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# CONSTITUTIONAL LAW- SIXTH AMENDMENT-IMPARTIAL JURY-GOVERNMENT EMPLOYEES ON JURY WHEN GOVERNMENT IS PARTY

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CONSTITUTIONAL LAW — SIXTH AMENDMENT — IMPARTIAL JURY — GOVERNMENT EMPLOYEES ON JURY WHEN GOVERNMENT IS PARTY—Petitioner, General Secretary of the Communist Party in the United States, was convicted of contempt of Congress after he failed to obey a subpoena of the Committee on Un-American Activities of the House of Representatives.[1] At the trial counsel for the petitioner during voir dire examination inquired as to the employment of each prospective juror, and challenged all Government employees for cause.[2] Counsel argued that because of the "Loyalty Order"[3] and other security investigations taking place in Washington, Government employees would be afraid to risk the possible consequences of an acquittal and were therefore subject to implied bias. The challenge was denied, the trial judge relying on a statute ex-

[1] 11 Stat. L. 155 (1857), 2 U.S.C. §192.

[2] Counsel had previously moved for a change of venue alleging that an impartial trial could not be obtained within the District for the same reasons as were given in support of the challenge. Principal case at 164-5.

[3] Executive Order 9835, 12 FED. REG. 1935 (1947).

pressly qualifying Government employees for jury service.[4] Petitioner then proceeded to exercise two of his three peremptory challenges against such employees. The remaining peremptory challenge was also exercised, on other grounds. Seven Government employees remained on the jury, and each expressed the belief that he could render a fair and impartial verdict. The court of appeals affirmed the verdict.[5] On certiorari to the United States Supreme Court, *held,* affirmed. Congress has a wide discretion in defining the impartial jury required by the Sixth Amendment.[6] Congress has provided that Government employment of a juror does not constitute implied bias when the Government is a party to the action, and inasmuch as actual bias is still cause for challenge, the impartial jury is preserved. *Dennis v. United States,* 339 U.S. 162, 70 S.Ct. 519 (1950);[7] rehearing denied 339 U.S. 950, 70 S.Ct. 799 (1950).

Bias with respect to a case disqualifies one as a juror in such case if challenge is made.[8] At common law challenges for bias were divided into challenges for principal cause and challenges for favor. The former, often referred to as challenges for implied bias, allowed a juror to be disqualified, irrespective of his personal attitude, if his relation to a party in the case was of a particular nature.[9] In *Crawford v. United States*[10] the Supreme Court held that Government employment constituted one of these particular relations when the Government was a party to the action. That decision applied a common law rule to the District of Columbia, but in so doing did not define the impartial jury of the Sixth Amendment.[11] Congress, faced with a shortage of jurors in the District, attempted to change the *Crawford* rule in 1935 by expressly qualifying

[4] 49 Stat. L. 682 (1935), D.C. Code (1940) §11-1420: "All other persons, otherwise qualified according to law whether employed in the service of the Government of the United States or of the District of Columbia . . . shall be qualified to serve as jurors. . . ."

[5] Dennis v. United States, 84 App. D.C. 31, 171 F. (2d) 986 (1948).

[6] U.S. CONST., Sixth Amendment.

[7] Justices Reed and Jackson concurred, each with a separate opinion. Justices Frankfurter and Black dissented, each with a separate opinion. Justices Clark and Douglas did not participate.

[8] Logan v. United States, 144 U.S. 263, 12 S.Ct. 617 (1892); 3 WHARTON, CRIMINAL PROCEDURE, 10th ed., §§1557 and 1560 et seq. (1918).

[9] Such as (1) consanguinity and affinity, (2) master and servant, (3) landlord and tenant, among others. See BUSCH, LAW AND TACTICS IN JURY TRIAL §91 et. seq. (1949) and cases cited therein for a complete enumeration. See also 158 A.L.R. 1361 (1945) (implies bias by membership in certain organizations); 140 A.L.R. 1183 (1942) (power of court to exclude jurors for implied bias). For examples of actual bias see BUSCH, §§117-130.

[10] 212 U.S. 183, 29 S.Ct. 260 (1909). The rule of this case was extended in United States v. Griffith, 55 App. D.C. 123, 2 F. (2d) 925 (1924) to bar Government employees from grand jury service.

[11] Crawford v. United States, 212 U.S. 183 at 195-6, 29 S.Ct. 260 (1909). The decision was in accord with the view adopted in many states that taxpayers of a municipality could be challenged for implied bias when the municipality was a party. Hearn v. City of Greensburgh, 51 Ind. 119 (1875); Bailey v. Town of Trumbull, 31 Conn. 581 (1863). See also State v. Lewis, 50 Nev. 212, 255 P. 1002 (1927); Evans v. State, 13 Ga. App. 700, 79 S.E. 916 (1913); 140 A.L.R. 1183 (1942). The modern trend is in the other direction. Ward v. City of Florence, 144 S.C. 76, 142 S.E. 48 (1928).

Government employees.[12] Attacked as unconstitutional, this statute was measured against the Sixth Amendment in *United States v. Wood*,[13] and the Court held (1) that Congress had the power to change the common law rule, and (2) that there was no such relation between Government prosecution and Government employment as would create any special interest on the part of the employee jurors.[14] This decision, however, retained the challenge for actual bias and indicated that special circumstances might create an exception which would attribute bias to the employees as a class.[15] This exception was preserved while the rule of the *Wood* case was being extended and strengthened in *Frazier v. United States*.[16] The principal case, however, raises some question as to whether implied bias can ever be shown no matter what the circumstances.[17] Recent developments on the national scene cast some doubt upon the proposition that Government employees are immune to and disinterested in the repercussions of current Government prosecutions.[18] To insist, as does the majority, that trial of a Republican for contempt is no different in its effect upon those close to the Government than trial of a Communist, is to insist on the equality of unequals.[19] Nor, for this purpose, is there any fair comparison between an action under the Narcotics Act and an action for Contempt of the Un-American Activities Committee. It would seem to be relatively unimportant that the interest of the class in the principal case was not clearly shown; doubts as to the impartiality of the jury are sufficient to cast doubt upon the whole judicial process. It is submitted that the Court in this case missed an opportunity to make effective a valid and recognized exception to the *Wood* rule, and in so doing weakened the guarantee of the Sixth Amendment.

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[12] Supra note 4. See also H. Rep. 1421 and S. Rep. 1297, 74th Cong., 1st sess. (1935).

[13] 299 U.S. 123, 57 S.Ct. 177 (1936), noted in 50 HARV. L. REV. 692 (1937).

[14] United States v. Wood, 299 U.S. 123 at 145, 57 S.Ct. 177 (1936).

[15] Id. at 149. This exception is not express, but results from the broad definition of "actual bias" which the Court adopted, i.e., actual bias includes any prejudice which might be implied from exceptional circumstances. The crime charged in this case was petit larceny. Two government clerks and a civil war pensioner were on the jury.

[16] 335 U.S. 497, 69 S.Ct. 201 (1948), noted in 37 GEO. L. J. 436 (1949) and 28 NEB. L. REV. 446 (1949). Justices Jackson, Frankfurter, Douglas and Murphy dissented. See also Great Atlantic and Pacific Tea Co. v. District of Columbia, 67 App. D.C. 30, 89 F. (2d) 502 (1937); Schackow v. Government of the Canal Zone, (C.C.A. 5th, 1939) 108 F. (2d) 625. As to the exception for special circumstances see footnote 19 to the Court's opinion in the Frazier case.

[17] "A holding of implied bias to disqualify jurors because of their relationship with the Government is no longer permissible. The act makes no exception for distinctive circumstances." Principal case at 171. Justice Reed, however, concurred stating that he understood the opinion to provide for the traditional exception.

[18] The most glaring example of this was the angry attack upon judge and jury which followed the first Alger Hiss trial. N. Y. TIMES, July 10, p. 1:4; July 11, p. 11:2; July 12, p. 4:5, 1949.

[19] "It was a wise man who said that there is no greater inequality than the equal treatment of unequals." Frankfurter, J., dissenting in the principal case at 184.