Court Historical Society
NEWSLETTER Eastern District of Tennessee

September 2018

A Little-known Story About A Jury Oath

The manner in which jurors were given their oath in one division of this court in the 1920s and continuing to the early 1980s was once criticized by the Sixth Circuit Court of Appeals as "loose and unsafe."

This point was brought to our attention by Nashville lawyer **Doug Pierce**, a member of the Court Historical Society who served as a law clerk for **Judge Robert L. Taylor** from 1982 to 1984. Following his service with the court, Doug began the practice of law in Nashville with the firm of King & Ballow, where he remains today.

What caused him to recall the appellate court's admonition was our article in the July issue about the late **U.S. District Judge Xenophon Hicks**, who was the target of that criticism during his tenure on the district bench, 1923 to 1928.

Doug recalled how he, as a young law clerk, was surprised to see that the Sixth Circuit criticized Judge Taylor in 1984 for his jury swearing practice. "Being a new lawyer, it never occurred to me that there was anything amiss about what apparently was standard procedure. Apparently the only other precedent for the way Judge Taylor did it was the way Judge Hicks did it in the 1920s. The Sixth Circuit told Judge Hicks not to do it that way anymore, but it looks like it continued for another 60 years," up through Judge Taylor's tenure, Doug said.

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We asked Doug to write the following article detailing the history of that practice and the appellate court's criticism of it.–EDITOR

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LEGACY OF JUDGE HICKS CONTINUED INTO THE 1980s

By Douglas R. Pierce

Doug Pierce

The last edition of this newsletter featured Judge Xenophon Hicks, who served as a judge in this district from 1923 until 1928, when he was appointed to the U.S. Court of Appeals for the Sixth Circuit. While on the bench in this district, his method of swearing juries was strongly criticized by the Sixth Circuit. It appears, however, that his practice of not giving an oath to jurors at the end of voir dire in each case, which may have pre-dated him, continued in this district long after Judge Hicks.

In 1982, Judge Taylor was the only judge in the Eastern District of Tennessee due to the death of **Judge Frank W. Wilson** and the retirement of **Judge Charles G. Neese**. As a result, Judge Taylor tried a Northeastern Division (Greeneville) case, *United States v. Martin*, and he tried it in Knoxville. After defendants' conviction the Sixth Circuit explained:

> This case presents a bizarre and disturbing set of facts in which respected citizens of Greeneville, Tennessee, including a former district attorney in the 20th Judicial District of Tennessee, his wife, two deputy sheriffs and a banker, conspired with others to import 1,500 pounds of marijuana into the United States from Columbia, South America.

U.S. v. Martin, 740 F2d 1352, 1355 (6th Cir. 1984).

On appeal the Sixth Circuit observed:

> Appellants raise a significant question concerning the method by which the jurors were sworn. The members of the jury panel were sworn en masse on the first day of their terms, rather than following voir dire for each particular case. This has been the procedure followed in the Northern Division of the Eastern District of Tennessee for over twenty years.

Id at 1358. Although the Sixth Circuit would not reverse the convictions on this issue, the court did say that it did not approve of this practice and that it should be prospectively discontinued. The court noted that the appellants had not objected to the method of administering the oath on, before or during trial. The appellants said they were unaware that the jury had not been sworn following voir dire until after the jury returned the verdict. The Court of Appeals found this explanation "scarcely credible." *Id.*

Significantly, as it relates to Judge Hicks, the Court of Appeals stated, "This case is similar to *Walker v. United States*, 13 F.2d 844 (6th Cir.), *cert. denied*, 273 U.S. 726, 47 S. Ct., 237, 71 L.Ed. 860 (1926) which also arose from the Eastern District of

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Tennessee's method of wholesale swearing of the jurors." 740 F.2d at 1358. *Walker* was a case in which Judge Hicks was the trial judge. Interestingly, the *Martin* case from the 1980s was a case of illegal drugs and the *Walker* case, which arose during the height of Prohibition, was a case involving conspiracy to transport intoxicating liquor.

In the 1926 *Walker* case the Sixth Circuit referred to the practice in which jurors were sworn as "a Tennessee practice" and the court found "it is obviously loose and unsafe." 13 F.2d at 845. In neither *Walker* nor *Martin* case would the Court of Appeals reverse the convictions. It did state, however, "We strongly disapprove of the practice of swearing the venire followed here. As we stated in *Walker*, we question whether such practice is 'consistent with the dignity and effectiveness which should attend federal court trials'." 740 F.2d at 1358, quoting, 13 F.2d at 845. Fifty-eight years after its decision in *Walker,* the Sixth Circuit stated, "In cases tried after this date where objection is made to the procedure followed here, we will not hesitate to reverse." 740 F.2d at 1359.

Your author is not aware of any subsequent cases in which this manner of jury selection became an issue. In *Martin* the Sixth Circuit had said that this practice had been followed in the Northern Division of the Eastern District "for over twenty years"; however, the court did not explain the source of this information. Presumably one of the attorneys in the case provided an affidavit or other evidence of the longevity of this procedure. It is also possible that the practice had never changed from the time Judge Hicks presided over the *Walker* case until Judge Taylor presided over the *Martin* case. Judge Taylor was appointed to the bench in 1949 and he may have followed existing practice and continued this same practice from the date of his appointment.

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EDITOR'S NOTE–The juror oath practice criticized by the Court of Appeals in the above article stopped at the end of Judge Taylor's career. We know that the standard procedures for administering the various oaths to jurors were followed in Judge Neese's trials. We presume that they were followed by Judge Wilson, although we do not have first-hand knowledge of this. Standard procedures have been followed by all of this district's judges since.

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Juror Trial Oaths from the "Benchbook for U.S. District Court Judges"

Administered at juror qualification or at voir dire:

Do you solemnly swear [or affirm] that you will truthfully answer all questions that shall be asked of you regarding your qualifications as a juror in the case now called for trial, so help you God?

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For jurors to try civil cases:

Do each of you solemnly swear [or affirm] that you will well and truly try the matters in issue now on trial and render a true verdict according to the law and the evidence, so help you God?

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For jurors to try criminal cases:

Do each of you solemnly swear [or affirm] that you will well and truly try and a true deliverance make in the case now on trial and render a true verdict according to the law and the evidence, so help you God?

Do You Have An Article?

Just as we asked member Doug Pierce to write an article for this issue, we ask you–any of our members–to do the same. If you know of a subject related to the court--an event or a person--that you think would interest other members, draft an article and submit to us. Send it to either the editor's email address or postal address in the masthead of this newsletter. Or you may call to discuss it.–EDITOR