No. 99-1978

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JUDGE TERRY J. HATTER, JR., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

This case concerns Congress's actions to bring federal judges within the Medicare hospital insurance (HI) program and Social Security old-age, survivors, and disability insurance (OASDI) program by extending coverage under those programs, as well as the taxes financing those programs, to the employment of Article III judges. The questions presented are:

1. Whether Congress violated the Compensation Clause, U.S. Const. Art. III, § 1, when it extended the taxes financing the HI and OASDI programs to the judicial salaries of respondents, who were sitting Article III judges at the time those taxes were first applied to judicial salaries.

2. Whether any constitutional violation ended when Congress increased the statutory salaries of federal judges by an amount greater than the amount of HI and OASDI taxes deducted from respondents' judicial salaries.

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OPINIONS BELOW

The initial decision of the United States Claims Court, dismissing this case for lack of jurisdiction (Pet. App. 12a-18a), is reported at 21 Cl. Ct. 786. The decision of the court of appeals reversing that dismissal (Pet. App. 19a-29a) is reported at 953 F.2d 626. The decision of the Court of Federal Claims on remand, dismissing respondents' claims on the merits (Pet. App. 30a-53a), is reported at 31 Fed. Cl. 436. The decision of the court of appeals reversing that dismissal (Pet. App. 54a-66a) is reported at 64 F.3d 647. The decision of this Court, affirming that decision of the court of appeals under 28 U.S.C. 2109 because of the lack of a quorum (Pet. App. 69a), is reported at 519 U.S. 801.

The further decision of the Court of Federal Claims on remand, ruling in favor of the government on the issues of damages and the statute of limitations and awarding some respondents limited damages (Pet. App. 70a-111a), is re-

ported at 38 Fed. Cl. 166. The opinion of the panel of the court of appeals reversing the Court of Federal Claims as to damages (Pet. App. 112a-127a) is reported at 185 F.3d 1356. The order of the court of appeals vacating the panel's judgment and ordering rehearing en banc on the issue of the statute of limitations (Pet. App. 128a-129a) is reported at 199 F.3d 1316. The opinion of the en banc court of appeals, reversing the Court of Federal Claims on both damages and statute of limitations (Pet. App. 1a-11a), is reported at 203 F.3d 795.

JURISDICTION

The judgment of the en banc court of appeals was entered on February 9, 2000. On May 2, 2000, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including June 8, 2000. The petition for a writ of certiorari was filed on June 8, 2000, and was granted on October 16, 2000 (J.A. 143). This Court's jurisdiction rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Compensation Clause, U.S. Const. Art. III, § 1, and pertinent provisions of 26 U.S.C. 3101 and 3121 (1994 & Supp. IV 1998) are set forth in the appendix to the petition for a writ of certiorari (Pet. App. 130a-132a).

STATEMENT

1. More than 90% of the paid civilian labor force in the United States is engaged in employment covered by the Social Security old-age, survivors, and disability insurance (OASDI) program and the Medicare hospital insurance (HI) program. J.A. 41. Employees earn credits towards eligibility for OASDI and HI benefits based on their

employment.[1] Both programs are financed in part out of taxes imposed "on the income of every individual," in amounts equal to certain percentages of an employee's wages. See 26 U.S.C. 3101(a) and (b).

Before 1983, the employment of Article III judges, as well as almost all other federal employees, was excluded from both taxes and benefits under the HI and OASDI programs. Federal judges and other federal employees were covered by separate retirement systems. Since 1869, Article III judges have been entitled to retire after meeting certain age and service requirements and to receive lifetime annuities equal to their salary at their retirement. Those annuities are financed entirely from general tax revenues. See 28 U.S.C. 371(a); Act of Apr. 10, 1869, ch. 22, § 5, 16 Stat. 45. Beginning in 1920, most other federal employees were eligible to receive retirement annuities under the Civil Service Retirement System (CSRS) upon meeting certain service requirements, and were also required to contribute part of their salary to finance the CSRS program. See 5 U.S.C. 8331 *et seq.*; 5 U.S.C. 719 (1925) (mandatory deduction from federal employees' salary to finance retirement system); Act of May 22, 1920, ch. 195, 41 Stat. 614. Federal judges and employees could, however, receive OASDI and HI benefits based on their non-federal employment if they had accrued sufficient credits in such employment (and in some cases based on their spouses' coverage).

On January 1, 1983, employees in all three Branches of the federal government, including judges, first began to earn

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[1] Eligibility for HI benefits, in general, is tied to eligibility for Social Security old-age benefits. See 42 U.S.C. 426(a)(2)(A). Eligibility for old-age benefits is based on an individual's having paid OASDI taxes for 40 "quarters of coverage." See 42 U.S.C. 402(a), 414(a)(2). "[Q]uarters of coverage" is tied to payment of "wages," which is defined in terms of remuneration for "employment." See 42 U.S.C. 409(a) (1994 & Supp. IV 1998), 42 U.S.C. 413(a)(2)(A).

credits for HI coverage on the basis of their federal employment, and also first became subject to the HI tax on their salaries. One year later, on January 1, 1984, newly hired federal employees and judges began to earn credits for Social Security old-age benefits on the basis of their federal service, and also became subject to the OASDI tax on their salaries.[2] The 1983 and 1984 amendments also imposed HI

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[2] The taxes on employees' wages that finance in part the OASDI and HI programs are imposed by 26 U.S.C. 3101(a) and (b). Both Sections impose a tax on income equal to a percentage of the employee's wages with respect to "employment," as defined in 26 U.S.C. 3121(b) (1994 & Supp. IV 1998). Section 3121(b) and a companion provision, Section 3121(u), have undergone several changes relevant to this case. Before September 3, 1982, Section 3121(b) excluded from the definition of "employment" "service performed in the employ of the United States * * * if such service is covered by a retirement system established by a law of the United States." 26 U.S.C. 3121(b)(6)(A) (1982). That provision exempted Article III judges from the HI and OASDI taxes, because those judges were (and are) covered by another retirement system established by 28 U.S.C. 371 (1994 & Supp. IV 1998). That system permits a judge to retire from service on an annuity equal to the judge's salary at the time of retirement.

Congress extended the HI tax to federal judges' salaries in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, Tit. II, Subtit. E, Pt. III, § 278, 96 Stat. 559-563. TEFRA added a new Section 3121(u)(1)(A), which provided that, "[f]or purposes of the [Medicare hospital insurance tax] imposed by section 3101(b) * * * paragraph (6) of [26 U.S.C. 3121(b)] shall be applied without regard to subparagraph[] (A) * * * thereof." 26 U.S.C. 3121(u)(1)(A) (1982); see Pub. L. No. 97-249, § 278, 96 Stat. 559. That provision of TEFRA, in effect, instructed that the exclusion of federal judges' salaries from the definition of "employment" should be disregarded for purposes of the HI tax, and thus extended that tax (but not the OASDI tax) to judges' salaries. That provision of TEFRA also effectively extended the HI tax, but not the OASDI tax, to the salaries of federal employees who were covered by the CSRS.

Congress extended the OASDI tax to federal judges' (and other federal employees') salaries in the Social Security Amendments of 1983, Pub. L.

and OASDI taxes for the first time on the salaries of the President, Vice President, cabinet members, political appointees in the Senior Executive Service, and Members of Congress. Those employees and officials remain subject to HI and OASDI taxes today. See 26 U.S.C. 3121(b)(5) (1994 & Supp. IV 1998).

Congress brought federal employees, including federal judges, within the HI and OASDI systems in part out of concern that those employees were not paying a fair share of the cost of financing benefits under those programs, which are funded out of current HI and OASDI taxes. When Congress in 1982 enacted legislation to bring federal employees within the HI system, the Senate Finance Committee noted as follows:

> Many active Federal civilian employees have worked long enough (or their spouses have) in employment covered by social security to become insured under the Hospital Insurance program. However, while most workers in covered social security employment are

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No. 98-21, § 101(b)(1), 97 Stat. 69, which again amended 26 U.S.C. 3121. The Social Security Amendments of 1983 redefined "employment" in Section 3121(b)(5) generally to exclude "service performed in the employ of the United States," but also excluded from that exclusion service performed by federal judges, among others. See Pub. L. No. 98-21, § 101(b)(1), 97 Stat. 70. In addition, the Social Security Amendments of 1983 amended Section 3121(u) to provide that, for the purpose of the Medicare tax, Section 3121(b) "shall be applied without regard to paragraph (5) thereof." See Pub. L. No. 98-21, § 101(b)(2), 97 Stat. 70. Because the Social Security Amendments of 1983 excluded service by federal judges from the federal-employment exclusion from the general definition of "employment," it subjected federal judges to the HI and OASDI taxes of Section 3101, which falls on the income of all wage-earners in respect of their employment, unless excluded. Because the same Act directed that the exclusion of federal employees in Section 3121(b)(5) be disregarded for HI tax purposes, it again brought federal employees, including judges, within the coverage of the HI tax.

> subject to the Hospital Insurance tax throughout their entire working careers, Federal employees may earn the same coverage with relatively fewer years of work subject to the tax. The committee believes that Federal workers should bear a more equitable share of the costs of financing the benefits to which many of them eventually become entitled.
>
> The bill, therefore, extends Medicare coverage to all members of the Federal workforce in the same way coverage is provided to most other workers.

S. Rep. No. 494, 97th Cong., 2d Sess. Vol. 1, at 378 (1982). Similarly, when Congress in 1983 enacted legislation to bring many federal employees (including federal judges) within the Social Security old-age benefit system, the House Ways and Means Committee observed that the expansion of coverage to include "several groups of workers previously excluded from participation in the program" was intended to "maintain the social security program on a sound financial basis" and to "assur[e] both the short-term and long-term financial stability of the program." H.R. Rep. No. 25, 98th Cong., 1st Sess. 3 (1983).

When Congress considered extending OASDI benefits and taxes to federal employment in 1983, it recognized that doing so could subject federal employees under the CSRS program to a double imposition—the mandatory contribution to CSRS and the OASDI tax. Congress also recognized that many federal employees had long relied on the CSRS to make retirement and estate plans. Thus, to treat incumbent federal workers as equally as possible to other wage earners, Congress allowed them to continue to participate in CSRS rather than the OASDI program. See H.R. Rep. No. 25, *supra*, at 14; J.A. 112-113. Federal judges, however, were not subject to any similar mandatory civil-service retirement contribution, as they are entitled to retire on an annuity

financed out of general tax revenues. Thus, Congress had no occasion to permit judges to "opt out" of the OASDI program to avoid a double imposition.[3] Moreover, after 1984, federal judges earned coverage for OASDI benefits (in addition to the lifetime annuity provided under 28 U.S.C. 371 (1994 & Supp. IV 1998)) based on their judicial employment, whereas other incumbent federal employees who continued to participate in the CSRS program remained ineligible for OASDI benefits based on their federal employment.

2. On December 29, 1989, eight federal judges[4] (the "early-filing judges") filed suit against the United States in the United States Claims Court (the predecessor to the Court of Federal Claims). They contended that Congress had unconstitutionally diminished their compensation, in violation of the Compensation Clause, U.S. Const. Art. III, § 1, when, on January 1, 1984, it made their judicial salaries subject to the OASDI tax.[5] J.A. 23-27. Those eight judges

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[3] Congress also permitted a small number of high-level federal officials subject to the OASDI tax to opt out of CSRS. That option was afforded because, otherwise, those officials would have been subject to a mandatory double contribution for retirement income security purposes. Congress did not permit those officials to opt out of Social Security taxes; it instead required them, like judges, to pay OASDI taxes but made the contribution to CSRS optional for those officials. See J.A. 64-65.

[4] Those eight judges were District Judges Hatter, Arceneaux, Beer, Burciaga, McNamara, Ramirez, and Wiseman, and Circuit Judge Pregerson. District Judges Bowen and Roettger were also plaintiffs in the original suit, but did not appeal from the adverse decision of the Claims Court dismissing the case on jurisdictional grounds. J.A. 24-25; Pet. App. 19a. After the court of appeals reversed that dismissal and remanded, Judges Bowen and Roettger rejoined the lawsuit, when several other judges also became plaintiffs. See *id.* at 75a n.5. For statute of limitations purposes, Judges Bowen and Roettger were grouped with the "later-filing judges." See pp. 9-10, *infra*.

[5] The Compensation Clause provides: "The Judges, both of the supreme and inferior Courts, * * * shall, at stated Times, receive for their

were all sitting judges as of January 1, 1984, when the OASDI tax first became applicable to judicial salaries. The judges did not contend that Congress had diminished their prescribed statutory salary. Rather, they contended that the incidence of the OASDI tax on their salary on January 1, 1984, effectively and unconstitutionally diminished that salary, and that the unconstitutional diminution continued to the present day, despite substantial salary increases received by those judges after January 1, 1984.[6]

The Claims Court initially dismissed the suit on jurisdictional grounds, but the court of appeals reversed and remanded, ruling that the lower court had jurisdiction under the Tucker Act, 28 U.S.C. 1491(a). Pet. App. 19a-29a.[7] On

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Services, a Compensation, which shall not be diminished during their Continuance in Office."

[6] From December 17, 1982, to December 31, 1983, just before Congress extended the OASDI tax to federal judges, circuit judges were paid an annual salary of $77,300, and district judges were paid an annual salary of $73,100. See Exec. Order No. 12,387, 47 Fed. Reg. 44,981, 44,988 (1982). In 1984, after OASDI taxes were first imposed upon judges, the annual salaries of circuit judges were raised to $80,400, and those of district judges were raised to $76,000. Exec. Order No. 12,456, 49 Fed. Reg. 347, 360 (1983), as amended by Exec. Order No. 12,477, 49 Fed. Reg. 22,041, 22,052 (1984), and Exec. Order No. 12,487, 49 Fed. Reg. 36,493 (1984). Although the Executive Order increasing judges' salaries in 1984 was promulgated on September 1, 1984, the increase in judges' salaries was made retroactive to the first date of the first applicable pay period commencing on January 1, 1984. *Ibid.*; see Pet. App. 86a.

Since that time, federal judges have received additional salary increases. Circuit judges currently receive $149,900 annually, and district judges receive $141,300. See Exec. Order No. 13,144, 64 Fed. Reg. 72,242 (1999); see generally 28 U.S.C. 44 and 135 (1994 & Supp. IV 1998), Historical Notes (describing salary increases from 1919 for circuit judges and district judges, respectively).

[7] The Claims Court dismissed the suit on the ground that respondents had not filed administrative tax-refund claims. Pet. App. 12a-18a. The court of appeals ruled, however, that respondents were not required to file

remand, respondents filed a second amended complaint on January 11, 1993. That amended complaint added eight more judges (the "later-filing judges") as new plaintiffs.[8] The new complaint also challenged for the first time (on behalf of all respondents) the constitutionality of the HI tax, which had first been imposed on judicial salaries on January 1, 1983. J.A. 34. The parties cross-moved for summary judgment, and the court granted summary judgment for the United States, concluding that the application of the OASDI and HI taxes to respondents' judicial salaries was constitutional. Pet. App. 30a-53a.

3. The court of appeals reversed, and held that Congress's extension of the HI and OASDI taxes to the salaries of already-commissioned federal judges violated the Compensation Clause. Pet. App. 54a-66a. The court found this case controlled by *Evans* v. *Gore*, 253 U.S. 245 (1920), which held that the Compensation Clause prohibited the imposition of the federal income tax on the salary of a federal judge who had been appointed before Congress brought judicial salaries within the income subject to federal income tax. Pet. App. 59a. The court acknowledged (*id.* at 59a-60a) that this Court's subsequent decision in *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939), upheld the application of the income tax to the salaries of federal judges who took office after the income tax was enacted. Nonetheless, the court concluded that it was required to follow *Evans* rather than *O'Malley* because this Court had not expressly overruled *Evans*. See Pet. App. 60a-61a. It therefore remanded the case for a

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refund claims because one of the counts of their complaint "did not pursue a tax refund. Instead they sought damages for violation of Article III, § 1—an action which is within the Tucker Act jurisdiction of the Claims Court." *Id.* at 26a.

[8] The eight new plaintiffs were, in addition to District Judges Bowen and Roettger (who rejoined the case after the remand, see p. 7 n.4, *supra*), District Judges Evans, Mentz, Owens, Wilhoit, Baker, and Mihm. J.A. 31.

determination of the amount to which the HI and OASDI taxes had diminished respondents' compensation. *Id.* at 65a-66a.

4. The United States filed a petition for a writ of certiorari. Four Justices recused themselves from consideration of the petition. Because of those recusals, the Court lacked a quorum of six Justices to consider the petition. The Court therefore entered an order under 28 U.S.C. 2109, which provides that, when a quorum of the Court is absent, the judgment of the court of appeals shall be affirmed with the same effect as an affirmance by an equally divided Court. See *United States* v. *Hatter*, 519 U.S. 801 (1996); Pet. App. 69a.

5. On remand from the court of appeals, the Court of Federal Claims ruled that all the claims of the later-filing judges (see p. 9, *supra*) and all the respondents' claims based on the HI tax were barred by the six-year statute of limitations for actions against the United States (see 28 U.S.C. 2401(a), 2501). Pet. App. 90a-105a.[9] The court also ruled, as to the early-filing judges' claims based on the OASDI tax, that any constitutional violation had come to an end in 1984 when Congress granted judges a salary increase that exceeded the amount of the OASDI tax applied to their salaries on January 1, 1984. *Id.* at 78a-89a.

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[9] With respect to the statute of limitations, the court held that the HI claims and all the claims of the later-filing judges were filed more than six years after those claims had accrued, and rejected respondents' arguments that those claims were timely filed under the "continuing claim" doctrine. Pet. App. 101a-105a. The court questioned whether the continuing claim doctrine still exists at all, see *id.* at 103a, but it also concluded that that doctrine does not apply to this case, where "the unlawful diminution consisted of imposition of two new taxes on specific effective dates," *id.* at 105a. Those dates (January 1, 1983 and January 1, 1984), the court held, were the dates on which respondents' claims accrued.

On the latter point, the court observed that, "if, simultaneously with the imposition of a new tax, Congress granted an increase in salary which equaled or exceeded the tax, no diminution in the level of compensation just prior to imposition of the tax would have occurred." Pet. App. 79a. If that is so, the court reasoned, then any constitutional violation caused by the imposition of a new tax must also terminate when Congress raises judges' salaries "in an amount equal to or greater than the amount of the tax[.] * * * [I]f an increase in nominal salary occurred simultaneously with or subsequent to * * * a diminution, the simultaneous or subsequent increase accomplishes a cure to the extent of such increase." *Id.* at 82a. Otherwise, the court noted, Congress could never bring to an end a violation of the Compensation Clause caused by the initial application of a new tax except by repealing the tax (or by specifically granting the affected judges compensation for the tax). Indeed, the court observed that, in respondents' view, even "if Congress awarded all judges a pay raise of $1,000,000 per year retroactive to January 1, 1983 but not specifically or expressly related to the Social Security taxes imposed in 1983 or 1984, it would not cure the diminution resulting from imposition of the taxes," and "all Social Security taxes withheld must be refunded to plaintiffs and there can absolutely be no cure by subsequent increases in salary" granted to all federal judges. *Id.* at 83a-84a.

The court also found that Congress had in fact raised judges' salaries in an amount greater than the OASDI tax imposed on those salaries on January 1, 1984. Pet. App. 86a-87a. It also calculated that judges' salary increases over the pre-1984 compensation base exceeded in each year the total amount that judges paid in HI and OASDI taxes in that year, until by 1993, the annual sums represented by the successive pay increases "are more than ten times higher than the total of Social Security taxes withheld during any

calendar year." See *id.* at 89a-90a. Based on those facts, the court concluded that "no unlawful diminution in judicial compensation occurred" after respondents' salary increase in 1984 took effect. See *id.* at 89a.

The court therefore limited damages to the single deduction of OASDI taxes that occurred before the 1984 salary increase took effect. Because judges are paid on the first day of each calendar month for services rendered during the previous month, the court concluded that the OASDI tax deducted from the judges' salary payment on January 1, 1984 was in fact a tax on their salary earned during December 1983. Pet. App. 77a. The court accordingly entered judgment for respondents in the amount of the OASDI tax deducted from judges' salaries on January 1, 1984—$328.95 for the seven early-filing district judges and $347.85 for the early-filing circuit judge—with compound interest. *Id.* at 77a, 110a-111a.

6. A panel of the court of appeals reversed the Court of Federal Claims' holding that the constitutional violation terminated upon the judges' first salary increase following the initial incidence of the OASDI tax, Pet. App. 116a-125a, but affirmed the dismissal of the HI tax claims and all the later-filing judges' claims as time-barred, *id.* at 125a-127a.

On the former point, the court of appeals rejected the trial court's conclusion that any unconstitutional diminution in judicial compensation caused by application of the OASDI tax to judicial salaries terminated when Congress enacted a general increase in judicial salaries that exceeded the amount of the new tax. In the court of appeals' view, the trial court's approach was deficient because it "would create, with regard to judicial compensation, two different classes of judges." Pet. App. 122a. As the court of appeals put the matter, if the trial court's conclusion were upheld, then those judges who took office after Congress extended OASDI taxes to sitting judges could enjoy "the full benefit of

congressionally-granted salary increases" subsequent to those dates. *Ibid.* On the other hand, those judges who took office before OASDI taxes were applied to judicial salaries "would not receive the Congressionally-granted salary increases which became effective after 1983, because a significant portion of the increases would be allocated to pay the damage award to which they are entitled as a result of the earlier unconstitutional imposition." *Ibid.* The court also remarked that Congress had granted federal judges salary increases to adjust for inflation, and that "[t]o deprive the pre-1983 judges of the benefit of those increases by using them to offset the losses they incurred from the Government's earlier wrongful act would not only be unfair, but would be contrary to Congress's purpose in granting the increases." *Id.* at 125a. Thus, it held, any determination of the duration of a violation of the Compensation Clause and any calculation of damages must be "independent of any generally awarded adjustment to judicial salaries." *Ibid.*

7. Both the United States and respondents sought rehearing and rehearing en banc. The court of appeals denied the United States' petition but granted respondents' petition, which contested the panel's decision that the later-filing judges' claims and all claims based on the HI tax were time-barred. Pet. App. 128a-129a. On rehearing en banc, the court held that respondents' claims challenging both the OASDI and the HI taxes were timely, insofar as they challenged the taxes deducted from their salaries within six years before the claim was filed. *Id.* at 2a-11a.[10] The en banc

[10] The en banc court relied for that conclusion on the "continuing claim" doctrine, under which a claim accrues anew each time the government incurs an alleged obligation to make a payment to the claimant. The court reasoned that, because (in its view) each deduction of OASDI tax from a judge's salary payment continued the Compensation Clause violation, a new claim based on the Clause accrued each time such a deduction was made. See Pet. App. 4a-8a.

court at that time also reinstated the judgment of the panel, insofar as it had reversed the trial court's determination that the Compensation Clause violation came to an end when Congress granted judges a general salary increase. See *id.* at 1a-2a.

SUMMARY OF ARGUMENT

Congress's extension of the Social Security old-age, survivors and disability insurance (OASDI) and Medicare hospital insurance (HI) taxes to the salaries of sitting federal judges did not unconstitutionally diminish the compensation of those judges within the meaning of the Compensation Clause, U.S. Const. Art. III, § 1. The application and extension of a generally applicable, non-discriminatory tax to the salaries of federal judges does not implicate the Compensation Clause. Nor did Congress impermissibly discriminate against federal judges when it extended the OASDI and HI taxes to their salaries. Furthermore, even if there had been any unconstitutional diminution when those taxes were first deducted from sitting judges' salaries, any such constitutional violation would have terminated when Congress increased statutory judicial salaries in an amount that exceeded the amount of the OASDI and HI taxes.

I. A. The court of appeals relied on *Evans* v. *Gore*, 253 U.S. 245 (1920), to conclude that the application of the OASDI and HI taxes to sitting judges' salaries violated the Compensation Clause. This Court should now definitively overrule *Evans* v. *Gore*. In *Evans*, the Court concluded that the Compensation Clause barred the application of the federal income tax to the salary of an Article III judge; that judge happened to have been appointed to his judicial office before the tax was enacted, but that fact was not part of the Court's rationale in *Evans*. The Court's subsequent cases have repudiated *Evans*. In *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939), and *United States* v. *Will*, 449 U.S. 200 (1980), the Court made clear that the application of a gen-

erally applicable, nondiscriminatory tax to the salary of a federal judge is not an impermissible diminution of his compensation within the prohibition of the Compensation Clause.

The doctrinal basis of the Court's decision in *Evans* has long been demonstrated to be unsound. *Evans* relied heavily on the Court's intergovernmental tax immunity cases prohibiting the federal government and the States from applying their income taxes to the salaries of each other's employees, such as *Collector* v. *Day*, 78 U.S. (11 Wall.) 113 (1871), but the Court has since overruled that entire line of decisions. *Evans* also claimed support in state-court decisions construing similar provisions under state constitutions, but in fact the weight of state authority is to the contrary, as are decisions of courts in other English-speaking countries. *Evans* also cited a private 1862 letter of Chief Justice Taney and an 1869 opinion of Attorney General Hoar, but they also lend the decision in *Evans* little support. In sum, *Evans* has not withstood closer examination and the test of time and should be disapproved.

Respondents have argued that Congress's extension of OASDI and HI taxes to their salaries nonetheless constituted a diminution of their compensation because, after the taxes took effect, they were left with less "effective" compensation in the form of take-home pay than they had before the taxes were extended to their salaries. The "Compensation" that is protected from diminution by the Constitution, however, is the judges' statutory salary, not their "effective" salary or take-home pay after taxes are deducted. Respondents' construction, if accepted, might well lead to the conclusion that Congress is constitutionally prohibited from granting the President tax relief that is made available to the general population (since the President's "Compensation" may not be increased or diminished during his term of office) or extending generally applicable taxes to their own

salaries (since no law may vary the "Compensation" of Members until an election of Representatives has intervened). Respondents' construction would also suggest that Congress may not adjust even the rates of income tax applicable to the salaries of sitting federal judges, the President, or Members of Congress. These implausible consequences show that respondents' construction should be rejected.

Respondents' theory also has no basis in the policies of the Compensation Clause. The Clause is intended to protect judicial independence and to attract persons of high caliber to judicial service. A nondiscriminatory tax poses no threat to judicial independence. Similarly, while federal judges might well be concerned that Congress could use its power over their statutory salary to deprive them of adequate support, any concern that Congress would manipulate taxes of general applicability for such a purpose is without substance, because federal judges, like all members of the public, have the protection of the political process against excessively burdensome taxes that are generally applicable. Moreover, in bringing judges within the OASDI and HI programs, Congress also gave judges significant benefits, and respondents have pointed to nothing suggesting that OASDI and HI taxes have driven federal judges out of service.

B. Congress's extension of OASDI and HI taxes to judges did not impermissibly discriminate against respondents. In 1983 and 1984, Congress simply brought federal judges within a program that covers 90% of the civilian labor force. Congress therefore did at that time what it could have unquestionably done in 1935 when it first established the Social Security program, namely, subject judicial salaries to a generally applicable tax. Although Congress in 1984 allowed other incumbent federal employees to remain excluded from the OASDI program, it did so only because it

recognized that subjecting those employees to OASDI taxes as well as mandatory contributions for the existing Civil Service Retirement System (CSRS) would have made those employees subject to a double imposition for retirement income security. Federal judges were not similarly situated, because they were and are entitled to receive a lifetime annuity equal to the full salary received at the time of retirement, entirely at taxpayer expense, and so their salaries were not subject to deduction for CSRS or other retirement contributions.

II. Even if Congress did impermissibly diminish the compensation of sitting judges when it brought them within the HI and OASDI programs, that diminution terminated in 1984 when Congress increased judicial salaries in an amount greater than the amount of the new HI and OASDI taxes. After that increase, each judge received greater compensation, even net of the HI and OASDI taxes, than the judge had received before those taxes were first imposed. Congress therefore cannot be charged with any "diminution" in judicial compensation for periods after the enactment of the salary increases for federal judges.

ARGUMENT

I. CONGRESS DID NOT VIOLATE THE COMPENSATION CLAUSE WHEN IT EXTENDED SOCIAL SECURITY TAXES TO JUDICIAL SALARIES

A. The Application Of A Nondiscriminatory Tax To Judicial Salaries Does Not Violate The Compensation Clause

1. Evans *v.* Gore, *On Which The Court Of Appeals Relied, Should Be Overruled*

In holding that the application of OASDI and HI taxes to sitting judges violated the Compensation Clause, the court of appeals believed itself bound by this Court's decision in *Evans* v. *Gore*, 253 U.S. 245 (1920), which held that the Com-

pensation Clause barred the application of the federal income tax to federal judges' salaries. *Evans* should now be definitively overruled. Not only have this Court's own subsequent decisions expressly undermined the reasoning of *Evans*, but that decision rests on a serious misunderstanding of the Compensation Clause.

a. This Court's subsequent decisions have thoroughly disapproved the reasoning of *Evans*. *Evans* involved a federal income tax levied under a 1919 statute on the salary of a federal judge appointed in 1899 (see 253 U.S. at 246), but the Court's opinion did not limit its holding to situations in which the judge's appointment predated the imposition of the tax. Nor did the decision in *Evans* rely on a perception that the unconstitutional diminution was the effective reduction in judicial pay from the gross amount before the taxing act was passed to the amount net of taxes after the tax became effective. Rather, the rationale of *Evans* was that, under the Compensation Clause, Congress must not interfere with the ability of Article III judges to retain the full amount stated in law to be their salary, and may not indirectly diminish that amount by subjecting it to any tax at all. As the Court stated, "all which by their necessary operation and effect withhold or take from the judge a part of that which has been promised by law for his services must be regarded as within the prohibition." *Id.* at 254.

In reaching that conclusion, the Court in *Evans* relied (253 U.S. at 255) on intergovernmental tax immunity cases such as *Dobbins* v. *Commissioners of Erie County*, 41 U.S. (16 Pet.) 435 (1842), *Collector* v. *Day*, 78 U.S. (11 Wall.) 113 (1871), and *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), for the broad proposition that the Framers "were so sedulously bent on securing the independence of the judiciary [that they] intended to protect the compensation of the judges from assault and diminution in the name and form of a tax[.]" *Evans*, 253 U.S. at 256. The Court likened judicial

immunity from income taxes to the intergovernmental tax immunity cases because, it perceived, both principles of immunity were necessary to preserve "independence" (*id.* at 255) in the face of the power to tax, which "carries with it the power to embarrass and destroy" (*id.* at 256) (internal quotation marks omitted). On that premise, the Court concluded that a judge's "compensation is protected from diminution in any form, whether by a tax or otherwise, and is assured to him in its entirety for his support." *Id.* at 263.

Justice Holmes, joined by Justice Brandeis, dissented. They maintained that the inclusion of judicial salaries in the incidence of an income tax is constitutional as long as that tax does not single out judicial compensation but, rather, applies with like force to all citizens. Justice Holmes argued that the constitutional imperative of protecting judicial independence "is a very good reason for preventing attempts to deal with a judge's salary as such, but seems to me no reason for exonerating him from the ordinary duties of a citizen, which he shares with all others." 253 U.S. at 265. "To require a man to pay the taxes that all other men have to pay," he continued, "cannot possibly be made an instrument to attack his independence as a judge. I see nothing in the purpose of this clause of the Constitution to indicate that the judges were to be a privileged class, free from bearing their share of the cost of the institutions upon which their well-being if not their life depends." *Ibid.*

The Court's reasoning and holding in *Evans* were reaffirmed in *Miles* v. *Graham*, 268 U.S. 501 (1925). In *Miles*, the Court held that "the plain rule of *Evans* v. *Gore*" required invalidation of the income tax as applied to the salary of a judge who took office after the income tax was extended to judicial salaries. *Id.* at 509. The Court stated in *Miles* that the Compensation Clause "impose[s] upon Congress the duty definitely to declare what sum shall be received by each judge out of the public funds and the times for payment.

When this duty has been complied with, the amount specified becomes the compensation which is protected against diminution during his continuance in office." *Id.* at 508-509. The Court therefore found no distinction between judges who took office before the taxing act was enacted and those who took office after that date.

b. The Court's decisions in *Evans* and *Miles* exempting judges from income taxes were immediately and forcefully criticized by state courts, courts in other English-speaking countries interpreting similar provisions, and academic commentary.[11] In *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939), the Court, acknowledging much of that criticism (see *id.* at 281 nn. 6-8), reconsidered its view of the limitations imposed by the Compensation Clause upon Congress's power to tax, and adopted Justice Holmes's understanding that judicial salaries are as much subject to taxation as the salaries of other citizens. The Court held in *O'Malley* that "a non-discriminatory tax laid generally on net income is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition" of the Constitution. *Id.* at 282.

O'Malley expressly overruled *Miles*. 307 U.S. at 282-283. *O'Malley* did not expressly overrule *Evans*, for Congress had structured the income tax act under review in *O'Malley*

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[11] See pp. 24-28, *infra* (discussing state and foreign courts applying similar provisions); see also Edward S. Corwin, *Constitutional Law in 1919-1920. I*, 14 Am. Pol. Sci. Rev. 635, 642-643 (1920); David Fellman, *The Diminution of Judicial Salaries*, 24 Iowa L. Rev. 89, 99-101 (1938); James Parker Hall, Comment on Recent Cases, 20 Ill. L. Rev. 376, 377 (1925); Charles L.B. Lowndes, *Taxing Income of the Federal Judiciary*, 19 Va. L. Rev. 153, 159-160 (1932); Comment, *Further Limitations Upon Federal Income Taxation*, 30 Yale L.J. 75, 78-80 (1920); Recent Case, 3 U. Chi. L. Rev. 141, 142-143 (1935); Recent Case, 43 Harv. L. Rev. 318 (1929); Recent Case, *Federal Taxation of Judicial Compensation*, 7 Va. L. Rev. 69, 72 (1920); see also Recent Important Decision, 18 Mich. L. Rev. 697, 698 (1920) (agreeing with lower court's decision in *Evans*).

"to avoid, at least in part, the consequences of" *Evans* by making the tax applicable only to the salaries of judges appointed after its effective date. See *id.* at 280. But the Court plainly adopted the understanding of the Compensation Clause set forth in Justice Holmes's dissent in *Evans*, that the Clause does not insulate judges from sharing with others the ordinary burdens of citizenship. "[J]udges are also citizens," the Court explained, 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." *Id.* at 282.

The Court reexamined *O'Malley*, *Miles*, and *Evans* in *United States* v. *Will*, 449 U.S. 200 (1980). In *Will*, the Court held that Congress may not withdraw an increase in statutory judicial salaries once it has gone into effect, but that Congress may cancel a prospective statutory salary increase before it takes effect. The Court held that even a nondiscriminatory diminution of statutory judicial salaries (along with other government employees' salaries) violates the Compensation Clause. *Id.* at 226. In so holding, however, it distinguished the case of taxation of judicial salaries, and reaffirmed its holding in *O'Malley* that nondiscriminatory taxation of judicial salaries does not violate the Clause because "[f]ederal judges, like all citizens, must share the material burden of the government." *Ibid.* (internal quotation marks omitted). The Court in *Will* also disapproved the district court's reliance on *Evans* as a basis for holding that the rescission of a salary increase before its effective date

reduces the amount of compensation that a judge has been promised. See *id.* at 227. Rather, the Court stated:

> In *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939), this Court held that the immunity in the Compensation Clause would not extend to exempting judges from paying taxes, a duty shared by all citizens. The Court thus recognized that the Compensation Clause does not forbid everything that might adversely affect judges. The opinion concluded by saying that to the extent *Miles* v. *Graham*, 268 U.S. 501 (1925), was inconsistent, it "cannot survive." 307 U.S. at 282-283. Because *Miles* relied on *Evans* v. *Gore*, *O'Malley* must also be read to undermine the reasoning of *Evans*.

Id. at 227 n.31.

c. Not only has the Court adopted the position of Justice Holmes's dissent in *Evans*, that federal judges are not constitutionally immune from paying "the taxes that all other men have to pay," 253 U.S. at 265, but it has expressly repudiated the intergovernmental tax immunity decisions on which *Evans* heavily relied (see p. 19, *supra*). See *South Carolina* v. *Baker*, 485 U.S. 505, 520, 524 (1988) (overruling *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895)); *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, 486 (1939) (overruling *Collector* v. *Day*, 78 U.S. (11 Wall.) 113 (1871)); see also *Jefferson County* v. *Acker*, 527 U.S. 423, 436-437 (1999); *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 811 (1989) (noting overruling of "*Dobbins-Day*" line of cases).

In particular, in *Graves*, decided the same Term as *O'Malley*, the Court emphasized that the proper purpose of a limited intergovernmental tax immunity—such as that recognized in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819)—is "not to confer benefits on [government] employees by relieving them from contributing their share of

the financial support of the other government, whose benefits they enjoy, * * * but to prevent undue interference with one government by imposing on it the tax burdens of the other." 306 U.S. at 483-484. The Court held in *Graves* that a nondiscriminatory state income tax that falls on federal employees as well as others does not "impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions." *Id.* at 480-481. And as Justice Frankfurter stressed in his concurring opinion in *Graves*, subjecting individual government officials to nondiscriminatory income taxation does not imperil the independence of the institutions for which those officials work; the flaw of the broader intergovernmental tax immunity doctrine recognized in cases such as *Collector* v. *Day* was that "[f]ailure to exempt public functionaries from the universal duties of citizenship to pay for the costs of government was hypothetically transmuted into hostile action of one government against the other." *Id.* at 490. *Evans* suffered from the same flaw in reasoning: it erroneously transmuted Congress's failure to exempt federal judges from the general income tax into a danger to the independence of the institution of the federal judiciary.

d. *Evans* also claimed support in state court decisions interpreting similar state constitutional provisions (253 U.S. at 256), a private letter from Chief Justice Taney to Treasury Secretary Salmon Chase (*id.* at 257), and an opinion of Attorney General Hoar (*id.* at 258). Closer examination reveals that those sources lend *Evans* little support.

(i) The weight of state court cases supports Justice Holmes's position that a constitutional prohibition against diminution of judicial salaries does not grant judges immunity from generally applicable, nondiscriminatory taxes. In the first such state case of which we are aware, *Commissioners of Northumberland County* v. *Chapman*, 2 Rawle 73 (Pa.

1829), the Pennsylvania Supreme Court ruled that that State's 1790 constitution, which provided that the compensation of the judges of the courts of common pleas "shall not be diminished during their continuance in office," Pa. Const. of 1790, Art. 5, § 2, was not violated by the application to a judge of a tax on "all offices and posts of profit." *Chapman*, 2 Rawle at 73, 77. The court explained that "there is no reason to exempt a judge from contribution," and that, although the legislature "could not constitutionally retrench a part of a judge's salary under the pretext of assessing a tax on it," for the "*bona fide* purpose of contribution, a reasonable portion of it, like any other part of his property, may be applied to the public exigencies." *Id.* at 77. At least five other state supreme courts subsequently upheld the application of income taxes to state judges' salaries against similar constitutional objection. While the reasoning of the decisions varies somewhat, all of them rejected or expressed strong doubt about the proposition that a protection against diminution of salary grants judges an immunity from the duty to pay taxes that are imposed on other citizens generally.[12]

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[12] See *du Pont* v. *Green*, 195 A. 273, 276 (Del. 1937) (noting that "we express a preference for the dissenting views in *Evans* v. *Gore*, as delivered by Mr. Justice Holmes and concurred in by Justice Brandeis," that there is "no attack on the independence of a Judge by requiring him to pay a tax that all other men had to pay, regardless of their rank or station"); *Taylor* v. *Gehner*, 45 S.W.2d 59, 60 (Mo. 1931) (observing that the State's equivalent to the Compensation Clause "is one of the checks and restraints imposed to secure the independence of the judiciary. It is not a tax exemption provision."); see also *State ex rel. Wickham* v. *Nygaard*, 150 N.W. 513, 515 (Wis. 1915) (remarking that the proposition "[t]hat the framers of our Constitution intended to exempt public officers from any part of the burden of taxation which might be imposed generally on the body of the taxpayers of the state for the support of the government and the benefit of the public, including the office holders, may well be doubted"); *Poorman* v. *State Bd. of Equalization*, 45 P.2d 307, 312-315

A few state court decisions did invalidate certain taxes as applied to judicial salaries, but those decisions are of uncertain weight at best.[13] Only the North Carolina Supreme Court, in *Long* v. *Watts*, 110 S.E. 765 (1922), definitively invalidated the application of a general state income tax to judicial salaries, but that decision has little persuasive force in interpreting the federal Constitution because the court expressly stated that its reasoning exempted from taxation

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(Mont. 1935) ("[I]t is idle to say that because of this prohibition [against diminution of salaries] an official can refuse to pay any species of tax whatever from his acquisitions by way of salary"; expressing preference for dissent in *Evans* and reasoning of *Taylor* and *Wickham*, *supra*); *Martin* v. *Wofford*, 107 S.W. 2d 267, 271 (Ky. 1937) (observing that "[t]he Constitution deals with [public officials'] compensation as compensations and not as exemptions of public officials from any tax that is levied on any other citizen").

[13] In *Commonwealth ex rel. Hepburn* v. *Mann*, 5 Watts & Serg. 403 (1843), a decision noted in *Evans* (253 U.S. at 256), the Supreme Court of Pennsylvania invalidated under that State's 1838 constitution an income tax imposed solely on salaries of state officials (see 5 Watts & Serg. at 405), not a generally applicable income tax. The effect of that decision was, moreover, repudiated when Pennsylvania amended its constitution in 1873 to delete the prohibition against diminution of judicial salaries. See Pa. Const. of 1873, Art. 5, § 18; see also Pa. Const. Art. 5, § 16 (currently permitting nondiscriminatory diminution of judicial salaries). Similarly, the Maryland Court of Appeals, relying on *Evans* and *Miles*, invalidated the application of the state income tax to judicial salaries, see *Gordy* v. *Dennis*, 5 A.2d 69 (Md. 1939), but that decision was repudiated the very next year, when Maryland amended its constitution expressly to permit the imposition of a nondiscriminatory income tax on judicial salaries, see Md. Const. Art. 3, § 35A. The Louisiana Supreme Court invalidated the City of New Orleans' attempt to tax the salary of a state supreme court justice, see *New Orleans* v. *Lea*, 14 La. Ann. 197 (1859), but the nature of the tax in that case is not clear from the court's summary decision. The Alabama Supreme Court, in an advisory opinion, stated that a state occupation tax levied on the salaries of state and county officers (not a generally applicable tax) would be invalid as applied to judicial salaries. See *In re Opinions of the Justices*, 144 So. 111 (Ala. 1932).

judges who took office after the tax statute was enacted (*id.* at 771)—precisely the holding of *Miles* that this Court overruled in *O'Malley*.

(ii) The Court observed in *O'Malley* (307 U.S. at 281 & nn. 6, 8) that "English-speaking courts" abroad interpreting similar prohibitions against diminution of judicial salaries rejected the reasoning of *Evans* as authority for construing those restrictions to prohibit the application of income taxes on judicial pay. See *Krause* v. *Commissioner for Inland Revenue*, 1929 A.D. 286 (S. Afr.); *The Judges* v. *Attorney-General for Saskatchewan*, 53 Times L.R. 464 (P.C. 1937); see also *Cooper* v. *Commissioner of Income Tax for Queensland*, (1907) 4 C.L.R. 1304 (Austl.). Those tribunals rejected the view taken in *Evans* that the application of a general tax to judicial salaries threatens judicial independence. As Justice Barton of the High Court of Australia observed in *Cooper*, "[o]ne does not think of a Colonial Treasurer trying to levy a tax on the whole people, yielding many hundreds of thousands of pounds, for the mere purpose of vindictively obtaining a few pounds from one or half a dozen Judges." *Id.* at 1319-1320. Similarly, Justice Stratford of the South African Appellate Division observed in *Krause* that "[i]t is indeed difficult to appreciate in what manner a judge's independence of action is attacked by having to contribute, with all other citizens * * * , towards the maintenance of good order and government of the State in which he lives." 1929 A.D. at 295.

Justice Stratford also forcefully rejected *Evans*' assumption "that income tax has the 'effect' of diminishing the salary." *Krause*, 1929 A.D. at 295-296.[14] Similarly, in

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[14] Indeed, Justice Stratford remarked that, "[b]ut for a decision of the Supreme Court of the United States in *Evans* v. *Gore* I venture to think that the idea would not readily occur to any judge." *Krause*, 1929 A.D. at 294-295 (citation omitted). Justice Stratford also observed that judges' salaries had been "very much lessened in value by the [British] Imperial

Cooper, Justice O'Connor concluded that the "ordinary sense" of the prohibition against diminution of judicial compensation did not prohibit the application of income taxes to such salaries as long as "the full amount of statutory salary has been paid [to the judge] by the Government," and he rejected the argument that under the prohibition a judge "is entitled to have his salary exempted from any general scheme of taxation of incomes." 4 C.L.R. at 1323.

(iii) In *Evans*, the Court noted that, after passage of the income tax act of 1862, Chief Justice Taney wrote to Secretary Chase, objecting on constitutional grounds to the application of the tax to judicial salaries. 253 U.S. at 257-258; see 157 U.S. 701-703 (reprinting Taney letter). As the Court subsequently observed in *O'Malley*, however, in doing so Chief Justice Taney "merely gave his extra-judicial opinion, asserting at the same time that the question could not be adjudicated." 307 U.S. at 280. Chief Justice Taney, moreover, simply asserted that the tax act "diminishes the compensation of every judge three per cent, and if it can be diminished to that extent by the name of a tax, it may in the same way be reduced from time to time at the pleasure of the legislature." 157 U.S. at 701. He did not consider the forceful point that a legislature is unlikely to enact a generally applicable tax for the purpose of threatening judicial independence.

Government's action in departing from the gold standard," and that the British Government's actions had therefore, "in effect, diminished" judges' salaries, but he rejected the notion that the indirect effect of the departure from the gold standard upon judicial pay amounted to an improper diminution in judicial compensation; "the judges suffered with the rest of the community and it would be fantastic to think that their independence was affected by the general financial policy of the Imperial Government." *Id.* at 296. Justice Wessels, although not reaching the question, stated that he "very much doubt[ed]" the proposition that "the income tax payable on a judge's salary is a diminution of his remuneration." *Id.* at 290.

Evans also stated (253 U.S. at 258) that in 1869, Attorney General Hoar adopted Chief Justice Taney's position that the income tax could not be constitutionally applied to the salaries of Article III judges or the President.[15] See 13 Op. Att'y Gen. 161, 161-164 (1869). But that opinion, like *Evans*, relied squarely (*id.* at 162) on this Court's intergovernmental tax immunity decision in *Dobbins* v. *Commissioners of Erie County*, 41 U.S. (16 Pet.) 435 (1842) which has since been overruled. See pp. 19, 22-23. A more sound approach to the question is set forth in a 1919 opinion of Attorney General Palmer, see 31 Op. Att'y Gen. 475, 475-489 (not cited in *Evans*), which concluded that the Compensation Clause "protect[s] the salaries which [judges] shall receive, but [does] not, in any way, limit the power of Congress to create tax burdens to be borne by all citizens alike." *Id.* at 484.

e. In sum, *Evans* has not withstood closer examination and the test of time. Accordingly, that decision, and its reasoning which construes the application of a nondiscriminatory income tax to judicial pay as an impermissible diminution of the compensation that judges are due under Article III, should be disapproved.

2. *The Diminution Of Judicial Compensation Prohibited By Article III Is A Reduction In Judges' Salary Stated In Law, Not A Decrease In Their Effective Take-Home Pay Net Of Taxes*

The court of appeals in this case attempted to reconcile *Evans* and *O'Malley* by reading *Evans* to hold that Congress may not impose *new* taxes on the salaries of already sitting federal judges (even if those taxes do not discriminate against judges), even though under *O'Malley*, "nondiscriminatory taxation of a judge who took office after the tax

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[15] As discussed at pp. 30-31, *infra*, the Constitution prohibits any increase or decrease in the compensation of the President during his term of office. See U.S. Const. Art. II, § 1, Cl. 7.

went into effect does not violate the Compensation Clause." Pet. App. 64a (emphasis omitted). The court's reasoning was that, in the former case, the already sitting judge's compensation is "diminish[ed]" by the effect of the new tax, while in the latter case, "the taxation formed part of that judge's compensation scheme from the outset of his tenure." *Ibid.* Respondents have advanced the same interpretation of the Compensation Clause. See Br. in Opp. 17-20.

As we have explained (pp. 18-19, *supra*), this focus on taxation of the compensation of sitting judges, as opposed to those appointed after the taxing statute was enacted, was not part of the Court's rationale in *Evans*. In any event, the interpretation of the Compensation Clause advanced by respondents and reflected in the court of appeals' opinion is erroneous: the Clause does not bar Congress from applying nondiscriminatory taxes to the salaries of already sitting federal judges. Respondents do not argue that Congress has ever literally diminished their stated salary.[16] Respondents argue, rather, that the undiminished "Compensation" that is guaranteed to Article III judges is their take-home pay net of taxes, and so an increase in taxes applicable to their salaries equals an "effective" diminution of their compensation. The text of the Constitution and practicalities of tax administration refute that contention, and the policies of the Clause offer it no support.

a. First, respondents' construction suffers from serious textual flaws. A major problem in respondents' argument is the relation between the Judges' Compensation Clause and the President's Compensation Clause, Art. II, § 1, Cl. 7, which provides that the President shall "receive for his Services, a Compensation, which shall neither be *encreased* nor *diminished* during the Period for which he shall have been

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[16] To the contrary, since 1984, Congress has enacted substantial salary increases for federal judges. See p. 8 n.6, *supra*.

elected."[17] (Emphasis added.) Under respondents' theory, Congress could not eliminate any tax on the President's salary while he was in office, even if that elimination were applicable to all citizens, because such an action would "encrease[]" the President's effective compensation net of taxes. We see no reason, however, why the Constitution would require Congress to discriminate against the President by denying him tax relief that it provides to all other individuals.[18]

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[17] The background to the adoption of the Constitution confirms the similar purpose of the two Clauses. Both were intended to ensure independence from Congress. Compare *The Federalist* No. 73, at 441-442 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (because of the President's Compensation Clause, the legislature "can neither weaken his fortitude by operating upon his necessities, nor corrupt his integrity by appealing to his avarice") with *The Federalist* No. 79, at 472 (Alexander Hamilton) ("The remark made in relation to the President is equally applicable here. In the general course of human nature, *a power over a man's subsistence amounts to a power over his will*."). The principal difference is that the Constitution permits increases in judicial salaries but not in the salary of the President during his term of office. The Framers permitted increases in judicial compensation in the discretion of Congress in part because of the possibility that inflation might lessen the value of a judge's salary during his life tenure. The President's compensation, by contrast, did not present that problem, because the President is elected for only a four-year term. See *id.* at 473; *Will*, 449 U.S. at 219-220. It is notable, however, that the Framers did not *require* Congress to raise judicial salaries to keep pace with inflation, even though they plainly understood that a decline in the value of money could effectively diminish the buying power of a judge's salary. See *Atkins* v. *United States*, 556 F.2d 1028, 1047-1051 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978). That point casts significant doubt on respondents' theory that the "Compensation" protected from diminution by Article III is a judge's "effective" compensation rather than the statutory salary payable to judges.

[18] Attorney General Palmer noted this very point in his 1919 opinion, observing that "[i]f to impose an income tax is to diminish [the President's] salary, to repeal a tax in force at the beginning of his term would equally be to increase it." 31 Op. Att'y Gen. at 488. He further observed

Similarly, the Twenty-seventh Amendment provides that "[n]o law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened." U.S. Const. Amend. XXVII.[19] Under respondents' construction of "Compensation" as "compensation net of income taxes," Congress could not impose new (or repeal old) taxes on its own Members' salaries until an election of Representatives had intervened, even if it did so with respect to the general population, because such an action would "vary[] the compensation" of Senators and Representatives. Respondents' textual analysis therefore leads to the conclusion that, when Congress imposes new income taxes on the general population, it is constitutionally required to discriminate in favor of itself by exempting its Members from those taxes. This implausible result demonstrates that respondents' reading of the Compensation Clause cannot be sustained.

b. Respondents' construction of Article III would also lead to serious practical difficulties in tax administration. If

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that, if the Constitution indeed prohibited the imposition or repeal of generally applicable taxes on the President's salary during his term of office, then President Wilson was constitutionally required to continue to pay the tax levied by the 1916 income tax act, even though "that Act has since been repealed and no one else in the country now pays the tax." *Ibid.* The "extreme improbability" of such a result, he reasoned, supported the conclusion that "it was never intended that the amount which [the President and Article III judges] should receive as compensation should be regarded as affected in any way by the amount of income taxes imposed upon them, in common with other citizens, either before or during their terms of office." *Ibid.*

[19] The Twenty-seventh Amendment, which became effective in 1992, was proposed to the States by the First Congress and was first introduced in the House of Representatives by James Madison, who obviously was familiar with the Framers' understanding of the term "Compensation" as used in the Constitution. See 1 *Debates and Proceedings in the Congress of the United States* 448, 450, 452, 457, 756-757 (Joseph Gales comp., 1789).

respondents were correct that "Compensation" in Article III means the effective take-home pay net of income taxes, then it is difficult to understand why Congress would not also be prohibited from raising the *rates* of income taxes on the salaries of sitting judges.[20] If the application of a new income tax to judicial salaries would "diminish" a judge's compensation, so, it would seem, would an increase in the rate of such an income tax. Either action reduces the amount that the judge takes home in pay, even when the judge's statutory salary remains unchanged. But that construction, if accepted, would require Congress to apply differing income tax rates (and perhaps differing deductions, exemptions, and credits) to judges, depending on the date of their appointment. The application of such a system of income tax to judicial salaries would be extraordinarily unwieldy.[21]

Respondents have maintained (Br. in Opp. 29) that there is a difference of constitutional significance between a new

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[20] Because Congress is also prohibited from adjusting the compensation of the President and Members of Congress during the terms of office of the President or of Representatives, respectively (see pp. 29-31, *supra*), Congress might also be prohibited from *raising or lowering* the rates of income taxes on the salaries of the President and all Members of Congress, even as part of a general increase or decrease in tax rates.

[21] Under such a rule, Congress would essentially be required (a) to freeze the effective rate of any tax applicable to judicial salaries to the effective rate in force when each judge received the judicial commission, (b) to subject all federal judicial salaries only to the lowest effective income tax rate that was applicable when any sitting member of the judiciary first took office, or (c) to exempt federal judges from income taxes altogether (and to do so permanently, since any new application of an income tax to judicial salaries would violate the Compensation Clause as to sitting judges and would create the problems just discussed for judges appointed in the future). In addition, no change in tax rates could be applied to the salaries of the President and Members of Congress until a new election for President or for Representatives, respectively. Nothing in the text or background of the Compensation Clause remotely suggests that the Framers intended to relegate Congress to such a welter.

income tax and an increased income tax rate, but they do not explain why or how the Constitution could distinguish between the two, if they are correct in their initial premise that the imposition of a generally applicable tax constitutes a diminution in a judge's compensation.[22] Indeed, it is not clear that respondents can distinguish Social Security taxes from the income tax on that basis, for Social Security taxes on employees are merely a kind of income tax. See 26 U.S.C. 3101(a) and (b) (imposing OASDI and HI taxes "on the income of every individual"). Moreover, Congress has frequently imposed surtaxes on income that might be characterized either as a new income tax or an increase in the rate of income taxes.[23] Respondents' construction of the Compensation Clause offers no guidance about the proper treatment of such taxes.

c. Respondents' submission also finds little support in the underlying policies of the Compensation Clause. This Court has remarked that the Clause has two objectives: to preserve the independence of the judiciary from "potential domination by other branches of government," *Will*, 449 U.S. at 218, and to "attract able lawyers to the bench" by assuring them certain support, *id.* at 221. It is difficult to conceive,

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[22] Respondents may suggest that a judge who takes office after an income tax has been enacted is effectively on notice that Congress may subsequently increase the rate of that tax. But it is also true that judges, like all citizens, are on notice that Congress may impose new forms of taxes on income, given that such taxes are specifically authorized by the Sixteenth Amendment. That point distinguishes this case from *Evans*, because Judge Evans took office during a period in which the income tax was deemed unconstitutional. See *Jefferson County* v. *Acker*, 210 F.3d 1317, 1321 (11th Cir. 2000), petition for cert. pending, No. 00-455.

[23] See, *e.g.*, War Revenue Act, ch. 63, §§ 1, 2, 40 Stat. 300-301; Revenue Act of 1918, ch. 18, § 211, 40 Stat. 1062-1064 (1919); Revenue Act of 1942, ch. 619, § 172(a), 56 Stat. 884; Revenue Act of 1951, ch. 521, 65 Stat. 459-461; Revenue and Expenditure Control Act of 1968, Pub. L. No. 90-364, § 102, 82 Stat. 251-254.

however, how Congress's extension of the generally applicable, nondiscriminatory OASDI and HI taxes to judicial salaries—along with the salaries of numerous federal officials and employees—could have posed any threat to judicial independence. Certainly Congress is unlikely to establish a new, generally applicable tax on incomes for the purpose (or with the likely effect) of endangering the independence of the judiciary. See pp. 26-28, *supra*. Thus, if Congress had brought judges within the Social Security system at the same time that it extended that system to most wage-earners, there could have been no serious contention that Congress was threatening judicial independence.[24] That is particularly true since Congress also extended to federal judges the opportunity to earn credits for OASDI and HI benefits based on their judicial service, an opportunity they had not previously had.

Respondents' argument, therefore, is that Congress could not do in two steps what it could have done at one time—enact the Social Security system first for private-sector employees, and then extend it to federal employees as well. Thus, they contend, because Congress initially exempted judges from OASDI and HI taxes, it was required to maintain that exemption permanently for judges who were in office before the taxes were further extended. But, as the Court of Federal Claims observed, there is "no good

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[24] It is likely that political constraints on the imposition of taxes on the population at large effectively prevent Congress from using generally applicable, nondiscriminatory taxes to impair the independence of the judiciary. Any generally applicable income tax affects a very large number of people, and so the general public is likely to object to an onerous tax imposed for the purpose of punishing a small number of judges. The same political constraints, however, might not constrain Congress's power to fix the statutory salary of judges, in the absence of the Compensation Clause, since that power affects only a small number of individuals and not the general public. Indeed, reductions in judges' statutory salary might well escape general public notice.

reason why Congress in taxing judges has the power to accomplish wholesale what it cannot do piecemeal." Pet. App. 45a. Indeed, "the purpose of the Compensation Clause is not to make irrevocable every momentary tax exemption enjoyed by sitting judges relative to the public; its purpose is rather to protect the independence of the judicial branch by insuring that judges are shielded from attempts by the political branches to impose economic duress." *Ibid.*

Respondents argue, however (Br. in Opp. 20), that the extension of OASDI and HI taxes to their judicial salaries made their judicial positions relatively less attractive because, when they left the private sector, they expected that their judicial salaries (unlike their private-sector salaries) would be free of Social Security taxes. They maintain that the application of new taxes in such a manner deters qualified persons from assuming judicial positions. But respondents overlook the significant benefit that many sitting and future judges obtained in 1983 and 1984 by becoming eligible for OASDI and HI coverage based on their judicial service.[25] Indeed, although respondents have objected to the imposition of OASDI and HI taxes on their salaries, they have never suggested that they would waive the right to receive OASDI and HI benefits based on their coverage in judicial service in return for exemption from OASDI and HI taxes. Moreover, respondents have pointed to no evidence suggesting that the OASDI and HI taxes caused federal judges to leave judicial service; indeed, they have not even

[25] The eligibility for HI coverage is particularly significant, because, unlike OASDI benefits, HI benefits do not depend on the amount that an employee has earned or the length of time he or she has worked, as long as the employee has accrued sufficient quarters of coverage. Any employee has sufficient quarters of coverage is entitled to the full range of HI benefits available under the law.

alleged that any of them left the bench because of those taxes.[26]

More fundamentally, whereas a prohibition against diminution in judges' statutory salary may be necessary to assure them a reasonable certainty of support, a prohibition against taxation is not. If the Constitution did not prohibit Congress from reducing judges' statutory salaries, judges might well fear that Congress would exercise its discretion over their salary to reduce them to penury, without political objection from the general public. But a judge who is assured of a certain statutory salary, as respondents are, also knows that his rate of taxation will be no greater than that of similarly situated members of the general public, and that the general public will object to onerous income tax rates. Thus, while judges, like all members of the public, are subject to income taxes, they also have, like all members of the public, protection in the political system against excessively burdensome income taxes.

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[26] Cf. *Atkins*, 556 F.2d at 1055 (rejecting argument that Congress's failure to increase judicial salaries to match inflation violated Compensation Clause, absent a "demonstration of massive resignation for financial reasons").

B. Congress's Extension Of Social Security Taxes To Judicial Salaries Did Not Impermissibly Discriminate Against Article III Judges

Respondents have argued (Br. in Opp. 22-24) that Congress unconstitutionally discriminated against federal judges when it extended Social Security taxes to their salaries.[27] That contention is without merit. When Congress extended HI and OASDI taxes to the salaries of Article III judges and federal employees, it merely brought taxation of those salaries in line with the treatment of the vast majority of other wage-earners in this country.[28]

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[27] Although we have argued that the application of nondiscriminatory income taxes to judicial salaries does not violate the Compensation Clause because the Constitution's reference to "Compensation" is only to judges' stated salary, we assume that discriminatory taxation of judges would contravene fundamental principles underlying Article III, if not the Clause itself.

[28] Respondents have noted (Br. in Opp. 22) that a small minority of wage-earners still remain outside the Social Security system. See generally 26 U.S.C. 3121(b) (1994 & Supp. IV 1998) (setting forth various exceptions to coverage, including such persons as Bahamian temporary agricultural workers, student nurses, and teenagers delivering newspapers). In addition, Congress originally did not compel the participation of employees of state and local governments in the OASDI program, out of concern about the intergovernmental tax immunity doctrine and recognition that some state and local governments operate retirement programs similar to CSRS. In 1950, Congress established a system whereby state and local governments could elect to have certain of their employees covered by the OASDI program under agreements with the federal government. See *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 44-46 (1986); 42 U.S.C. 418; Social Security Act Amendments of 1950, ch. 809, § 106, 64 Stat. 514. In 1986, Congress required HI coverage of almost all new employees of state and local governments. See Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13205, 100 Stat. 313-318 (1986). And in 1990, Congress required OASDI coverage of essentially all employees of state and local governments who are not covered by a state retirement system

Respondents object (Br. in Opp. 23), however, that Congress did not also require all federal employees who were already then in service to pay the OASDI tax.[29] Congress was aware, however, that most incumbent federal employees were already required to make salary contributions to a separate retirement system, the CSRS, which had been in place since 1920. See pp. 3, 6-7, *supra*. Terminating CSRS immediately would have been extremely disruptive of federal employees' retirement plans. On the other hand, requiring federal employees to contribute to both Social Security and CSRS would have subjected those employees to a mandatory double deduction under federal law. Congress therefore allowed incumbent federal employees to remain in CSRS rather than the OASDI program and to receive a CSRS annuity (but not OASDI benefits) based on their federal employment. In doing so, Congress treated incumbent federal employees as equally as possible to all other wage earners, who are also subject to only one imposition under federal law for retirement income security, the

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similar to CSRS or who are not covered by OASDI pursuant to an agreement under 42 U.S.C. 418. See Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11332(b), 104 Stat. 1388-469; 26 U.S.C. 3121(b)(7)(F). The great majority of state and local employees are now covered by the OASDI and HI programs. See H.R. Rep. No. 25, 98th Cong., 1st Sess. 17-19 (1983).

Although about 10% of the civilian labor force remains outside the OASDI system, that hardly establishes that the imposition of Social Security taxes on judges' salaries is discriminatory. The taxes are surely generally applicable to most citizens, even if they are not *universally* applicable to all persons employed in the United States.

[29] Respondents' discrimination argument does not apply to the HI tax, because all federal civilian employees were required to pay that tax after January 1, 1983. J.A. 61. Most employees of state and local governments have also been required to pay HI taxes since 1986. See 26 U.S.C. 3121(u)(2)(A); S. Rep. No. 146, 99th Cong. 1st Sess. 389-391 (1985); H.R. Rep. No. 241, 99th Cong., 1st Sess. Pt. 1, at 25-27 (1985).

OASDI tax. Federal judges, however, were not subject to any similar civil-service retirement contribution, because judges are guaranteed a lifetime annuity after retirement at taxpayer expense. See 28 U.S.C. 371 (1994 & Supp. IV 1998). Congress therefore had no occasion to permit judges to "opt out" of the OASDI program.

Respondents also point out (Br. in Opp. 5-7) that, when Congress extended OASDI taxes to judicial salaries, it allowed a small number of high-level federal officials and employees to opt out of CSRS, thereby (respondents contend) permitting those persons effectively to offset the incidence of the new OASDI taxes on their salaries. But if Congress had required those federal officials to continue contributing to both CSRS and the OASDI program, they would have been subject to a double imposition. Moreover, Congress did not allow those high-level officials and employees to opt out of OASDI; it required them (like Article III judges) to pay OASDI taxes, and made the second payment (the CSRS contribution) optional. Judges were not covered by CSRS, and thus had no cause to complain of paying double retirement contributions.

There is therefore no basis for a conclusion that Congress impermissibly discriminated against federal judges by bringing them within the coverage of the OASDI program and requiring them to pay OASDI taxes. While it is true that Congress in 1984 allowed other incumbent federal employees to alleviate the effect of the extension of the OASDI tax to government employees' salaries, that is only because those other employees were already required under federal law to contribute to a program that, like OASDI, financed a retirement income security program. Federal judges had not previously been required to make contributions to such a program through salary contributions. By declining to grant federal judges an exemption or setoff from OASDI taxes, Congress did not discriminate against them; rather, it

equalized, as nearly as possible, the treatment of contributions from their salaries for retirement income security purposes with that of all other employees, federal and otherwise.

II. ANY CONSTITUTIONAL VIOLATION TERMINATED WHEN CONGRESS INCREASED THE STATUTORY SALARIES OF FEDERAL JUDGES IN AN AMOUNT GREATER THAN THE OASDI AND HI TAXES DEDUCTED FROM THOSE SALARIES.

In 1984, after Congress extended OASDI taxes to judicial salaries, Congress also granted federal judges an increase in salary that exceeded the amount of those taxes. See Pet. App. 86a-87a; pp. 8, 11-12, *supra*. The Court of Federal Claims concluded that that increase in judicial salaries terminated any Compensation Clause violation caused by the taxes' diminution of judges' take-home pay. Pet. App. 78a-89a. The court of appeals, however, held that the unconstitutional diminution in judicial compensation continued even after Congress elevated judges' effective take-home pay above its level before the extension of Social Security taxes to judges' salaries. The court of appeals analyzed the issue in terms of whether the salary increase was sufficient to pay the "damages" caused by what it believed to be an ongoing violation of the Compensation Clause resulting from the assessment of OASDI and HI taxes each month, rather than whether the increase in salary terminated the violation altogether. Viewing the matter from that perspective, the court reasoned that the measure of damages for a Compensation Clause violation is "independent of any generally awarded adjustment to judicial salaries." Pet. App. 125a. That ruling cannot be reconciled with the text or policies of the Clause.

The Compensation Clause provides that federal judges shall "receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Even if Congress had "diminished" the compensation of sitting judges when it imposed HI and OASDI taxes on their pre-existing salaries, that "diminution" would have come to an end when Congress raised those judges' salaries in an amount greater than the amount of the taxes imposed on their pre-tax salaries. Congress could be said to have "diminished" a judge's compensation only if it left the judge with less compensation than he received before the tax took effect. Cf. *Will*, 449 U.S. at 226-229 (holding that Congress did not unconstitutionally diminish judges' salaries when it canceled salary adjustments before their effective date). To be sure, the increase in the respondents' net pay was smaller than it would have been if the HI and OASDI taxes had not been withheld. But the Compensation Clause prohibits Congress only from *decreasing* judicial compensation; Congress has discretion to decide what *increases* in compensation should be given. See *id.* at 227.

The facts of this case are similar to the termination of the Compensation Clause violation in "Year 1" of the facts of *Will*. In Year 1, judges initially were granted a 4.8% annual salary increase for the fiscal year, pursuant to a recommendation of the Advisory Committee on Federal Pay and an Executive Order. Congress, however, enacted a statute rescinding that increase, which the President signed on the first day of the fiscal year, after the increase had taken effect. See 449 U.S. at 204-206, 224-225. Although the Court found a Compensation Clause violation in that rescission of the 4.8% salary increase, it also noted that Congress, later in that fiscal year, enacted a statutory increase in judges' salaries that exceeded the salaries that judges would have received had Congress left in effect the initial 4.8% increase. *Id.* at 206 n.3, 209 n.6. It was unquestioned in *Will* that

Congress's subsequent increase in judicial salaries terminated the violation caused by the rescission of the 4.8% increase. *Ibid.* The Court did not suggest that Congress was obligated to continue to pay to the judges who held office at the beginning of Year 1 the rescinded 4.8% increase *in addition to* the subsequently enacted statutory increase—yet that is essentially respondents' position here.

The court of appeals believed that the Compensation Clause violation in this case continued independent of any general judicial salary increases because, in its view, a different rule would create two classes of judges: those appointed after the taxes were extended to judicial salaries, who would enjoy the full extent of the general salary increases, and those appointed before application of the taxes, who would be required to pay "out of their own salaries, including generally-granted increases, the damages owed to them by the Government." Pet. App. 122a.[30] But once Congress increased judicial salaries above the level that existed before the incidence of the tax, there was no more diminution and hence no more violation of the Compensation Clause for which damages might be owed. Moreover, the court of appeals' ruling itself created two classes of judges with different compensation packages: federal judges appointed after the OASDI taxes took effect in 1984 must pay HI and OASDI taxes on their current annual salaries, whereas judges appointed before that date receive a permanent immunity from paying those taxes—even though they are eligible for HI and OASDI benefits based on their judi-

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[30] The same, of course, could have been said of Year 1 in *Will*. Judges who were appointed in the six months between the date on which Congress rescinded the 4.8% increase and that on which it enacted the statutory increase would have received the "full benefit" of the statutory increase, whereas judges who were in office before the 4.8% increase was rescinded would not. Yet the Court did not doubt that the constitutional violation terminated when the statutory increase was enacted.

cial service. The court of appeals' decision therefore creates inequities in judicial compensation.

The effect of the court of appeals' ruling on this point is that Congress may never bring to an end a Compensation Clause violation caused by taxation of judicial salaries except by repealing the offending tax (or, perhaps, by granting the affected judges a special salary increase, thereby compensating them differently from all other federal judges). That ruling casts a serious cloud over Congress's authority to extend nondiscriminatory taxes paid by the general population to judicial salaries; if Congress wished to do so, it would have to grant sitting judges a permanent exemption from the tax. That requirement would create inequities among Article III judges and would embed those inequities in the judicial compensation system for long periods of time, in view of the life tenure of Article III judges. Congress could, of course, exempt all judges from new taxes, but that approach would create inequity between Article III judges and all other citizens, as this Court recognized in *O'Malley*, when it said that "judges are also citizens" and do not have "an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering." 307 U.S. at 282. Accordingly, should the Court conclude that the Compensation Clause was violated by Congress's extension of OASDI and HI taxes to judicial salaries, it should also hold that the violation was terminated when Congress subsequently increased judicial salaries in an amount greater than the amount of the tax.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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