

**LINCOLN MEMORIAL UNIVERSITY
LAW REVIEW
BLOG- “OFF THE RECORD”**

VOLUME 9

FALL 2021

ISSUE 1

**MIXED MESSAGING – SHOULD JUDGES OF THE
TENNESSEE SUPREME COURT BE CALLED
“JUSTICES?”**

*Ryan E. Cox*¹

Most people refer to the final arbiters of the Volunteer State’s laws and constitution as “justices.” The use of the term “justice” is so widely accepted that no one seems to question its legitimacy or correctness; however, aside from the Chief Justice, there is no constitutional basis,² and the Tennessee Code lends little support to its continued usage.³

¹ Mr. Cox is a second-year law student at Lincoln Memorial University, Duncan School of Law in Knoxville, Tennessee. He graduated from the University of Tennessee in 2019 with a B.A. in Political Science, summa cum laude. Mr. Cox serves as an Associate Editor of the LMU Law Review. He can be reached at ryan.cox@lmunet.edu.

² See TENN. CONST. art. VI.

³ There are, as will be discussed below, a handful of provisions in the Tennessee Code that do use the term “justice” with ambiguous reference to the judges who currently sit or did sit on the state’s highest court. See e.g., Tenn. Code Ann. §§ 17-2-302 to -307 (2020).

The chartering language for the Tennessee judiciary, laid out in Article VI of the Tennessee Constitution of 1870, vests the judicial power of the state in “one Supreme Court and in such Circuit, Chancery, and other Inferior Courts as the Legislature shall from time to time, ordain and establish; in the Judges thereof, and in Justices of the Peace.”⁴ More particularly, the state Constitution provides that “[t]he Supreme Court shall consist of five *judges*....”⁵ The “judges” of the Supreme Court are then instructed to “designate one of their own number who shall preside as chief justice.”⁶

Much like Article III of the United States Constitution,⁷ Article VI provides no reference to the five judges of the Tennessee Supreme Court to be known as “justices.”⁸ In fact, there exist only two references to a “justice” outside the context of a “Justice of the Peace” in the state Constitution.⁹ The first of these two is the provision for designating a “chief justice[.]”¹⁰ The second more ambiguously refers to “...judges or justices of the Inferior Courts of Law and Equity....”¹¹

⁴ TENN. CONST. art. VI, § 1.

⁵ TENN. CONST. art. VI, § 2, cl. 1. (emphasis supplied).

⁶ TENN. CONST. art. VI, § 2, cl. 2.

⁷ U.S. CONST. art. III.

⁸ See TENN. CONST. art. VI.

⁹ See, Tenn. CONST. art. VI, § 2 (“The judges shall designate one of their own number who shall preside as chief justice.”); see also TENN. CONST. art. VI, § 10 (“The judges or justices of the Inferior Courts of Law and Equity, shall have power...”).

¹⁰ TENN. CONST. art. VI, § 2, cl. 2.

¹¹ TENN. CONST. art. VI, § 10.

While the first of these two provisions of course confers the title of “chief justice[.]”¹² it provides no basis for the other members to be known as justices or associate justices. Instead it refers not to the Supreme Court but to the “judges or justices of the Inferior Courts of Law and Equity[.]”¹³ This suggests that the ambiguous reference to justices is more likely dealing with the Justices of the Peace, authorized by Article VI, section 1.¹⁴

Still yet, it would be unusual to refer to either of these supreme courts’ members as “judge” and not “justice.” After all, few would dare question the applicability of the word “justice” to describe the late Antonin Scalia or Ruth Bader Ginsburg.

Do the esteemed, qualified judges of the Tennessee Supreme Court not deserve the same title as their federal brothers and sisters? In fact, as mentioned above, the U.S. Constitution did not confer the title of “justice” to Benjamin Cardozo or Oliver Wendell Holmes. So, what could possibly be the difference?

This raises the question: from where did this tradition come? It appears that the first official reference to members of

¹² TENN. CONST. art. VI, § 2, cl. 2.

¹³ TENN. CONST. art. VI, § 10.

¹⁴ The antiquated Justice of the Peace system was replaced by statute around 1960 with the general sessions structure. *See generally*, Tenn. Code Ann. § 16-1-112 (1979). *See also*, Tenn. Code Ann. § 16-15-101 (1959).

the U.S. Supreme Court as “justice” came in the Judiciary Act of 1789.¹⁵ After President Washington signed the Act into law, its provisions mandated that “...the supreme court of the United States shall consist of a chief justice and five associate justices....”¹⁶

So, from where did the First Congress get these titles? After all, nowhere in *The Federalist* does Alexander Hamilton, John Jay, or James Madison refer to judges of a supreme court as “justice” in the discussions of the debates on the Constitution and its proposed ratification.¹⁷ In fact, Hamilton refers to New York’s highest court’s members explicitly as “judges[.]”¹⁸

Of course, there is also little reason to believe that the drafters of the Judiciary Act of 1789 pulled the term “associate justice”¹⁹ out of thin air. As any first-year law student will recognize, the courts of England have referred to more senior judges as “Chief Justice,” “Lord Chief Justice,” “Lord/Lady Justice,” etc., for centuries.²⁰ So, the use of “justice” as a title for more senior judges was not uncommon in the early 18th Century through the American Constitutional Convention and first Congress.

¹⁵ Judiciary Act of 1789, 1 Stat. 73 (1789).

¹⁶ *Id.* (emphasis supplied)

¹⁷ See generally, THE FEDERALIST Nos. 78 through 83.

¹⁸ THE FEDERALIST No. 73 (Alexander Hamilton).

¹⁹ Judiciary Act of 1789, 1 Stat. 73 (1789).

²⁰ See e.g., *Armory v. Delamirie*, 1 Strange 505 (King’s Bench 1722); *The Queen v. Prince*, All ER Rep. 881 (1875); *The King v. Woodbourne and Coke*, 16 St. Tr. 53 (1722).

What is known is that, like the federal Judiciary Act of 1789, the Tennessee Code lends (limited) support to the proposition that the judges of the Tennessee Supreme Court would be called “justices.”

Six sections of the Tennessee Code refer to a justice without referring to chief justice or justice of the peace. First, a 1990 addition to the Code provides that “Any former supreme court justice...[with] at least eight (8) years of creditable service as a state justice...may request to be designated as a senior justice....”²¹ Second, a “former justice” may appointed to help serve an under-resourced judicial district.²² After this the Code explains the compensation and benefits scheme for a “senior justice.”²³ The Code also provides for the assignment of the senior justice²⁴ as well as the termination of senior status.²⁵ Finally, the conclusion of such senior or former justice’s law practice is addressed by the Code.²⁶

The careful reader will have recognized that none of these provisions address a “justice”; instead, each provision addresses a justice qualified as “former” or “senior.” Thus, there is no comparable provision in the Tennessee Code to that

²¹ Tenn. Code Ann. § 17-2-302 (2020).

²² This provision was also added to the Tennessee Code in 1990. Tenn. Code Ann. § 17-2-303.

²³ Tenn. Code Ann. § 17-2-305 (2020).

²⁴ Tenn. Code Ann. § 17-2-304 (2020).

²⁵ Tenn. Code Ann. § 17-2-306 (2020).

²⁶ Tenn. Code Ann. § 17-2-307 (2020).

of the federal Judiciary Act of 1789, explicitly establishing the title of associate justice.

This author suspects we will not soon depart from the colloquial use of “justice” when referring to the final expositors of our state’s laws and constitution; however, the author hopes some use may come of the discussion provided herein.

Perhaps, after all of these years, the General Assembly may codify the title.