Indiana Law Journal

Volume 15 | Issue 2 Article 5

12-1939

Constitutional Law

TAXATION OF JUDGES' SALARIES—CONSTITUTIONAL LAW.—Justice Woodrough took office as Judge of the Eighth United States Circuit Court May 1, 1933. The Federal Revenue Act of 1932 provided for the taxation of incomes including the compensation of judges of courts of the United States taking office after June 6, 1932.[1] This provision was included in subsequent Revenue Acts of 1934 and 1936.[2] Justice Woodrough paid the 1936 tax under protest and then sued to recover the amount on the grounds that

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19 Frick v. Pennsylvania (1905), 268 U. S. 473, 45 S. Ct. 603.

20 Graves v. Elliott (1939), 307 U. S. 383, 392, 59 S. Ct. 913, 917.

21 Union Refrigerator Transit Co. v. Kentucky (1905), 199 U. S. 194, 26 S. Ct. 36.

22 Lowndes, "The Passing of Situs" (1932), 45 Harvard L. R. 777.

1 47 Stat. 169, 178, 26 U. S. C. A. Sec. 22 (a), Federal Revenue Act of 1932, C. 209.

2 48 Stat. 680, 686, 687, 26 U. S. C. A. Sec. 22 (a), Federal Revenue Act of 1934, c. 277. 49 Stat. 1648, 1657, 26 U. S. C. A. Sec. 22 (a) (Supp. 1936) Federal Revenue Act of 1936, c. 690.

the tax on the income of federal judges was a diminution of his salary in violation of the United States Constitution. HELD: The statute is constitutional. *O'Malley v. Woodrough* (1939), 307 U. S. 277, 59 S. Ct. 838.

The provision of the United States Constitution which provides that the judges shall receive for their services, a compensation, which shall not be diminished during their continuance in office[3] has deferred the income taxing authorities from a fertile field of steady incomes ever since the Civil War when the income tax first came into vogue in this country.[4] In an attempt to find a loophole, the government did get the Supreme Court to limit the application of the prohibition against diminution to judges of a constitutional as distinguished from a legislative court.[5] When the Sixteenth Amendment was interpreted, another gleam of hope died: the court found that the clause "from whatever source derived" added nothing to the power to tax.[6] It is significant, therefore, that the present case marks a definite change in the law and is a victory for the taxing authorities.

The prevailing opinion has been that the provision against diminution was inserted in the Constitution to guarantee the independence of the judiciary from the influence of the legislature.[7] This independence doctrine and the growth of the dogma that the power to tax involves the power to destroy caused the courts and early writers to believe that a tax on the judges' salaries would be disastrous.

But if a non-discriminatory income tax were imposed on everyone in the United States, it is difficult to believe that Congress would be able to raise that tax simply to weaken the power of the judiciary. An easier way to affect the financial standing of the judges would be for Congress to fail to make sufficient appropriation for the payment of their salaries.[8]

But the issue here is not as to the constitutionality of a reduction of the salary. It is whether or not an income tax on this salary is a reduction

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[3] U. S. Const. Art. III, Sec. 1.

[4] Federal Revenue Act of 1862, c. 119, 12 Stat. 472, Sec. 86. See the present case, Mr. Justice Butler dissenting, 307 U. S. 277, 283, 59 S. Ct. 838, 840; Evans v. Gore (1920), 253 U. S. 245, 40 S. Ct. 550; Miles v. Graham (1925), 268 U. S. 501, 45 S. Ct. 601; Booth v. U. S., (1934), 291 U. S. 339, 54 S. Ct. 379.

[5] Williams v. U. S. (1933), 289 U. S. 553, 53 S. Ct. 751, held that the Court of Claims is not a constitutional but is a legislative court and thus the diminution provision does not apply. Compare O'Donoghue v. U. S. (1933), 289 U. S. 516, 53 S. Ct. 740, holding that the District Court of Washington, D. C. is a constitutional court and thus that the salary of the judges is not taxable. See 9 Ind. L. Jl. 318, (1934).

[6] Brushaber v. Union P. Ry. Co. (1915), 240 U. S. 1, 36 S. Ct. 236. See Lowndes, "Spurious Conceptions of The Constitutional Law of Taxation," 47 Harv. L. Rev. 628, 646, (1934).

[7] "In the general course of human nature, a power over a man's subsistence amounts to a power over his will—," Alexander Hamilton in the Federalist, No. 79. For a review of historical statements see Mr. Justice Butler's dissenting opinion in the present case, 307 U. S. 277, 283, 59 S. Ct. 838, 840.

[8] Riley v. Carter (1933), 165 Okla. 262, 25 P. (2nd) 666, 88 A. L. R. 1018, 22 Geo. L. Jl. 376, (1934), held that a constitutional provision as to no increase or decrease in judges salaries to be self-executing when the legislature cut the appropriation. For analogy see Carr v. Ind. (1891), 127 Ind. 204, 26 N. E. 778. These cases are peculiar and present a minority view.

of the salary at all. It has always been accepted that a property tax is not a diminution of ones income.[9] Although the income tax is closer to the salary in that one can see more clearly that the amount of the tax is related to the salary received, logically the imposition is no more a diminution of the income than are the other taxes and expenses that one has to pay. The fact that taxes appear on the expense side of the accountants' books aids in illuminating the point that taxes are expenses and not a deduction from income. Mr. Justice Frankfurter's opinion, which, in the face of such a formidable dissent as Mr. Justice Butler wrote, appears to be little more than a summary, states: "To subject them (judges) to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering."[10]

The decision itself is rather narrow since the tax was already in effect when Justice Woodrough took office; thus it might be said there was no reduction when the tax was levied. But the opinion indicates that the court considered the time element of little importance.[11] Since the tax is treated not as a reduction of salary but as an expense of living, the imposition on all judges regardless of the time they took office would not be in violation of the Constitutional provision against diminution.

The present decision perhaps will have more effect than merely to swell the coffers of the federal treasury with money from people who presumably are able to pay. In many of the state constitutions, including that of Indiana,[12]

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[9] Willis, Constitutional Law (1936), p. 379. Note also that the Court has held that a tax on income derived from exports was not a violation of U. S. Const. Art. I, Sec. 9, Cl. 5, which provides that "No tax or duty shall be laid on articles exported from any state." The Court stated, "It is not laid on income from exportation because of its source, or in a discriminative way, but just as it is laid on other income." Peck & Co. v. Lowe (1917), 247 U. S. 165, 38 S. Ct. 432.

[10] 307 U. S. 277, 282, 59 S. Ct. 838, 840. It seems that Mr. Justice Frankfurter could have made a more convincing argument in his opinion had he elaborated more to show the exact principles involved. For a short but clear statement of reasoning, see Mr. Justice Holmes dissenting in Evans v. Gore (1920), 253 U. S. 245, 264, 40 S. Ct. 550, 557.

[11] It is evident from the statute that Congress intended the court to treat the act to be an amendment of the salaries of those taking office after June 6, 1932: ". . . and all Acts fixing the compensation of such . . . judges are hereby amended accordingly." Supra, note 1. In Evans v. Gore (1920), 253 U. S. 245, 40 S. Ct. 550, the act of 1918 was held unconstitutional in its application to judges already in office. In Miles v. Graham (1925), 268 U. S. 501, 45 S. Ct. 601, the same act of 1918 was held unconstitutional in its application to judges taking office after the act became effective. In order to uphold the statute in the present case, the court specifically overruled Miles v. Graham and impliedly overruled Evans v. Gore. While the present case was pending, Congress, by Section 3 of the Public Salary Tax Act of 1939, amended Section 22 (a) so as to make it applicable to "Judges of courts of the United States who took office on or before June 6, 1932." It is interesting to note that the Justices of the United States Supreme Court for many years have voluntarily paid the tax. Phillips, American Government and Its Problems (1937), p. 627.

[12] Ind. Const. Art. VII, Sec. 13, "The Judges of the Supreme Court and Circuit Courts shall, at stated times, receive a compensation which shall not be diminished during their continuance in office."

there are similar provisions which require the salaries of various officials not to be diminished during their continuance in office. The point has not been ruled on in very many states and different conclusions have been reached where the issue has been raised.[13] The Indiana Gross Income Tax has been applied to state judges the same as to any other person and no controversy appears to have arisen.[14] With the present case to serve as a guide, the states may ultimately decide uniformly that although the salaries cannot be reduced, nevertheless, the judges should be held to share in the expense of maintaining organized government.

When considered with the recent holding of the Supreme Court of the United States that the states may tax federal employees,[15] the present case appears to permit the states as well as the federal government to tax the incomes of the federal judges domiciled within their boundaries. Such a result would place the officials on an equal basis with the rest of the taxpayers.

In spite of the fact that the advantages a judgeship offers would be lessened so one might argue that the more desirable men would be drawn into lucrative positions in private business, it is submitted that the present case is a step in the right direction both in respect of enlarging the tax base of the federal and state units and of shifting some of the burden to those citizens who are evidently as vitally interested in the welfare of these governments as any of the rest of the taxpayers.[16] L. N. M.

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[13] See Fellman, D., "The diminution of the Judges Salaries," 24 Iowa L. Rev. 89 (1938), for a comprehensive review of the cases of the states as well as of the English Countries. See also Hon. James Quarles, "Tax-exempt Judicial Salaries: Passing of Evans v. Gore Cause for satisfaction," 25 A. B. A. Jl. 832 (Oct., 1939).

[14] Ind. Acts 1933, c. 50, Sec. 3, Burns Ind. Stat. 1933, Sec. 64-2603 (f); Ind. Acts 1937, c. 117, Sec. 3 (f), Burns Ind. Stat. 1939 Supp., Sec. 64-2603 (f). See Ind. Gross Income Tax Regulation 1937, Sec. 3420.

[15] Graves v. N. Y. ex rel. O'Keefe (1939), 306 U. S. 466, 59 S. Ct. 595, 14 Ind. L. Jl. 461 (1939). See: Ind. Acts 1933, c. 50, Sec. 6, Burns Ind. Stat. 1933, Sec. 64-2606 (a); Ind. Acts 1937, c. 117, Sec. 6, Burns Ind. Stat. 1939 Supp., Sec. 64-2606 (a); Ind. Gross Income Tax Regulation 1937, Secs. 1615, 3419.

[16] Amid wide acclaim and applause for the decision, the President of the American Bar Association remains an advocate for the former view of the court. Hon. Frank J. Hogan, "Important Shifts in Constitutional Doctrines," 25 A. B. A. Jl. 629 (August, 1939).