

Gay Vs. U. S.

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Court : US Supreme Court

Decided On : 1973

Appeal No. : 411 U.S. 974

Appellant : Gay

Respondent : U. S.

Judgement :

GAY v. U. S. - 411 U.S. 974 (1973)

U.S. Supreme Court GAY v. U. S. , 411 U.S. 974 (1973)

411 U.S. 974

John R. GAY

v.

UNITED STATES.

No. 72-5572.

Supreme Court of the United States

May 7, 1973

Rehearing Denied June 11, 1973.

See 412 U.S. 944.

On petition for writ of certiorari to the District of Columbia Court of Appeals.

The petition for a writ of certiorari is denied.

Mr. Justice DOUGLAS, with whom Mr. Justice BRENNAN, Mr. Justice STEWART, and Mr. Justice MARSHALL concur, dissenting.

Petitioner was convicted of larceny. The District of Columbia Court of Appeals reversed. 241 A.2d 446. The United States Court of Appeals reversed the latter court, 133 U.S.APP.D.C. 337, [410 F.2d 1036](#) , and remanded the case to the District of Columbia Court of Appeals for a ruling on the propriety of the trial court's instruction. That court held that the instructions had not been prejudicial and the United States Court of Appeals affirmed. Thereafter petitioner sought relief by way of coram nobis. The trial court dismissed the case without prejudice and the District of Columbia Court of Appeals affirmed. During the time petitioner's original or direct appeal was being considered by the court Frank Q. Nebeker was Assistant United States Attorney in charge of the Appellate Section in the office of the United States Attorney for the District. One of his duties was to review the appellate briefs submitted by that office of the appellate courts. His name was on the brief opposing petitioner on the appeal. He was named to the District of Columbia Court of Appeals by President Nixon in May of 1969. When the coram nobis action was brought to the District of Columbia Court of Appeals it was heard by a three-judge panel which included Nebeker. His prior role in the case was not brought to his attention and he doubtless was unaware of the fact that this case had been one of the fact that this he had processed while in the United States Attorney's office.

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Nonetheless Canon 3C(1)(b) of the recently adopted Code of Judicial Conduct provides:

'A Judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where . . . he served as lawyer in the matter in controversy. . . .'

This Canon, as it applies to this case, is merely a reflection of the basic concept of due process of law that a person should not serve as both prosecutor and judge.

The matter might not be considered of any great moment here if the three judges in the panel had taken part. But one of the three, Judge Yeagley, did not participate in the decision. Hence in one view there was only a single qualified judge sitting on the appeal. That fact makes singularly appropriate the suggestion of the Solicitor General that it may be just under the circumstances to vacate the judgment of the Court of Appeals for the District of Columbia and remand for further proceedings. I would do just that.

Although this issue may not rise to the level of a constitutional question and there is no federal statute involved, we should take this action under our supervisory authority over the administration of justice in the federal courts. See, e. g., *Mallory v. United States*, [354 U.S. 449](#) , 452-453; *McNabb v. United States*, [318 U.S. 332, 341](#) ; *Nardone v. United States*, [308 U.S. 338](#) , 341-342, 84 L.Ed.307. The District of Columbia Court of Appeals, established by Congress pursuant to Art. I, 8, Cl. 17, of the Constitution,¹ clearly is within the parameters of the federal

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court system. See *Embry v. Palmer*, [107 U.S. 3, 10](#) ; *Moss v. United States*, 23 App.D.C., 475, 482-483. The judges of that court are appointed, with the advice and consent of the Senate, by the President. [[Footnote 2](#)] It is true, of course, that this Court normally will not review decisions of the courts of the District of Columbia which involve merely questions of 'local law.' See, e. g., *General Motors Corp. v. District of Columbia*, [380 U.S. 553](#) , 556-557; *Griffin v. United States*, [336 U.S. 704](#) , 717-718. To this extent the courts of the District may be comparable to state courts. [[Footnote 3](#)] Nevertheless, we heretofore have exercised jurisdiction where a decision 'has an impact not confined to the Potomac's shores' *General Motors Corp. v. District of Columbia*, supra, 380 U.S. at 556, 85 S. Ct. 1156. See also *Miller v. United States*, [357 U.S. 301, 306](#) .

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In this case any appearance of impropriety may reflect adversely on the federal judiciary as a whole. Canon 1 of the Code of Judicial Conduct states that '[a]n independent and honorable judiciary is indispensable to justice in our society.' Canon 2 provides that a judge 'should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary,' and the commentary to that Canon states that he 'must avoid all impropriety and the appearance of impropriety.' We must bear the ultimate responsibility, within the limits of our jurisdiction,⁴ for insuring that the federal judiciary adheres scrupulously to these principles of impartial adjudication.

Footnotes

[Footnote 1](#) See District of Columbia Court Reform and Criminal Procedure Act of 1970, 11-101(2)(A), Pub.L. No. 91-358, 77 Stat. 478. We discussed the differences between 'legislative,' or Art. I, courts and 'constitutional,' or Art. III, courts in *Palmore v. United States*, [411 U.S. 389](#) and *Glidden Co. v. Zdanok*, [370 U.S. 530](#) .

[Footnote 2](#) District of Columbia Court Reform and Criminal Procedure Act of 1970, *supra*, 11-1501(a).

[Footnote 3](#) The House Report states that the District of Columbia Court of Appeals will be 'the highest court in the jurisdiction, similar to a state Supreme Court,' H.R.Rep.No.91-907, 91st Cong., 2d Sess. 23, and that '[t]he jurisdictional changes recommended by your Committee will result in a Federal-State court system in the District of Columbia analogous to the court systems in the several states.' *Id.*, at 35.

The Senate Report states:

'This constitutional authority for the creation of a local court system, distinct from the Federal court system established pursuant to article III, has been recognized in *Keller v. Potomac Electric Power Co.*, [261 U.S. 428](#) (1923); *Federal Radio Commission v. General Electric Co.*, [281 U.S. 464](#) (1930); and *O'Donoghue v. United States*, [289 U.S. 516](#) (1933). The Committee

believes that there is nothing in the result reached in *Glidden Co. v. Zdanok*, [370 U.S. 530](#) (1962), which denies the congressional authority to create a local court system for the District of Columbia which is distinct from the Federal court system.' S.Rep.No.91-405, 91st Cong. 1st Sess. 18.

The statement that the new D.C. court system is 'distinct from the Federal court system' obviously relates only to the distinction between Art. I and Art. III courts. See n. 1, *supra*.

[Footnote 4](#) This Court has jurisdiction under 28 U.S.C. 1257(3). See District of Columbia Court Reform and Criminal Procedure Act of 1970, *supra*, 11-102. Under 28 U.S.C. 2106, we may vacate the judgment below and 'require such further proceedings to be had as may be just under the circumstances.'

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