haynes, *supra* note 26, 80-100; Nelson, *supra* note 36, at 1180-81.

56. *See* Ellis, *supra* note 17, at 283-84; Hofstadter, *supra* note 35, at 49, 54-61, 65-66.

57. *See* Hofstadter, *supa* note 35, at 44.

58. *See id.* at 48.

59. *See* Friedman, *supra* note 3, at 116.

60. *See* Glick & Vines, *supra* note 3, at 10, 38; Haynes, *supra* note 26, at 90.

> more is lost by the long continuance of men in office than is generally to be gained by their experience . . . . In a country where offices are created solely for the benefit of the people no one man has any more intrinsic right to official station than another.[61]

In restricting the tenure of judges, the framers of the Tennessee constitution of 1834 followed the lead of Alabama and Mississippi, the latter state having also adopted popular election of all state judges in 1832.[62] In this action and in providing a more equitable property tax base and eliminating the property qualification for suffrage and for holding public office, the new Tennessee constitution reflected the influence of the democratic movement.[63] Even its seemingly incongruous elimination of suffrage for free blacks[64] was politically consistent with the democratic purpose of ensuring economic security for the white male majority.

The reformist spirit was not content with merely a reduction in judicial tenure. The idea of a controlled, accountable government and the belief in the competence of the average citizen to fill public offices by his vote with those of the same political convictions resulted in support of popular elections for all important state offices. Since by the 1830's judges were actively formulating law and public policy, it was inevitable that they too would be subjected to more direct popular control.[65] In the ten years after 1846, when New York followed the lead of Mississippi in adopting judicial selection by popular vote, fifteen of the twenty-nine states by constitutional amendment changed to the popular election of all or most judges for terms of years.[66]

Tennessee moved to the popular election of all state judges by constitutional amendment in 1853. In the six years before ratification of the amendment, judicial selection had been a major issue in the rivalry between state Democrats and Whigs.[67] Initially, supported by the Democrats, legislation calling for constitutional amendment first passed the House in January 1848. The Senate then deferred action on the bill until after the next gubernatorial election in 1849.[68]

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61. Quoted in HOFSTADTER, *supra* note 35, at 50.
62. *See* HAYNES, *supra* note 26, at 101, 117.
63. *See* CALDWELL, *supra* note 8, at 197, 199-202.
64. TENN. CONST. art. IV (1834); *see* CALDWELL, *supra* note 8, at 202-03.
65. *See* FRIEDMAN, *supra* note 3, at 110-11.
66. *See* HAYNES, *supra* note 26, at 100; 9 ARIZ. L. REV. 297, 298 (1967).
67. *See* 4 MESSAGES OF THE GOVERNORS OF TENNESSEE 1845-1857, at 333-43 (R. White ed. 1957) [hereinafter cited as White].
68. *See id.* at 333-34.

Elected in 1849, William Trousdale, a Democrat, was the first governor formally to propose popular election of judges.[69] His advocacy of that position in the campaign was encouraged by Andrew Johnson, who was himself engaged in a successful campaign for his fourth term in Congress. Johnson thought that the Democrats should advocate popular election of judges, the comptroller, the secretary of state and the treasurer, knowing that since "the Whigs have all the places" they would be opposed to the change.[70]

Johnson's conduit in relaying his proposed platform to Trousdale was Elbridge G. Eastman, editor of the staunchly Democratic paper, the *Nashville Union*.[71] That paper kept the issue before the public through editorials that cited the trend in other states toward popular election of judges, denounced opponents of the change as distrustful of the competency of people to choose public officials, and declared the main principle in controversy to be that "[n]o person should be allowed to hold an office contrary to the wishes of those upon whom the power is to operate."[72]

After Trousdale's election, a committee of the House issued a report stating that adherence to the English precedent of appointment of judges was without justification in America where government was responsible directly to popular control. It was believed that the people were competent to choose capable judges, and that no system of selection could be more partisan and abusive than legislative appointment. Confidence was expressed that popular election would not degrade the bench: "We have no fear of the purity of the ermine being contaminated by popular contact."[73]

The act passed both houses with minimal opposition in December 1849 and February 1850, but needed to be passed again at the next legislative session before being submitted to the voters for ratification.[74] The proposed amendment thus became an issue in another gubernatorial campaign in 1851. In that election campaign even the victorious Whig candidate, William Campbell, supported the proposal.[75] After the election, the bill received final approval of both legislative houses with only one negative vote.[76]

69. Legislative Message, Oct. 22, 1849 in White, *supra* note 67, 295 at 301-02.
70. *See* 1 The Papers of Andrew Johnson 509 (L. Graf & R. Haskins eds. 1970).
71. *See id.*
72. White, *supra* note 67, at 337.
73. *Id.* at 341.
74. *See id.* at 343.
75. *See id.* at 409-10.
76. *See id.* at 449-52.

The amendment, which provided for popular election of all judges and reduced tenure of supreme court judges from twelve to eight years, was ratified in August 1853.[77]

In the same year that the amendment was ratified, Andrew Johnson was elected governor. As an initial promoter of a popularly elected judiciary, Johnson probably recognized the change as a potential way to root more Whigs out of public office.[78] It was an inevitably popular measure[79] both because it appealed to the common man's faith in his own judgment, expressed through the ballot, and because people generally were unhappy with courts, judges and lawyers. Johnson, however, incorrectly believed there was a momentum for broad reform and modernization of the court system. Legislation he proposed toward that end was never enacted.[80] The change to popular election of judges remained a singular, partisan response to the temper of the times and not the carefully deliberated part of general court reform it might have been.

III. The Inertia of Complacency and the Pull of Professionalism

The change to popular election of judges in the states did not

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77. *See id.* at 588.

78. Johnson, in initially proposing the popular election of more state officials in 1849, had predicted Whig opposition to such a change because most offices were at that time filled by Whigs. *See* note 70 *supra* and accompanying text. By the time of Johnson's gubernatorial election in 1853 it was becoming apparent that the Democrats were gaining ascendancy over the rival party. William Campbell in 1851 was the last Whig elected governor in Tennessee. *See* White, *supra* note 67, at 411.

79. By 1851 even a majority of the Whigs favored the proposed constitutional amendment. *See* White, *supra* note 67, at 409-10.

80. In his biennial legislative message of December 19, 1853, Johnson expressed the belief that the judicial tenure limitations imposed by the 1834 Constitution and the recent change to popular election of judges were in response to the public mood:

> These changes in the constitution have been effected in part, for the purpose of conforming the courts of the country, in their whole structure, to the wants and necessities of the people. There has been evident dissatisfaction with the courts of the country for a number of years past. The people find fault with the judges, complain of lawyers, and sometimes condemn jurors, affording conclusive evidence that there is a wrong somewhere. Delay, expense and perplexity of mind on the part of the litigants—confidence in the courts much impaired in the public estimation.

2 The Papers of Andrew Johnson 202 (L. Graf & R. Haskins eds. 1970).

Johnson portrayed the perpetuation of a dual court system of law and equity as the greatest single cause of confusion and discontent, and endorsed legislation to unify the court system. *Id.* at 203. Court reform bills before the legislature were never enacted. *Id.* at 203; White, *supra* note 67, at 571-72.

It is interesting to note that when he subsequently became President, Johnson sought to limit by constitutional amendment the tenure of federal judges. *See* Higley, *Tenure and Removal of Federal Judges*, 80 Case & Com. 23, 29 (1975).

have the profound results that some had hoped for and others had feared. Election campaigns generally were not very partisan. In fact, incumbent judges usually ran with no, or only nominal, opposition. Moreover, those elected most often had reached the bench initially through gubernatorial appointment.[81]

This pattern was established in Tennessee when, in the first popular election of supreme court judges held on May 25, 1854, the three incumbents on the court were returned without opposition.[82] The only spectacular contest for the supreme court occurred in 1910 when three incumbent judges bolted the Democratic party in disagreement over its prohibition position and were elected on an Independent Judiciary ticket with Republican support.[83] Such heated races were, however, rare. The *de facto* appointive system in the state was well described by an observer in 1947:

> Of the 42 justices who have served on our Supreme Court since 1846, 24 first ascended to that court by interim appointments by the Governor. Thus nearly 60 percent of the regular judges who have served on our Supreme Court during the last one hundred years have been appointed by the Governor in the first instance. My guess is that approximately one-half of the regular circuit judges and chancellors who have served during the last one hundred years were likewise appointed by the Governor in the first instance. The Governor is, generally speaking, a lawyer and even when he is not, he almost invariably seeks the advice of judges and lawyers before making judicial appointments. Judges appointed to serve out unexpired terms are generally re-elected. Even when a judge first reaches the bench through the election route, he is not as a rule selected by the electorate. He is selected by the party leaders, and the party leaders are generally lawyers who have considerable information as to their selectee's qualifications for judicial office. The election by the people is only a formal approval of such selection by the party leaders and that approval is generally obtained in Tennessee in an election in which there is no opposition.[84]

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81. *See* FRIEDMAN, *supra* note 3, at 323. Friedman notes that the elective system may have had a subtle effect upon decision-making or upon the form or language in which opinions were case. *Id.* at 324. *See also* GLICK & VINES, *supra* note 3, at 42.

82. *See* Phillips, *Our Supreme Court Justices*, 17 TENN. L. REV. 466, 468 (1942).

83. *See* MOORE & FOSTER, *supra* note 8, at 610-11. There were also charges in 1910 that the governor had tried unsuccessfully to intimidate the members of the supreme court into reversing the murder conviction of one of the governor's political allies. *Id.*

84. W. WICKER, PROCEEDINGS OF THE SIXTH ANNUAL SOUTHERN INSTITUTE OF LOCAL GOVERNMENT 14 (1947).

There were numerous factors contributing to the lack of active contests for judgeships. Lawyers were rarely willing to challenge incumbent judges before whom, if defeated, they would appear and plead. When a bold lawyer did enter an election, the members of the bar were reluctant to discuss publicly the relative merits of their brethren, and the electorate was left with an uninformed choice at the polls. The voters were thus likely to accept the designated candidate of a political party. Since after the Civil War the state was generally controlled by the Democratic Party, nomination by the Democrats to a seat on the bench was tantamount to election.

With the passage of years and absence of controversial elections, the notion of a popularly elected judiciary acquired the attribute of tradition reinforced by complacency. There were those, though, who continued to argue against the concept on grounds of policy. A serious effort was made at Tennessee's third constitutional convention in 1870 to return to the appointment of all state judges. There it was argued that:

> If our Judges are to be constantly looking forward to re-election, as they will be, and shaping their conduct accordingly—if they are to engage in strife and demoralizng contests for office—if they are to witness the zealous efforts of friends to retain them in place, and the determined endeavors of those who are not friends, to pull them down—they cannot, they will not, as long as human nature is what it now is—be independent and impartial.[85]

Information regarding the composition of Tennessee courts and the manner in which the judges first reached the bench is contained in *Appendix—Historical Data of the Supreme Court of Tennessee (1790-1940)*, 176 Tenn. 861 (1941) and in the opening pages of subsequent volumes of the Tennessee Reports. From those sources, the following can be gleaned—after the judicial elections of 1870 up through 1970, 25 judges first reached the supreme court through gubernatorial appointment and only 15 were initially elected. After 1918, only 2 judges first reached the supreme court by election, one in 1926 and the last in 1942. Of the 30 judges who went onto the various courts of appeal between 1930-1970, 25 first reached the court by gubernatorial appointment.

85. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF 1870, at 127. This statement was made in a Minority Report of the Committee on the Judiciary printed in the Journal at 126-32. A majority of the committee had proposed that the governor nominate and appoint supreme court judges with confirmation by the senate, and that all inferior judges be selected by popular election. *Id.* at 124. The Minority Report argued strongly for the removal of trial judges from elective politics. Noting that trial judges are directly brought in contact with the "prejudices and passions of the day," the Report opined that public confidence in trial judges would increase under an appointive system since people distrusted "those who habitually seek office before them." Judges compelled to look ahead to the necessity of re-election campaigns would not be able to escape the "infection" of politics and would have to learn "the arts of the political trickster." *Id.* at 127-29.

Although it proved unpersuasive to the 1870 Convention, the Minority Report does

The delegates to the convention of 1870 were not, however, in a mood for reform. They intended merely to restore the governmental system to what it had been before the war. Accordingly, they provided for the refranchisement of the white majority and endorsed the constitution of 1834 in all significant respects.[86] The delegates voted down all proposals to return to an appointive system for judges, to increase the judicial term of office,[87] or to specify in the constitution grounds which would warrant removal of judges by vote of both houses of the legislature.[88]

The dissatisfaction that did exist with selection by election was invariably found in the legal profession itself.[89] Lawyers who

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suggest that judicial selection considerations do differ at the trial and appellate court levels. On the one hand, trial judges are local judges, more visible to laymen than are appellate judges and more likely, if unpopular or controversial, to attract re-election opposition. An incumbent trial judge may feel overt or subtle pressures to tailor his judicial conduct or his decisions to the current feelings of a community majority. If he makes decisions which are unpopular with the majority, or with a vocal minority, he may find himself in the midst of a heated campaign for re-election which is unlikely to be determined on issues of who is better qualified by intellect and integrity for a judicial position. On the other hand, the fact that trial judges are more likely to be known either personally or by reputation by the people within their jurisdiction insures that selection by election will be on a more informed basis than is the case with appellate court candidates who run in state-wide campaigns. If it is assumed that judges are public officials who ought to be responsive to popular will as well as intellectually qualified and ethically responsible, a strong case for the election of trial judges can be posited.

86. *See* CALDWELL, *supra* note 8, at 297, 299-302. A leading member of the convention, A.O.P. Nicholson, cautioned the delegates: "Let us be careful; let us do no more than is absolutely necessary. In ten years from now all this must be done again." *Id.* at 300. Unfortunately, this prediction did not materalize. There have been limited constitutional conventions in recent years, but Tennessee's constitution today remains essentially the one written in 1834. *Id.* at 325-54.

87. *See* JOURNAL OF THE CONSTITUTIONAL CONVENTION OF 1870, at 208, 219, 222. The Journal reveals a myriad of proposals which, despite the conservative mood and result of the convention, indicate a significant dissatisfaction regarding judicial selection and tenure. Included were proposals that: (1) all judges be appointed by the governor with confirmation by the senate, *id.* at 25, 181-82, 205; (2) that all judges be appointed by the legislature in joint assembly, *id.* at 207; (3) that trial judges be nominated by an appointed supreme court and confirmed by the senate, *id.* at 67; (4) that no one be eligible for judicial position until he had had twenty-five years experience of practice at the bar, and that retirement be mandatory at age 70, *id.* at 76; and, (5) interestingly, that "no Indian, Asiatic, African, mulatto or mustee shall be allowed to vote in any election for judicial officers in this state." *Id.* at 218.

88. *See id.* at 225-30. There was a lengthy and divisive debate over article VI, § 6 which allows removal of judges from office by the legislature in addition to removal by impeachment. The convention rejected moves to specify in the constitution specific grounds, for example, "official corruption, or . . . continued neglect of duty, or continued incapacity of any kind to perform the duties of . . . office." *Id.* at 225. Apparently the delegates considered it important that the legislature retain an unlimited reserve power to remove judges from office.

89. *See* FRIEDMAN, *supra* note 3, at 324.

opposed the system did so in part because, as one writer has stated:

> The elective principle undermined the idea that no one but lawyers had the right to determine the proper outcome of cases, and that only strictly legal principles belonged in the armory of judges.[90]

In the twentieth century lawyers increasingly argued for an appointed bench on the grounds of professionalism.[91] Law itself was becoming more complex as it accommodated the expansion and problems of an industrialized, urbanized society. While popular elections might not produce enough unqualified judges to hinder an agrarian society, a highly organized commercial system demanded rational, skilled and flexible jurists.[92] Leading members of the national bar were particularly attentive to the needs of a business economy, and sensitive to abuses of the elective system occurring in large cities.[93]

It was only in the early part of the twentieth century that the bar became sufficiently organized to promote reforms concertedly within the law and the profession. After 1900, the American Bar Association and local bar associations grew in membership. As a result they became lobbyists for uniform acts, stiffened requirements for admission to the bar and enforced a code of professional ethics.[94] Aware that judicial elections were a sham in most states and a disgrace in some, leaders of the bar proposed the innovative merit selection plan for state judges.[95]

First promoted by the American Judicature Society, the merit plan was endorsed by the American Bar Association in 1937 and adopted in Missouri in 1940.[96] Other adopting states added modifications, but the essential features of the plan remain that of a nominating commission of lawyers and lay citizens submitting a list of screened candidates to the governor who would then appoint a judge from among the tendered candidates. The name of the appointed judge would appear uncontested on the ballot at

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90. *Id.*

91. GLICK & VINES, *supra* note 3, at 10-11, 41; *see* FRIEDMAN, *supra* note 3, at 333, 592.

92. *Cf.* ELLIS, *supra* note 17, at 257.

93. *See generally* GLICK & VINES, *supra* note 3, at 41. R. WATSON & R. DOWNING, THE POLITICS OF THE BENCH AND THE BAR (1969).

94. *See* FRIEDMAN, *supra* note 3, at 592-93; GLICK & VINES, *supra* note 3, at 41.

95. *See* FRIEDMAN, *supra* note 3, at 592; Winters, *The Merit Plan for Judicial Selection and Tenure—Its Historical Development*, 7 DUQUESNE L. REV. 61, 63-71 (1968).

96. *See* Winters, *The Merit Plan for Judicial Selection and Tenure—Its Historical Development*, 7 DUQUESNE L. REV. 61, 71 (1968).

public election with the voters indicating whether or not he should be retained in office.[97]

Beginning in the 1960's, the Tennessee Bar Association in conjunction with the Tennessee Law Revision Commission actively promoted judicial reform measures which the American Bar Association had been urging its members to support.[98] Patterned after promotional efforts in other states, the bar sponsored a lay citizens' organization to give a public interest image to the campaign.[99] An ambitious effort to call a convention to rewrite all the state constitutional provisions regarding the judiciary failed.[100] The reforms had to be sought piecemeal thereafter.

In 1971, the legislature enacted three reform bills supported by the Tennessee Bar Association. The merit selection plan was adopted for appellate-level judges;[101] a similar bill for trial court judges failed to pass.[102] A Judicial Standards Commission was established for the investigation and removal of judges for physical or mental unfitness.[103] In addition judicial salaries were substantially increased.[104]

The sponsor of the merit selection bill in the Senate stated in floor debate that the measure was intended to take judges out of politics and particularly out of the debasing practice of raising campaign funds, to provide for a more intelligent selection of judges, and unlike the federal system, to leave a method for the

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97. *See id.* at 63-64, 71-74.

98. *See* Bratton, *Court Modernization—A Beginning—How Say You?* 2 TENN. BAR. J. No. 4, at 13 (1966); Gullett, Legislative Program of Tennessee Bar Association, 3 TENN. BAR J. No. 1, at 5 (1967).

99. *See* Bratton, *Report on Tennessee Citizens' Conference to Improve the Administration of Justice,* 2 TENN. BAR J. No. 2, at 13 (1966); Winters, *Improvement through Citizen Committees,* ABA SECTION OF JUDICIAL ADMINISTRATION, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 138 (5th ed. 1971).

100. *See* TENNESSEE LAW REVISION COMMISSION, SPECIAL REPORT TO THE 85TH GENERAL ASSEMBLY concerning a bill to submit to the people the question of calling a limited constitutional convention to consider the revision of article VI of the Constitution relating to the Judicial Department, including all aspects of the judicial system and the administration of justice (1969); Bratton, *Court Modernization—A Beginning—How Say You?* 2 TENN. BAR J. No. 4, at 13 (1966).

101. Act of May 12, 1971, Ch. 198 [1971] Tenn. Pub. Acts 510, *as amended* in 1974, TENN. CODE ANN. § 17-701 (Supp. 1976).

102. *Synopsis of Minutes, Tennessee Bar Association 90th Annual Convention,* 7 TENN. BAR J. No. 3, at 17, 21 (1971). The TBA dropped its support of the bill when it became apparent that many state trial judges did not favor it. *Id.*

103. TENN. CODE ANN. §§ 17-801 to 816 (Supp. 1974).

104. Act of May 17, 1971, ch. 226 [1971] Tenn. Pub. Acts 630, *as amended* in 1974, TENN. CODE ANN. § 8-2303 (Supp. 1976). *See Synopsis of Minutes, Tennessee Bar Association 90th Annual Convention,* 7 TENN. BAR. J. No. 3, at 17, 21 (1971).

voters to remove judges they found unfit or unpopular.[105] An additional consideration probably in the minds of some legislators was the recent resurgence of the Republican party in the state and the increased likelihood of contested and partisan judicial elections. The merit selection bill had bipartisan support in both houses, with almost every lawyer in the legislature voting in favor.[106]

The merit selection plan aroused little controversy or opposition in 1971 when enacted. The professional interests of the bar had prevailed in a climate of public unconcern.[107] Soon thereafter, however, the plan became embroiled in the intensifying political struggle between the Republican governor and his Democratic opponents in the legislature. The governor's mishandling of his first appointment to the supreme court kindled bills in the legislature to repeal the merit plan. When it became apparent that through imminent retirements from that court the governor would be appointing a majority of its members, Democrats in the legislature decided it was time to return to popular election of supreme court judges.[108] Over the governor's veto, and amid charges of vote-swapping on other key legislative issues, the merit selection plan as it applied to the supreme court was repealed in 1974, leaving it intact for intermediate appellate court judges.[109]

Judicial terms expired in 1974. The political parties put forward slates of candidates for the supreme court seats. Modest campaigns were waged in which no real issue emerged.[110] The slate of the majority Democratic party easily won election. In the midst of the campaign the candidates for the court all concurred that some sort of appointive system was preferable to electioneering.[111] Their view probably is shared by the leaders of the organized bar of the state, but the legislature is unlikely to consider again the issue in the near future. Without doubt, the public does not perceive the question as one of overriding importance.

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105. Sen. Edward C. Blank II, Senate debate of April 29, 1971, on tape at the Tennessee State Archives, Nashville.

106. *See* S. JOUR. [Tenn. 1971] 739-40; H.R. JOUR. [Tenn. 1971] 1047.

107. *See* Nashville Tennessean, March 26, 1973 at 1.

108. *See* Nashville Tennessean, April 18, 1973 at 1.

109. Act of Feb. 14, 1974, ch. 433 [1974] Tenn. Pub. Acts 47.

110. *See* Nashville Tennessean, July 21, 1974, § B at 2. It is indeed difficult to think of issues which would be both appropriate and germane in contested judicial elections except where the candidates are willing to discuss their relative professional qualifications. Campaign promises beyond those to be impartial and diligent would certainly compromise and demean the judicial position.

111. See *id.*

CONCLUSION

A study of the political evolution of the court perhaps indicates the present system of judicial selection is not the best available. Resolution of current problems, however, must start with an understanding of their origins. Tennessee's method of selecting judges is a product of intellectual assumptions and social aspirations which have themselves continually evolved throughout its history. The state's present dual system, whereby trial judges and judges of the highest court are elected, while intermediate appellate judges are appointed, is a historical anomaly which should be corrected to reflect public interest as it is presently perceived.

On balance, the merit selection plan best serves the public interest.[112] People are likely to have more confidence in a competent, nonpartisan judiciary selected by more knowledgeable citizens than they are in judges they elect without sufficient information as to qualifications. The plan's safety valve is the voters' option to refuse to return an incumbent to office.[113] For the sake of consistency, one system, preferably the merit plan, should be used in selecting all judges. Regardless of which system is used, it should be apparent that members of the bar have an obligation,

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112. A recent study indicates that there is little statistically meaningful difference between elected and appointed judges in competence or performance on the bench, and that a judicial selection system is a policy choice between, on the one hand, liberalism and more direct public participation in government, and, on the other hand, non-partisan selection based on technical competence. *See* S. NAGEL, COMPARING ELECTED AND APPOINTED JUDICIAL SYSTEMS 36-38 (1973).

113. It has been pointed out that the practical effect of the merit plan is to reinstate life tenure for incumbent judges. *See* GLICK & VINES, *supra* note 3, at 46. That is not a necessary result and would not be the case if those best informed about the qualifications of incumbent judges, viz. the practicing members of the bar, would be willing to publicly discuss those qualifications or lack thereof.

heretofore neglected, to contribute actively and openly toward making the governor's or the voters' choices informed ones.[114]

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114. This is an affirmative duty of a lawyer. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration No. 8-6 (footnotes omitted):

> Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified, by personal observation or investigations to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified. It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and should strive to have elected or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

The Tennessee Bar Association has proposed the following "Missouri Plan" of selection to the 1977 Limited Constitutional Convention:

> *Selection of Appellate Judges and Attorney General*
>
> 23. Each Justice of the Supreme Court and each Judge of the Court of Appeals and the Attorney General shall be appointed by the Governor from three nominees for each vacancy selected by the Judicial Nominating Commission.
>
> 24. At the next general election occurring more than two years after the date of appointment and, thereafter, at the general election next preceding the expiration of each eight year term, the name of each Appellate Judge and the Attorney General seeking re-election shall be submitted to the electorate for retention or rejection.
>
> 25. The incumbent Justices of the Supreme Court seeking election as Justices, incumbent Judges of the other Appellate Courts seeking election as Judges of the Court of Appeals, and the Attorney General seeking election as the Attorney General shall be submitted to the electorate for retention or rejection at the general election in 1982.
>
> 26. To the extent possible, an equal number of Justices of the Supreme Court and an equal number of Judges of the Court of Appeals shall be residents of each of the three Grand Divisions of the State.
>
> *Selection of Other Judicial Officers*
>
> 27. Judges of the District Court, Judges of the Sessions Court, District Attorneys General and District Public Defenders shall be elected by the people of the District in which they serve. Vacancies in such offices shall be filled as shall be prescribed by statute.

Tennessee Bar Association, Proposed Judicial Article, Tennessee Constitution Article VI (1977).