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CONSTITUTIONAL LAW - TAXATION OF SALARIES OF JUDGES OF THE UNITED STATES

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CONSTITUTIONAL LAW — TAXATION OF SALARIES OF JUDGES OF THE UNITED STATES — The Revenue Act of 1932 provided that "In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and

judges are hereby amended accordingly.”¹ A United States circuit judge, appointed in 1933, was required to include in his tax return the amount of his salary, under the Revenue Act of 1936, which re-enacted the above provision.² His claim for refund being rejected, the present suit was brought, and judgment was against the collector. On appeal, the Supreme Court held the statute constitutional, on the grounds that it was a general non-discriminatory tax laid on net income, and when applied to the income of a federal judge it was not within the prohibition of Article III, section 1 of the Constitution, which provides that the compensation of federal judges shall not be diminished during their continuance in office. *O'Malley v. Woodrough*, (U. S. 1939) 6 U. S. LAW WEEK 1356.

In his lengthy dissenting opinion, Justice Butler lamentingly reminds us “that another landmark has been removed.” The landmark referred to is less than twenty years old, having been established by the cases of *Evans v. Gore*³ and *Miles v. Graham*⁴ in 1920 and 1925 respectively. In the *Evans* case the Court held that compensation paid to a judge appointed *before* the passage of the taxing act was not taxable, and in the *Miles* case the Court applied the same ruling to compensation paid to judges appointed *after* the taxing act. By reason of these decisions it appeared to be settled that an income tax levied on salaries of judges of constitutional courts⁵ was contrary to Article III, section 1 of the Constitution. Speaking through Justice Frankfurter, the Court pointed out in the principal case that the decisions in the *Evans* and *Miles* cases had met much disapproval from professional opinion and legal scholarship.⁶ An examination of the debates in the Constitutional Convention throws no light on the question whether taxing the salaries of federal judges is a diminution of that compensation guaranteed them.⁷ But the all-inclusive language employed in the Sixteenth Amendment (“to lay and collect taxes on incomes, from whatever source derived”) would seem to indicate that even if taxation constituted a diminution of compensation, the people had by the Amendment given to Congress the power to tax the income of Presidents and judges of the United States.⁸ The Court in

¹ Revenue Act of 1932, § 22 (a), 47 Stat. L. 169 at 178.

² Revenue Act of 1936, § 22 (a), 49 Stat. L. 1648 at 1657.

³ 253 U. S. 245, 40 S. Ct. 550 (1920).

⁴ 268 U. S. 501, 45 S. Ct. 601 (1925).

⁵ It has been recognized since *Evans v. Gore* that the principle therein established does not apply to judges of “non-constitutional” or “legislative” courts. See I. T. 2226, C. B. IV-2, p. 42 (1925); Jasper Y. Brinton, 3 B. T. A. 1056 (1926); *Williams v. United States*, 289 U. S. 553, 53 S. Ct. 751 (1933), noted 47 HARV. L. REV. 133 (1933).

⁶ 18 MICH. L. REV. 697 (1919); 20 MICH. L. REV. 540 (1921); 30 YALE L. J. 75 (1920). A large number of state courts rejected *Evans v. Gore* when the similar question presented itself before those tribunals. *Du Pont v. Green*, (Del. 1937) 195 A. 273; *Poorman v. State Board of Equalization*, 99 Mont. 543, 45 P. (2d) 307 (1935); *Martin v. Wolford*, 269 Ky. 411, 107 S. W. (2d) 267 (1937). *Contra*, *Gordy v. Dennis*, (Md. 1939) 5 A. (2d) 69, but see dissenting opinion at 82.

⁷ Fellman, “The Diminution of Judicial Salaries,” 24 IOWA L. REV. 89 (1938).

⁸ See dissenting opinion by Holmes in *Evans v. Gore*, 253 U. S. 245, 40 S. Ct. 550 (1920).

the *Evans* case, however, reaffirmed the view that the Amendment did not extend the taxing power to new subjects, but only removed the necessity for apportionment of taxes laid on income,⁹ and defined taxation of judges' salaries as a means of doing indirectly that which was forbidden directly. In deciding the principal case, it should be emphasized, the Court has overruled only *Miles v. Graham*.¹⁰ The Court left for another day the overruling of *Evans v. Gore*, which passed on the constitutionality of taxing the salaries of judges appointed before the taxing act. That day should not be far away.¹¹ Applying the reasoning used in the principal case, together with the more technical argument of Justice Holmes in his dissenting opinion to *Evans v. Gore*, the Court should have little hesitancy in removing completely Justice Butler's "landmark." From a realistic approach, it is difficult to conceive how an income tax levied on the salaries of judges of the United States constitutes an encroachment upon the independence of the judiciary department, for "To subject them to a general tax is merely to recognize that judges are also citizens, and 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."¹² And it may be argued that the word "diminution" as used in Article III, section 1, refers only to direct decreases in salary and not to "decreases" resulting from such indirect sources as an income tax.¹³ Analogies for this contention are plentiful.¹⁴ It is submitted that this result can

⁹ Other cases so holding: *Eisner v. Macomber*, 252 U. S. 189, 40 S. Ct. 189 (1920); *Brushaber v. Union Pacific R. R.*, 240 U. S. 1, 36 S. Ct. 236 (1916); *Peck & Co. v. Lowe*, 247 U. S. 165, 38 S. Ct. 432 (1918).

¹⁰ As pointed out by Lowndes, "Taxing Income of the Federal Judiciary," 19 VA. L. REV. 153 (1932), the provision of section 22a in issue in the principal case is an unusual piece of legislative draftsmanship, for it amends legislation to be enacted in the future. Perhaps Congress thought that by combining this provision with later acts appointing and fixing the compensation of judges, the ruling in the *Miles* case would be sidestepped. But the difficulty with this plan is that the appointee's salary would not be definite; and the Court in the *Miles* case left no doubt but that "definiteness" of salary was necessary to fulfill the constitutional requirements. The Court in the principal case did not mention this unique part of the taxing provision, nor did it base its decision on the construction of the provision above summarized. It is submitted that the broad ruling of the Court was much the wiser method, rather than delving into fine technicalities in order to sustain the provision.

¹¹ Congress has amended the Revenue Act so as to make the provision at issue in the principal case applicable to judges of non-constitutional courts of the United States who took office on or before June 6, 1932. Public No. 32, 76th Cong., 1st sess., c. 59, § 3 (1939). But as pointed out in note 5, supra, *Evans v. Gore* has not been applied to taxing the salaries of judges of "legislative" courts; therefore, this recently enacted provision is unnecessary. But it is believed that as a result of the general language used in the opinion of the majority in the principal case, Congress will amend the statutes so as to apply it retroactively to judges of constitutional courts.

¹² Principal case, 6 U. S. LAW WEEK 1356 at 1357.

¹³ Holmes, J., dissenting in *Evans v. Gore*, 253 U. S. 245, 40 S. Ct. 550 (1920).

¹⁴ *Peck & Co. v. Lowe*, 247 U. S. 165, 38 S. Ct. 432 (1918) (federal income tax on net income of a company engaged in exports upheld as not contravening Article I, section 9, clause 5: "No tax or duty shall be laid on articles exported from any

thus be accomplished without the necessity of redefining the scope of the Sixteenth Amendment.

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state"); *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 38 S. Ct. 499 (1918) (state income tax on net income of a company engaged in interstate commerce upheld as not contravening Article I, section 8: "The Congress shall have Power . . . to regulate Commerce . . . among the several States. . .").