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FEDERAL COURTS-CRIMINAL PROCEDURE-EFFECT OF EXCUSING PROCEDURE ON COMPOSITION OF JURY PANEL

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FEDERAL COURTS—CRIMINAL PROCEDURE—EFFECT OF EXCUSING PROCEDURE ON COMPOSITION OF JURY PANEL—Petitioner was found guilty of violating the Harrison Narcotics Act[1] in the Federal District Court for the District of Columbia by a jury composed wholly of federal employees.[2] During the course of *voir dire* examination, petitioner moved to strike the entire panel, asserting that it did not represent a proper cross-section of the community. This motion was denied. Petitioner exhausted his ten peremptory challenges, and, upon finding that only government employees remained on the jury, then challenged the jury as impaneled for cause. The challenge was overruled. Conviction was affirmed by the circuit court of appeals.[3] On certiorari to the United States Supreme Court, *held,* affirmed. In absence of affirmative evidence showing systematic exclusion of a particular class or occupational group, the fact that a panel may not represent a cross-section of the community is insufficient to sustain a motion to strike the entire panel. Nor does final composition of the jury entirely of government employees afford a basis for challenge for cause. *Frazier v. United States,* (U.S., 1948) 69 S.Ct. 201.

The common law rule that a servant of one of the parties to litigation is incom-

[1] 53 Stat. L. 271 (1939), 26 U.S.C. (1946) § 2553.

[2] Moreover, one of the jurors and the wife of a second were employed in the Treasury Department, which branch is charged with administration and enforcement of federal narcotics laws. 46 Stat. L. 585 (1930), 5 U.S.C. (1946) § 282.

[3] Frazier v. United States, (App. D.C., 1947) 163 F. (2d) 817.

petent for jury service is generally considered to be the law today.[4] It is not clear whether crown servants were qualified as jurors in criminal cases at common law.[5] However, the Supreme Court, in 1909, seized upon a somewhat ambiguous statement by Blackstone[6] to dictate a broad rule that government employees were incompetent to serve as jurors in cases in which the United States was a party.[7] Practical difficulties arose from this decision because of the large number of federal workers in such places as the District of Columbia[8] and the Canal Zone.[9] Legislative repeal of the rule resulted.[10] Sustaining the constitutionality of the statute which qualified federal employees for jury duty, the Supreme Court in *United States v. Wood*[11] pointed out that the Sixth Amendment, guaranteeing trial by an "impartial jury," prescribes no specific tests for determining impartiality.[12] It is clear that a litigant is not entitled to have any particular class of persons represented on a jury.[13] On the other hand, the categorical exclusion of Negroes,[14] women[15] or members of a political party[16] has been held not to satisfy the requirement of impartiality. More recently, the practice of systematically excluding an occupational group, such as daily wage earners, was stricken down in *Thiel v. Southern Pacific Co.*[17] There the Court concluded that a reluctance to imopse financial hardship on lower income groups because of inadequate compensation for jury duty was outweighed by the policy which favors having all classes of persons available for jury service.[18] In the principal case, petitioner asserts that

[4] 35 C.J., Juries § 338 (1924).

[5] Cf. 5 BACON ABRIDGMENT, Bouvier ed., 355 (1844); DUNCOMBE, TRIAL PER PAIS, 8th ed., 189 (1766); 2 HAWKINS, PLEAS OF THE CROWN, 6th ed., c.43, 579 (1788); also 50 HARV. L. REV. 692 (1937).

[6] 3 BLACKST. COMM., Wendell ed., 363 (1854).

[7] Crawford v. United States, 212 U.S. 183, 29 S.Ct. 260 (1909).

[8] See 79 CONG. REC. 13,401 (1935).

[9] See Schackow v. Government of the Canal Zone, (C.C.A. 5th, 1939) 108 F. (2d) 625.

[10] 49 Stat. L. 682 (1935), 11 D.C. Code (1940) § 1420.

[11] 299 U.S. 123, 57 S.Ct. 177 (1936). Though the statute applied only in the District of Columbia, the effect of the Wood decision was to make federal employees competent throughout the United States.

[12] For discussion of objectives and methods of jury selection in federal courts, see: Blume, "Jury Selection Analyzed: Proposed Revision of Federal System," 42 MICH. L. REV. 831 (1944); Knox, "Selecting Jurors for Service in the District Courts of the United States," 21 DICTA 283 (1944); OTIS, SELECTING FEDERAL COURT JURORS (1942).

[13] 35 C.J. 143 (1924). Thus, it is not ground for complaint that a particular jury does not contain Negroes, Jackson v. State, 180 Md. 658, 26 A. (2d) 815 (1942); Masons, People v. Jennett, 3 Wend. (N.Y.) 314 (1829), or Socialists, Ruthenberg v. United States, 245 U.S. 480, 38 S.Ct. 168 (1918).

[14] Smith v. Texas, 311 U.S. 128, 61 S.Ct. 164 (1940).

[15] Ballard v. United States, 329 U.S. 187, 67 S.Ct. 261 (1946).

[16] United States v. Murphy, (D.C. N.Y. 1915) 224 F. 554.

[17] 328 U.S. 217, 66 S.Ct. 984 (1946); see Goodman, "Federal Jury System as Affected by Thiel v. So. Pacific Co.," 21 CALIF. S.B.J. 352 (1946).

[18] In light of the Thiel decision, it is interesting to note the recent revision of the Judicial Code, 28 U.S.C. (Supp. 1948), which became effective September 1, 1948. Section 1863 (b) authorizes a district judge to exclude "any class or group of persons . . . by an order . . . based on a finding that such jury service would entail undue hardship. . . ."

when the jury panel was drawn, the court asked all those who did not wish to serve to step aside, and they were excused. While the majority holds such facts to be insufficient as a foundation for complaint, Justice Jackson, dissenting, maintains that such a procedure when coupled with the dual system of compensation for jurors which prevails in the District of Columbia[19] inherently tends to produce a partial jury. Conceding that such a system naturally tends to distort the composition of federal juries in the District of Columbia, the answer, it would seem, lies in legislative action to raise the compensation for jury service and to restrict judicial power to excuse persons from jury duty. If the Court accepts the rule of the *Wood* case that government employment is not per se ground for disqualification as a federal juror, it would appear inconsequential, in the absence of actual bias, that a particular jury happens to be composed of four,[20] nine[21] or twelve government employees.

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[19] Principal case at 211. Non-government jurors receive $4 per day, 11 D.C. Code (1940) § 1513, while government jurors are given leave with full pay, 11 D.C. Code (1940) §§1421-1423.

[20] See Great Atlantic and Pacific Tea Co. v. District of Columbia, (App. D.C., 1937) 89 F. (2d) 502.

[21] See Higgins v. United States, (App. D.C., 1946) 160 F. (2d) 222.