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United States v. Hatter and the Taxation of Federal Judges

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TAXATION, COMPENSATION, AND JUDICIAL INDEPENDENCE: *HATTER v. UNITED STATES*

By Jonathan L. Entin and Erik M. Jensen

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Does the constitutional requirement that the "compensation" of federal judges "not be diminished during their Continuance in Office" preclude Congress from subjecting sitting judges to social security wage taxes from which they had previously been exempt? In *Hatter v. United States*, the Federal Circuit ruled for judges claiming such an exemption, and the Supreme Court heard arguments in the case on February 20. The authors argue that the Supreme Court should reverse the Federal Circuit. Neither the original understanding nor any other reasonable interpretation of the Compensation Clause, they say, supports exempting judges from taxes of general application, and Supreme Court authority points to that same clear result.

Some issues just won't go away. Can federal judges be subject to a federal income or wage tax that affects them in the same way it affects other American taxpayers? Despite early authority to the contrary — the Supreme Court, in a 1920 decision, *Evans v. Gore*,¹ struck down extension of the national income tax to federal judges — most commentators used to think the answer was unquestionably Yes. To be sure, the Constitution's Compensation Clause provides that federal judges "shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office,"² but a generally applicable federal tax simply treats judges like anyone else.

So much for apparently settled doctrine. In *Hatter v. United States*,³ a case that has been bouncing up and down in the federal judicial system for more than a decade, the United States Court of Appeals for the Federal Circuit held that bringing the federal judiciary into the social security system, and thus imposing the social security wage tax on judges who had previously been exempt from the tax, violated the Compensation Clause. The Supreme Court granted *certiorari* in *Hatter*,⁴

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¹253 U.S. 245 (1920).

²U.S. Const. art. III, section 1 (emphasis added).

³*Hatter* now involves eight reported decisions: (1) 21 Cl. 786, 90 TNT 232-7 (1990) (dismissing for lack of jurisdiction); (2) 953 F.2d 626 (Fed. Cir. 1992) (reversing the jurisdictional ruling); (3) 31 Fed. Cl. 436, 95 TNT 233-9 (1994) (granting summary judgment to the government); (4) 64 F.3d 647, Doc 95-8287 (10 pages), 95 TNT 173-60 (Fed. Cir. 1995) (reversing the grant of summary judgment and remanding); (5) 519 U.S. 801 (1996) (affirming the Federal Circuit due to the lack of a Supreme Court quorum); (6) 38 Fed. Cl. 166, Doc 97-22403 (33 pages), 97 TNT 148-15 (1997) (granting limited damages to some of the plaintiffs for a limited time period because the statute of limitations had run on many claims); (7) 185 F.3d 1356, Doc 1999-26402 (14 original pages), 1999 TNT 152-77 (Fed. Cir. 1999) (holding that all plaintiffs were entitled to greater damages); (8) 203 F.3d 795, Doc 2000-4281 (10 original pages), 2000 TNT 29-11 (Fed. Cir. 2000) (*en banc*) (holding that the continuing-claim doctrine overrode the statute of limitations so that the plaintiffs were entitled to damages for a longer time period than that determined by the Court of Federal Claims).

⁴121 S. Ct. 338 (2000) (No. 99-1978).

and the case was argued on February 20. (See *Tax Notes*, Feb. 26, 2001, p. 1151.)

This old-fashioned issue will therefore have another day in the sun, but none of this should have happened. With the Federal Circuit deciding as it did and with a number of federal judges claiming an exemption from a tax of general application (a rather unseemly position for judges to take publicly), it's understandable the Supreme Court agreed to hear the case. But neither the original understanding nor any other plausible reading of the Compensation Clause supports an absolute tax exemption for federal judges, and *Evans v. Gore*, the case on which the Federal Circuit relied in *Hatter*, was effectively overruled in 1939.⁵ Originalists and non-originalists should be able to agree: The purposes of the Compensation Clause aren't implicated in *Hatter*.

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The Compensation Clause was part of the constitutional structure designed to protect the judiciary against interference from other governmental branches, particularly Congress. The concern was judicial independence, not preserving the after-tax incomes of federal judges. It's certainly true that a tax directed at specific judges would violate the Compensation Clause, and it's probably true that a tax directed only at the judiciary would violate the clause. For that matter, it might even be the case that a facially neutral statute motivated by a congressional intent to influence the judiciary would fail constitutional requirements.⁶ But those interesting hypotheticals have nothing to do with *Hatter*. Requiring that federal judges be subject to the same taxing scheme applicable to other Americans shouldn't affect judicial independence at all.

In this article, we examine the merits of the dispute in *Hatter*. After a brief description of the specifics of the case, we discuss two areas that should affect *Hatter's* resolution: the original understanding of the Compensation Clause and the 20th century jurisprudence on the relationship between the clause and the taxing power. Both suggest — clearly, we think — that the Federal Circuit's decision should be reversed. Along the way we also discuss some 19th century misunderstandings of the Compensation Clause.

I. *Hatter*

The controversies in *Hatter* are beginning to strain the capacities of law libraries and electronic databases. Eight opinions have been issued so far,⁷ and more words are on the way. Much of the case's procedural

history is complex — raising questions such as who can hear the case,⁸ and the implications of the Supreme Court's inability to muster a quorum when the case was brought there at an earlier stage⁹ — but the fundamental, substantive issue is straightforward: Under the Compensation Clause, can Congress extend an already existing tax of general application to sitting judges who had previously been exempt from the tax?

The controversies in Hatter are beginning to strain the capacities of law libraries and electronic databases. Eight opinions have been issued so far, and more words are on the way.

Judge Terry Hatter and several other federal judges sued in 1989, challenging the application to them of the wage taxes that fund the social security old-age, survivors, and disability insurance (OASDI) program and the Medicare hospital insurance program. Before 1983, most federal employees, including judges, were exempt from social security taxes because of the separate retirement systems established by the federal government on their behalf. But the Tax Equity and Fiscal

⁸At least 10 suits involving almost 100 other federal judges with similar claims are in the pipeline. See Petition for *Certiorari*, App. L, *United States v. Hatter* (No. 99-1978). No members of the Supreme Court have been parties to *Hatter* or any of the other cases. See *id.*; Linda Greenhouse, "Supreme Court Roundup: Court to Review Benefits Tax on U.S. Judges," *N.Y. Times*, Oct. 17, 2000, at A29.

⁹Four justices recused themselves when the case reached the Court in 1996, see 519 U.S. 801 (1996), apparently because they might have been "entitled to refunds if the plaintiffs' broadest remedial theory prevail[ed]." Greenhouse, *supra* note 8 (noting that only two justices are not participating in this round, presumably because the passage of time leaves them as the only members of the Court with a potential financial stake in the outcome). Because of the four recusals last time, the Court lacked a quorum of six participating members. See 28 U.S.C. section 1. The absence of a quorum had the effect of affirming, as if by an equally divided Court, the Federal Circuit's 1995 ruling (64 F.3d 647) that the extension of social security taxes to incumbent Article III judges violated the Compensation Clause. See 28 U.S.C. section 2109. Although an affirmance by an equally divided Court has no precedential significance, such a disposition is said to be "conclusive and binding" on the parties. See *United States v. Pink*, 315 U.S. 203, 216 (1942); *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 113 (1868). The Court's 1996 disposition might therefore represent the law of the case in *Hatter*. On the other hand, the law-of-the-case doctrine applies "only with respect to issues previously determined," *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979), and the 1996 order under section 2109 was not an adjudication of the merits that would trigger that doctrine. Cf. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973) (finding that an earlier dismissal of *certiorari* as improvidently granted was not the law of the case); *Neil v. Biggers*, 409 U.S. 188, 192 (1972) (refusing to treat the prior affirmance of a state conviction by an equally divided Court as precluding the defendant from raising a federal *habeas corpus* claim).

⁵See *O'Malley v. Woodrough*, 307 U.S. 277 (1939); *infra* Part IV.C.

⁶That's an issue the Supreme Court hasn't yet had to resolve. See *United States v. Will*, 449 U.S. 200, 226 n.30 (1980).

⁷See *supra* note 3.

Responsibility Act of 1982 subjected federal judges to the Medicare tax,¹⁰ and the Social Security Amendments of 1983 imposed the OASDI wage tax on the judges.¹¹ Hatter and the other judges party to the suit were already on the bench when the wage taxes became effective — hence the claim that their compensation was being unconstitutionally diminished.

The suit focuses on the effect of the social security taxes on federal judges, but the statutory changes didn't single out the judges for any special, deleterious treatment. Congress was trying to increase revenue for the social security system, and the changes also imposed the wage taxes for the first time on many other federal officials, including the president, the vice president, cabinet members, and members of Congress. The statutory changes thus weren't aimed at the judiciary and, at bottom, the changes merely required treating most government officials in the same way other American citizens had been treated for decades. As we'll demonstrate, that should make every difference in the world in *Hatter*.

II. Original Understanding

The Compensation Clause isn't mysterious. It's clear from the founding debates that the clause was intended to help protect federal judges from external pressures, particularly from Congress and the president, that might keep them from acting impartially. As the Supreme Court wrote in 1980,

The Compensation Clause has its roots in the longstanding Anglo-American tradition of an independent Judiciary. A Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government.¹²

The founders debated whether the clause went far enough or whether it went too far, but there was no disagreement about its purpose. That understanding of the Compensation Clause should make *Hatter* an easy case. If a taxing statute imposes no pressure on the judiciary qua judiciary or on individual judges, its application shouldn't be limited by the Compensation Clause.

The founders realized that life tenure, while a critical element in protecting judicial independence, wasn't enough by itself. A guaranteed job wouldn't mean much if a judge's compensation could be tied to the content of his decisions. As Justice Story put it in 1833, "Without [the Compensation Clause], the other [provision], as to the tenure of office, would have been utterly nugatory, and indeed a mere mockery."¹³ How impar-

tial would a judge be if he knew that Congress might adjust his salary downward when he didn't decide cases in the congressionally desired way or that Congress might give him a bonus when he acted as desired? Alexander Hamilton explained in the first sentence of *The Federalist No. 79*, "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support."¹⁴

This wasn't a hypothetical concern for the founders. The Declaration of Independence condemned King George because he had "made Judges dependent on his Will alone; for the Tenure of their Offices, and the Amount and Payment of their Salaries."¹⁵ That history pointed to the importance of both life tenure and the Compensation Clause in protecting judges from the sovereign's commands.

In 1787, the King was out of the picture, of course, but the fundamental issue hadn't changed. As Alexander Hamilton noted in 1802, "From the injunction, that the compensation of the Judges shall not be diminished, it is manifest that the Constitution intends to guard the independence of those Officers against the Legislative Department: Because, to this department *alone* would have belonged the power of diminishing their compensations."¹⁶

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That passage from Hamilton restates what everyone was saying about the purpose of the Compensation Clause at the Constitutional Convention in 1787 and during the later ratification debates. Two questions were discussed in the founding debates: whether judicial compensation should be absolutely fixed for any sitting judge so as to protect his independence, and (an Anti-Federalist concern) whether the clause helped give *too much* independence to federal judges. We'll now discuss those two questions, with the goal of demonstrating that no one at the time of the founding had any doubt about the purpose of the clause.

A. The Permissibility of Raises in Compensation

Some founders thought the Compensation Clause didn't go far enough to protect judicial impartiality. James Madison, for a very important example, wanted

¹⁰Pub. L. No. 97-248, Tit. II, Subtit. E, Pt. III, section 278, 96 Stat. 324, 559-63 (amending 26 U.S.C. section 3121).

¹¹Pub. L. No. 98-21, section 101(b)(1), 97 Stat. 65, 69 (amending 26 U.S.C. section 3121).

¹²*United States v. Will*, 449 U.S. 200, 217-18 (1980).

¹³Joseph Story, *Commentaries on the Constitution of the United States* section 844, at 602 (Ronald D. Rotunda and John E. Novak eds., 1987) (1833).

¹⁴*The Federalist No. 79*, at 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹⁵Some of the history of this issue, including English antecedents to the Compensation Clause, can be found in *United States v. Will*, 449 U.S. 200, 217-21 (1980).

¹⁶Alexander Hamilton, *The Examination*, No. 12 (Feb. 23, 1802), reprinted in 4 *The Founders' Constitution* 175, 175 (Philip B. Kurland and Ralph Lerner eds., 1987).

to make sure Congress couldn't change a judge's compensation at all. Indeed, the resolution that was the basis for the first debate on judicial compensation at the Constitutional Convention, a resolution introduced by Edmund Randolph of Virginia and sponsored by the Virginia delegation, including Madison, provided that the National Judiciary should "receive punctually at stated times fixed compensation for their services, in which *no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution.*"¹⁷ That is, *all* adjustments in compensation, upward as well as downward, would have been forbidden for any sitting judge.

When this provision of the Virginia plan was first debated at the Convention, on July 11, Gouverneur Morris (representing Pennsylvania) moved that the words "or increase" should be struck because "the Legislature ought to be at liberty to increase salaries as circumstances might require, and . . . this *would not create any improper dependence in the Judges.*"¹⁸ Benjamin Franklin agreed that increases in compensation should be permitted: "Money may not only become plentier, but the business of the [judicial] department may increase as the Country becomes more populous."¹⁹

Avoiding "improper dependence" was the universally acknowledged goal. Madison understood that preventing a reduction in compensation was more important than preventing an increase, but he was still bothered by the prospect of judges interested in higher compensation trying to curry favor with Congress through their decisions:

The dependence will be less if the *increase alone* should be permitted, but it will be improper even so far to permit a dependence. Whenever an increase is wished by the Judges, or may be in agitation in the legislature, an undue complaisance in the former may be felt towards the latter. If at such a crisis there should be in Court suits to which leading members of the Legislature may be parties, the Judges will be in a situation which ought not to be suffered, if it can be prevented.²⁰

But there was an obvious practical problem with capping compensation. Inflation could erode the economic position of sitting judges, and good judges might therefore leave for greener pastures. Life tenure isn't a protection if no one can afford to serve for long.²¹

¹⁷ *The Records of the Federal Convention of 1787*, at 21-22 (Max Farrand ed., rev. ed. 1966) (May 29, 1787) (emphasis added) [hereinafter Farrand].

¹⁸ *Id.* at 44 (July 18, 1787) (emphasis added). If Madison reported the language of the resolution correctly, the motion should have been to delete "increase or," but nothing in our argument turns on the placement of the "or."

¹⁹ *Id.* at 44-45.

²⁰ *Id.* at 45.

²¹ The president's situation is different. While his compensation "shall neither be increased nor diminished during the period for which he shall have been elected," U.S. Const. art. II, section 1, cl. 7, the presidency wasn't expected to be a lifetime position and in any event had a fixed term. See *id.* cl. 1; *The Federalist No. 79*, *supra* note 14, at 473.

Rather than setting compensation at a specific dollar figure, Madison therefore suggested, why not tie fixed compensation to some always valuable commodity? He proposed that "[t]he variations in the value of money, may be guarded [against] by taking for a standard wheat or some other thing of permanent value."²²

Linking judicial compensation to wheat is an interesting idea, but Gouverneur Morris pointed out the difficulty:

The value of money may not only alter but the State of Society may alter. In this event the same quantity of wheat, the same value would not be the same compensation. The Amount of salaries must always be regulated by the manners & the style of living in a Country.²³

Morris prevailed on this point, and the prohibition against any "increase" was struck from the draft Clause by a substantial vote.

Madison didn't give up. In late August, he and James McHenry of Maryland tried to reinstate the prohibition against increases in judicial compensation, and, after Morris repeated how unlikely it was that any particular asset would maintain a constant value as conditions changed, George Mason spoke in favor of the Madison-McHenry motion. Maybe new judges will have to be paid more if the country is going to maintain a quality judiciary, but that doesn't mean sitting judges should be entitled to more: "There was no weight . . . in the argument drawn from changes in the value of the metals, because this might be provided for by an increase of salaries so made as not to affect persons in office, and this was the only argument on which much stress seemed to have been laid."²⁴

Madison and his supporters lost again. General Charles Cotesworth Pinckney of South Carolina responded to Mason, questioning the desirability of a multi-tiered compensation system, particularly if the more senior judges were likely to be paid less:

The importance of the Judiciary will require men of the first talents; large salaries will therefore be necessary, larger than the U.S. can allow in the first instance. He was not satisfied with the expedient mentioned by Col. Mason. He did not think it would have a good effect or a good appearance, for new Judges to come in with higher salaries than old ones.²⁵

Gouverneur Morris added that a prohibition on increases for sitting judges would be easy to circumvent: "[T]he expedient might be evaded & therefore amounted to nothing. Judges might resign, & then be re-appointed to increased salaries."²⁶ The Madison-McHenry motion was defeated, as was another motion made by Madison and Randolph that would have added the following words to the Compensation

²² Farrand, *supra* note 17, at 45 (July 18, 1787).

²³ *Id.*

²⁴ *Id.* at 429 (Aug. 27, 1787).

²⁵ *Id.* at 429-30.

²⁶ *Id.* at 430.

Clause: "nor increased by any Act of the Legislature which shall operate before the expiration of three years after the passing thereof."²⁷

Throughout these debates at the Convention no one questioned that the goal of the Compensation Clause was to protect judicial impartiality. The founders knew that, while their solutions to the problem were imperfect, they were a lot better than nothing. The most extensive discussion of the Compensation Clause in its final form is found in Hamilton's *The Federalist No. 79*. Hamilton explained why a fixed salary wouldn't work, if the country was going to keep good people in office,²⁸ but it was still necessary to have "restrictions as to put it out of the power of that body [Congress] to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation."²⁹ Congress shouldn't be able even to contemplate a reduction in the compensation of individual judges. The threat of such a reduction might deter a judge from his duty, and a "power over a man's subsistence amounts to a power over his will."³⁰ If such a threat isn't involved, however, the Compensation Clause ought to be irrelevant.

B. The Fear of Excessive Judicial Independence

The Anti-Federalists raised a different question about the Compensation Clause and the other provisions protecting judicial impartiality. Unlike James Madison, they worried that the Constitution provided *too much* independence for the judiciary. For example, Anti-Federalist "Brutus" complained in 1788 that "[t]hey have made the judges *independent*, in the fullest sense of the word. There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature."³¹

Another Anti-Federalist, known as the "Federal Farmer," while more restrained than Brutus, also concluded the Convention had gone overboard. The Clause prevented the legislature from taking the sensible step of reducing judicial salaries across the board should economic conditions warrant:

The same judge may frequently be in office thirty or forty years; there may often be times, as in

²⁷*Id.*

²⁸"It will readily be understood, that the fluctuations in the value of money and in the state of society rendered a fixed rate of compensation in the constitution inadmissible. What might be extravagant today, might in half a century become penurious and inadequate." *The Federalist No. 79*, *supra* note 14, at 473.

²⁹*Id.*

³⁰*Id.* at 472; *see also id.* at 473 ("The salaries of judicial offices may from time to time be altered, as occasion shall require, yet never so as to lessen the allowance with which any particular judge comes into office, in respect of him.")

³¹Essay of Brutus, No. 15 (Mar. 20, 1788), *reprinted in 2 The Complete Anti-Federalist* 437, 438-39 (Herbert J. Storing ed., 1981).

cases of war, or very high prices, when his salary may reasonably be increased one half or more; in a few years money may become scarce again, and prices fall, and his salary, with equal reason and propriety be decreased and lowered: not to suffer this to be done by consent of all the branches of the legislature, is, I believe, quite a novelty in the affairs of government.³²

These Anti-Federalist concerns weren't reflected in the final version of the Compensation Clause. But even the most ardent Anti-Federalists supported the proposition that the judiciary should be protected at least to some extent,³³ and the real danger — the danger that a well-crafted Compensation Clause should protect against — was legislative and executive action directed specifically at the judiciary.

C. The Founding and Taxation

Of course there's nothing in the founding debates about the relationship between income taxes and the Compensation Clause because there was no original understanding that *anyone's* income or wages might be taxed.³⁴ Accordingly, we can't say for sure what the founders would have thought about taxing the income or wages of federal judges. But we have a pretty good idea. It's hard to see how a tax that reaches everyone's income, including that of judges, would have raised any serious concern about judicial independence. There's nothing in the founding debates to suggest federal judges were to be exempt from the taxes that the founders did expect to be imposed, such as duties on imports.³⁵ And the national direct taxes on real es-

³²Letter No. 15 from the Federal Farmer to the Republican (Jan. 18, 1788), *reprinted in 2 Storing, supra* note 31, at 315, 318-19.

³³For example, Brutus approvingly referred to the British practice of having "fixed salaries" for judges. Essay of Brutus, No. 15, *supra* note 31, at 438.

³⁴The Articles of Confederation had effectively given the central government no revenue power, other than requisitioning funds from the states. *See* Erik M. Jensen and Jonathan L. Entin, "Commandeering, the Tenth Amendment, and the Federal Requisition Power: *New York v. United States Revisited*," 15 *Const. Comm.* 353 (1998). In these circumstances, merely permitting the government to levy duties on imports was such a major increase in the national taxing power that a tax on income was almost unimaginable.

In any event, if an income tax had been imagined, it would have been understood to be subject to the direct-tax apportionment rule, U.S. Const. art. I, section 2, cl. 3; art. I, section 9, cl. 4 — or so one of us believes. In Jensen's view, the Supreme Court was right in 1895 when it struck down an income tax on the ground that it was a direct tax that hadn't been properly apportioned among the states on the basis of population. *Pollock v. Farmers' Loan & Trust Co.* 157 U.S. 429 (1895), 158 U.S. 601 (1895). *See* Erik M. Jensen, "The Apportionment of 'Direct' Taxes: Are Consumption Taxes Constitutional?" 97 *Colum. L. Rev.* 2334, 2366-75 (1997).

³⁵The founders thought the burden of such indirect taxes would be borne by purchasers. *See* Jensen, *supra* note 34, at 2393-97. As far as we know, no one thought a judge purchasing imported goods should be immune from the effects of an import.

tate that were enacted beginning in 1798 — and apportioned to meet the requirements of the direct-tax clauses of the Constitution³⁶ — contained no exemptions for federal judges, even though such a tax would obviously have “diminished” the economic position of any judge subject to the tax.³⁷

III. Nineteenth Century Variations

Some 19th century developments don't reflect this understanding of the Compensation Clause; they show confusion about the purposes of the clause. There was some sentiment that the clause limited Congress's power to tax the income of federal judges, but the question was never specifically ruled on by any court. When Congress enacted the Civil War income tax,³⁸ Chief Justice Taney protested to the Secretary of the Treasury against applying the tax to judges: “The act in question, as you interpret it, 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.”³⁹

Taney conceded the impropriety of litigating his objections to the tax,⁴⁰ but his position received a sympathetic response soon afterward. In 1869, Attorney General Hoar issued an opinion stating that a tax on judicial salaries would violate the Compensation

³⁶See U.S. Const. art. I, section 2, cl. 3; art. I, section 9, cl. 4; see also Jensen, *supra* note 34, at 2355-56 (discussing direct taxes on real estate enacted between 1798 and 1861).

³⁷See, e.g., Act of July 14, 1798, ch. 75, 1 Stat. 597. Of course, the measure of such a tax wouldn't have been “compensation,” as we generally understand the term. But if the concern under the Compensation Clause is only whether a judge is hurt economically by a new tax — and that has to be the argument at the foundation of Judge Hatter's case — why should we care whether \$100 in taxes is paid pursuant to something called an income tax or something called a property tax?

³⁸A 3 percent tax was initially applied to “all salaries of officers, or payments to persons in the . . . service of the United States,” Act of July 1, 1862, ch. 119, section 86, 12 Stat. 432, 472, which was interpreted to include the president and the judiciary.

³⁹Letter from R.B. Taney to Hon. S.P. Chase (Feb. 16, 1863), reprinted in 157 U.S. 701, 701 (1895). At Taney's request, this letter was made part of the Court's records by an order dated March 10, 1863, see *id.*, but was not published for another 32 years. The letter appears in the same volume of the *U.S. Reports* that contains the first decision in the *Income Tax Cases, Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895). We don't know whether this was coincidental.

⁴⁰See 157 U.S. at 702 (observing that “all of the judges of the courts of the United States have an interest in the question, and could not therefore with propriety undertake to hear and decide it”). Twentieth century judges have been less reluctant to entertain Compensation Clause claims by their brethren even in situations where they have a financial stake in the outcome. See, e.g., *United States v. Will*, 449 U.S. 200, 211-17 (1980) (invoking the Rule of Necessity).

Clause.⁴¹ Four years later, the government refunded the taxes paid by federal judges.⁴² Justice Field, too, subsequently questioned the validity of taxing judges' salaries.⁴³

Despite Taney's self-serving claim that the indirect effects of an income tax on judicial salaries might create “the suspicion of [undue] influence”⁴⁴ — a claim underlying the other objections as well — it's hard to see how those suspicions could have developed or why the judges deserved a refund. The Civil War income tax didn't fall only, or primarily, on judges. Where's the possible influence on the judiciary?

IV. Twentieth Century Jurisprudence

We've demonstrated, to our satisfaction at least, that the original understanding of the Compensation Clause doesn't preclude imposing a tax of general application on sitting federal judges. And we're equally convinced that Supreme Court jurisprudence on the Compensation Clause, despite the 19th century diversions and another false start in 1920, supports the same conclusion. Yes, *Evans v. Gore*⁴⁵ (1920) and *Miles v. Graham*⁴⁶ (1925), if they remained good law, would preclude the taxes at issue in *Hatter*. But those cases aren't good law; they aren't even close. They misinterpreted the Compensation Clause, and the Court in 1939, in *O'Malley v. Woodrough*,⁴⁷ gutted both cases. Moreover, while the Court in *United States v. Will*,⁴⁸ decided in 1980, vigorously applied the Compensation Clause to strike down the retroactive repeal of judicial cost-of-living increases (one of which had been in place for only a few hours), that case in no way revives the properly discredited understanding of *Evans*.

If there's nothing left of *Evans v. Gore*, there's nothing to Judge Hatter's case. We think *Evans* was wrongly

⁴¹13 Op. Att'y Gen. 161 (1869). But a 1919 opinion by Attorney General Palmer found the objections to such taxes unpersuasive after a more thorough review than Hoar had undertaken. See 31 Op. Att'y Gen. 475 (1919). The Supreme Court nonetheless reaffirmed Attorney General Hoar's opinion the following year. See *Evans v. Gore*, 253 U.S. 245, 258-59 (1920).

⁴²See *Wayne v. United States*, 26 Ct. Cl. 274, 290 (1891). The *Wayne* court noted “the general acquiescence of the profession” in the impropriety of taxing judges, *id.*, but didn't address the constitutionality of the practice. Instead, the case concerned a claim by the estate of Justice Wayne to recover the amount owed him after his refund warrant was stolen before delivery. See *id.* at 275-76.

⁴³Field concurred in the invalidation of the 1894 income tax, pointing to the application of the tax to federal judges as one of many reasons why he thought the tax had to fall. See *Pollock v. Farmers' Bank & Trust Co.*, 157 U.S. 429, 604-06 (1895).

⁴⁴157 U.S. at 702. It's self-serving in that it supports exemption from tax. It's hardly self-serving in the image it presents of the judiciary.

⁴⁵253 U.S. 245 (1920).

⁴⁶268 U.S. 501 (1925).

⁴⁷307 U.S. 277 (1939).

⁴⁸449 U.S. 200 (1980).

decided to begin with — it was inconsistent with the purposes of the Compensation Clause — but, even if we're wrong about that, we'll run through the cases to demonstrate why *Evans* hasn't withstood the test of time.

A. *Evans v. Gore*

In the first post-Sixteenth Amendment income tax statute, the compensation of federal judges was exempted from the tax.⁴⁹ In general, Congress, feeling its way slowly because the boundaries of the Amendment were unclear, drafted the Income Tax Law of 1913 conservatively, not seeking to tax many items that might have been within congressional power.⁵⁰

Yes, *Evans v. Gore* and *Miles v. Graham*, if they remained good law, would preclude the taxes at issue in *Hatter*. But those cases aren't good law; they aren't even close.

Wartime revenue needs overcame congressional conservatism, however, and, in the Revenue Act of 1918, Congress extended the tax base, "including in the case of the President of the United States [and] the judges of the Supreme and inferior courts of the United States . . . the compensation received as such."⁵¹ A federal judge appointed to the bench in 1899, long before the effective date of the Act — and, for that matter, long before the Sixteenth Amendment began its move through the state legislatures in 1909 — challenged the application of the Revenue Act to him, culminating in the Supreme Court's 1920 decision in *Evans v. Gore*.⁵²

The Supreme Court concluded the tax was invalid under the Compensation Clause. Despite a dissent

⁴⁹See Income Tax Law of 1913, ch. 16, section II.B., 38 Stat. 114, 168 ("in computing net income under this section there shall be excluded . . . the compensation . . . of the judges of the supreme and inferior courts of the United States now in office").

⁵⁰After the Supreme Court had rejected the 1894 income tax as a direct tax that hadn't been properly apportioned among the states on the basis of population, the Sixteenth Amendment removed "taxes on incomes, from whatever source derived," from the apportionment requirement. U.S. Const. amend. XVI. But the early post-Amendment Congresses generally took a restrained view of what could be included in "income." For example, Congress didn't try to tax dividends representing the distribution of pre-1913 corporate earnings, although the Supreme Court later suggested that would have been within congressional power. See *Eisner v. Macomber*, 252 U.S. 189, 204 (1920). And Congress didn't try to tax appreciation in the value of property from the pre-1913 period, even if the realization of the appreciation occurred after ratification of the Amendment. See Revenue Act of 1918, ch. 18, section 202(a)(1), 40 Stat. 1057, 1060 (providing that basis of "property acquired before March 1, 1913, [would be] the fair market value of such property as of that date").

⁵¹Ch. 18, section 213(a), 40 Stat. 1057, 1065.

⁵²253 U.S. 245 (1920).

from Justice Holmes,⁵³ the majority opinion, written by Justice Van Devanter, reads as if this case were a no-brainer. The opinion is striking in its failure to examine the purposes of the Compensation Clause, except at the most abstract level. No diminution in compensation means no income tax, regardless of whether the tax reaches other government officials, regardless of whether it's a tax that applies generally. At no point did the Court make a serious effort to explain what the danger to the judiciary was from a tax of general application. The Court quoted extensively from many of the usual suspects concerning judicial independence, but never tied that discussion to the particulars of the case before it.⁵⁴

B. *Miles v. Graham*

In *Evans*, the Court hadn't seemed to rely on the fact that the judge was already sitting when the Revenue Act of 1918 went into effect, but some suggested that fact might have been crucial to the result. If a judge assumes office after a tax is already on the books — so that he can do the calculations about his future economic position taking the tax into account — what possible claim is there that his compensation has been diminished by the tax?⁵⁵ Nevertheless, the Supreme Court, in 1925, in *Miles v. Graham*,⁵⁶ concluded that such a judge was also protected from federal income taxation.

Judge Graham's appointment was effective September 1, 1919, after the Revenue Act of 1918 was in place. So, asked Justice McReynolds, "[d]oes the circumstance that [Graham's] appointment came after the taxing act

⁵³Holmes thought the tax would have been valid anyway, see *id.* at 265 (Holmes, J., dissenting), but he also suggested that the ratification of the Sixteenth Amendment should have removed all doubt, by permitting an unapportioned tax on incomes "from whatever source derived." *Id.* at 267. We doubt the significance of Holmes's alternative argument. As Justice Van Devanter pointed out in the majority opinion, there's substantial evidence that the Amendment wasn't intended to overturn preexisting immunities from taxation. New York Governor Charles Evans Hughes raised such a question, in initially resisting his state's ratification of the Amendment, because he feared the Amendment might have overturned the understanding that state and local bond interest couldn't be reached by an unapportioned income tax. But the *Evans* Court noted that Hughes's concern "promptly brought forth from statesmen who participated in proposing the Amendment such convincing expositions of its purpose . . . that the apprehension was effectively dispelled and ratification followed." *Id.* at 261. Such interest can be taxed today because of a change in intergovernmental immunity law, not because the Court has changed its view of what the Amendment did: "[If the Amendment] had frozen into the Constitution all the tax immunities that existed in 1913, then most of intergovernmental tax immunity doctrine would be invalid." *South Carolina v. Baker*, 485 U.S. 505, 522 n.12 (1988). Nevertheless, "[t]he legislative history . . . shows that . . . the sole purpose of [the Amendment] was to remove the apportionment requirement for whichever incomes were otherwise taxable." *Id.*

⁵⁴See *Evans*, 253 U.S. at 249-53.

⁵⁵See 1 Boris I. Bittker and Lawrence Lokken, *Federal Taxation of Income, Estates, and Gifts* para. 1.2.7 (3d ed. 1999).

⁵⁶268 U.S. 501 (1925).

require a different view concerning his right to exemption?"⁵⁷ The answer (for all but dissenting Justice Brandeis) was No:

The words and history of the clause indicate that the purpose was to impose 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 become the compensation which is protected against diminution during his continuance in office.⁵⁸

The applicable statute said Judge Graham should be paid \$7,500 and that, said Justice McReynolds, was that.

C. *O'Malley v. Woodrough*

In 1939, the Court revisited the Compensation Clause in *O'Malley v. Woodrough*.⁵⁹ In the Revenue Act of 1932, Congress had provided that the statutory term "gross income" would include compensation of "judges of courts of the United States taking office after June 6, 1932."⁶⁰ Judge Woodrough, fitting within that defined category, brought suit, reasonably arguing that, under *Miles v. Graham*, the tax couldn't be applied to federal judges.

The difference between the Court's analysis in 1939 and the two cases from the 1920s is the difference between night and day.

The difference between the Court's analysis in 1939 and the two cases from the 1920s is the difference between night and day. Justice Frankfurter reexamined the Compensation Clause and concluded that the tax at issue didn't affect judicial independence, which is what the clause is all about. Moreover, it obviously irritated the Court that Judge Woodrough was seeking to avoid the civic obligations of ordinary citizens; judges ought to pay their share of the costs of civilization. Some samples from the Frankfurter opinion suggest its scope:

The meaning which *Evans v. Gore* imputed to the history which explains Article III, section 1 was contrary to the way in which it was read by other English-speaking courts.⁶¹

To suggest that [the tax] makes inroads upon the independence of judges who took office after

Congress had thus charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of Article III, section 1.⁶²

To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering.⁶³

To be sure, one sentence quoted above alludes to the fact that Judge Woodrough was appointed after the tax was extended to members of the judiciary, but a fair reading of Justice Frankfurter's opinion shows that this statement merely reflects the particular details of the lawsuit. Nothing in *O'Malley* supports a constitutional distinction between incumbent judges and new judges for tax purposes. Justice Frankfurter began his discussion with the first quotation, which strongly condemned the approach taken in *Evans v. Gore*, and the rest of his analysis applies to all judges — whenever they were appointed.

The reasoning in *O'Malley* is totally inconsistent with that in *Evans* and *Miles*. Nevertheless, Justice Frankfurter said nothing directly about the continuing vitality of *Evans*, and he couldn't even bring himself to say that *Miles* had been entirely overturned. Frankfurter wrote only that "to the extent that what the Court now says is inconsistent with what was said in *Miles v. Graham*, the latter cannot survive."⁶⁴ *Miles* was clearly rejected in its entirety, however, and Frankfurter's logic cannot be limited to that decision. Because *Miles* rested exclusively on *Evans*, the repudiation of *Miles* necessarily eviscerated *Evans* as well.⁶⁵

D. *United States v. Will*

This interpretation was confirmed in the 1980 case of *United States v. Will*.⁶⁶ a case that has attracted more attention for its discussion of the propriety of the Supreme Court's addressing the merits of a lawsuit about judicial salaries than for its discussion of the Compensation Clause. In *Will*, the Court held that certain retroactive cancellations of scheduled cost-of-living raises for federal judges violated the clause, even though the cancellation affected members of the other

⁵⁷*Id.* at 508.

⁵⁸*Id.* at 508-09.

⁵⁹307 U.S. 277 (1939).

⁶⁰Ch. 209, section 22(a), 47 Stat. 169, 178, reenacted by Revenue Act of 1936, ch. 690, section 22(a), 49 Stat. 1648, 1657. It wasn't until 1954 that statutory provisions specifically taxing judicial salaries were eliminated as surplusage. See S. Rep. No. 1622, 83d Cong., 2d Sess. 168 (1954); 1 Bittker and Lokken, *supra* note 55, para. 1.2.7.

⁶¹*O'Malley*, 307 U.S. at 281.

⁶²*Id.* at 282.

⁶³*Id.*

⁶⁴*Id.* at 282-83.

⁶⁵If *Evans* remained good law after *O'Malley*, the Compensation Clause presumably would require the maintenance of the real, rather than the nominal, value of judicial salaries. But the Court of Claims, relying heavily on *O'Malley*, rejected this argument in a case brought by a group of Article III judges whose salaries had declined in real terms by 34.4 percent over a six-year period. See *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977), cert. denied 434 U.S. 1009 (1978).

⁶⁶449 U.S. 200 (1980).

government branches as well.⁶⁷ Despite the general character of the cancellations, the Court wrote that “[t]he inclusion in the freeze of other officials who are not protected by the Compensation Clause does not insulate a direct diminution in judges’ salaries from the clear mandate of that Clause; the Constitution makes no exceptions for ‘nondiscriminatory’ reductions.”⁶⁸

1. *O’Malley and Evans*. Although the extension of social security taxes to which Judge Hatter objects is also nondiscriminatory, *Will* doesn’t help his position. Hatter is challenging a reduction in his net pay, not his gross salary — which was the issue in *Will*. In subjecting Article III judges to the taxes at issue in *Hatter*, Congress treated them the same way it treated high-level officials of the legislative and executive branches and the same way that virtually all other citizens are treated. For this reason, the purposes of the Compensation Clause aren’t implicated in the case. As the *Will* Court presciently noted: “This is quite different from the situation in *O’Malley*. . . . There the Court held that the Compensation Clause was not offended by an income tax levied on Article III judges as well as on other taxpayers; there was no discrimination against the plaintiff judge.”⁶⁹ Like Judge Woodrough, Judge Hatter is suffering no discrimination when compared with the rest of the American population and therefore no unconstitutional diminution in salary: “In *O’Malley*. . . 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.”⁷⁰

We hate to think that the judges are suggesting that their impartiality on the bench might be affected by their having been forced to become part of the social security system.

If all of that isn’t clear enough, the *Will* Court noted what had been apparent for decades — that *O’Malley* had left *Evans* staggering, even if not officially down for the count. Pointing to Justice Frankfurter’s statement in *O’Malley* that “to the extent *Miles v. Graham*. . . was inconsistent, it ‘cannot survive,’” the *Will* Court noted the obvious: “Because *Miles* relied on *Evans v. Gore*,

O’Malley must also be read to undermine the reasoning of *Evans*. . . .”⁷¹

Yes, it must be read that way, and that’s why Supreme Court jurisprudence doesn’t support Judge Hatter’s claim.

2. **Another rationale for the Compensation Clause?** But perhaps we’ve been looking at the purpose of the Compensation Clause too narrowly. Maybe the clause furthers another goal, as the Court suggested in *Will*:

This Court has recognized that the Compensation Clause also serves another, related purpose. As well as promoting judicial independence, it ensures a prospective judge that, in abandoning private practice — more often than not more lucrative than the bench — the compensation of the new post will not diminish. Beyond doubt, such assurance has served to attract able lawyers to the bench and thereby enhances the quality of justice.⁷²

While it’s true that the Compensation Clause can have effects on recruiting, we’re skeptical this was a “purpose” of the clause at the founding.⁷³ But even if the clause can be justified as a way of making judicial service more attractive, this rationale doesn’t apply to a tax that affects the population as a whole. If a potential judge is going to be subject to social security taxes whether he takes a judicial post or not, the quality of the judiciary shouldn’t suffer because of the tax.⁷⁴

E. Interring *Evans*

Since the Supreme Court has never explicitly overruled *Evans v. Gore*, the Federal Circuit in *Hatter* concluded that *Evans* was still good law.⁷⁵ But that’s wishful thinking. Everything Justice Frankfurter said in *O’Malley* about the purposes of the Compensation Clause suggested that the intellectual foundation for *Evans* had been destroyed, as *Will* recognized. Frankfurter’s failure to state explicitly that *Evans* had been overruled reflected judicial caution, nothing more. *Evans* and *O’Malley* can’t both be the law.

⁶⁷*Id.*

⁶⁸*Id.* at 220-21 (citing *Evans v. Gore*, 253 U.S. 245, 253 (1920)); 1 James Kent, *Commentaries on American Law* 276 (1826)).

⁶⁹Removing the prohibition on increases in the first version of what became the Compensation Clause was certainly intended to make attracting qualified judges easier, see *supra* text accompanying note 25, but that’s not the same as saying the purpose of the clause was to help prospective judges resist the enticements of law practice.

⁷⁰Of course, eliminating taxes on the income of federal judges could be a backdoor way of increasing their real compensation, and the argument has been made that Judge Hatter should prevail precisely because higher compensation is needed to attract good people. As salaries for new law firm associates skyrocket, one can applaud the sentiment, but we shouldn’t conflate policy arguments and the requirements of constitutional law.

⁷¹See 64 F.3d 647, 650 (Fed. Cir. 1995).

⁶⁷The Court upheld the prospective cancellation of other pay raises, finding no Compensation Clause violation in withholding from judges (as well as high-level executive officials and members of Congress) projected salary increases that had never taken effect. See *id.* at 229; see also *Williams v. United States*, 2001 WL 128053 (Fed. Cir. 2001) (rejecting Compensation Clause challenge to prospective cancellation of judicial pay raises).

⁶⁸*Will*, 449 U.S. at 226.

⁶⁹*Id.*

⁷⁰*Id.* at 227 n.31.

The absence of "the magic word 'overruled'"⁷⁶ can't resurrect *Evans*. The Supreme Court in *Brown v. Board of Education*⁷⁷ didn't expressly overrule *Plessy v. Ferguson*,⁷⁸ either. The *Brown* Court simply "rejected" statements in *Plessy* that were contrary to "modern [psychological] authority"⁷⁹ and "conclude[d] that in the field of public education the doctrine of 'separate but equal' has no place."⁸⁰ Nevertheless, many subsequent cases have said that *Brown* really did overrule *Plessy*,⁸¹ and certainly everyone thinks that's what happened.⁸² *Brown* did to *Plessy* what *O'Malley* did to *Evans*.

The Supreme Court's reluctance to overrule moribund precedents hasn't prevented lower courts from recognizing their lack of vitality. Perhaps the most notable example is *Barnette v. West Virginia State Board of Education*,⁸³ where the district court foresightedly declined to follow the two-year-old precedent of *Minersville School District v. Gobitis*⁸⁴ because of evidence that the Supreme Court no longer regarded that ruling as sound but had not formally interred it.⁸⁵

In fact, several lower courts have remarked on the apparent demise of *Evans v. Gore* despite the Supreme

Court's failure to repudiate it explicitly.⁸⁶ It's perhaps understandable that the Federal Circuit has refused to treat *Evans* as a dead letter in light of the Supreme Court's recent insistence that lower courts follow all high court precedents, however fragile they might appear, until the justices themselves apply the *coup de grâce*.⁸⁷ That's why the Court should take the opportunity presented in *Hatter* to overrule *Evans* once and for all.

V. Conclusion

The position taken by the federal judges prosecuting the *Hatter* case requires reading the Compensation Clause in a mindlessly literal way, and, even then, it's not the only literalist interpretation imaginable. ("Compensation," as that term is used in many contexts, is not diminished by imposition of a tax. An income tax obviously affects after-tax income; it doesn't affect the level of salary paid by an employer to employee, at least not directly.) Certainly the judges' reading requires ignoring the primary purpose of the Compensation Clause, to protect judicial independence. And we hate to think that the judges are suggesting that their impartiality on the bench might be affected by their having been forced to become part of the social security system.

There's some superficial plausibility to the judges' claim because the legislation extending the social security taxes to federal judges wasn't a statute of general application. It singled out government officials for the new, unhappy consequences. But it didn't single out the judiciary, a fact that should make some difference, and it effectively required only that federal judges be treated like other American citizens. If Congress could have included judges in the social security system to begin with, and we have no doubt on that score, surely Congress shouldn't be precluded from legislating to correct an earlier excess of caution.

⁷⁶*Jefferson County v. Acker*, 210 F.3d 1317, 1320 (11th Cir. 2000), petition for cert. filed (Sept. 22, 2000) (No. 00-455).

⁷⁷347 U.S. 483 (1954).

⁷⁸163 U.S. 537 (1896).

⁷⁹*Brown*, 347 U.S. at 494-95.

⁸⁰*Id.* at 495.

⁸¹See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992) (plurality opinion of O'Connor, Kennedy, and Souter, JJ.); *id.* at 960 (Rehnquist, C.J., joined by White, Scalia, and Thomas, JJ., concurring in the judgment in part and dissenting in part); *Patterson v. McLean Credit Union*, 491 U.S. 164, 191 (1989) (Brennan, J., joined by Marshall and Blackmun, JJ., concurring in the judgment in part and dissenting in part); *Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 152 n.6 (1981) (Stevens, J., concurring); *Oregon v. Mitchell*, 400 U.S. 112, 133 (1970)

⁸²For example, the lower court in the case that led to the end of the Montgomery bus boycott was quite confident that *Plessy* hadn't survived *Brown*. See *Browder v. Gayle*, 142 F. Supp. 707, 717 (M.D. Ala.) (three-judge court), *aff'd per curiam* 352 U.S. 903 (1956).

⁸³47 F. Supp. 251 (S.D. W. Va. 1942) (three-judge court), *aff'd* 319 U.S. 624 (1943).

⁸⁴310 U.S. 586 (1940), overruled by *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

⁸⁵See 47 F. Supp. at 253. For other examples of "anticipatory overruling" by lower courts, see Margaret N. Kniffin, "Overruling Supreme Court Precedents: Anticipatory Action by United States Courts of Appeals," 51 *Fordham L. Rev.* 53, 61-69 (1982).

⁸⁶See, e.g., *Jefferson County v. Acker*, 210 F.3d 1317, 1320 (11th Cir. 2000) (noting that the Court in *O'Malley* and *Will* "came as close to overruling [*Evans*] as it could without actually uttering the word"), petition for cert. filed (Sept. 22, 2000) (No. 00-455); *Atkins v. United States*, 556 F.2d 1028, 1043 (Ct. Cl. 1977) (*en banc*) (characterizing *Evans* as "no longer good law"), cert. denied 434 U.S. 1009 (1978); *id.* at 1044 (observing that *O'Malley* "by force of reasoning overruled a good deal of *Evans*"); *id.* at 1045 (referring to the "overruling" of *Evans* in *O'Malley*).

⁸⁷See *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).



United States v. Hatter and the Taxation of Federal Judges

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In the March 12 issue of *Tax Notes*, we characterized *United States v. Hatter*,¹ which had been argued before the Supreme Court on February 20, as a slam-dunk case.² Exhibiting the doubt-free perspective of law professors, we saw no good reason for the Court to strike down the extension of the old-age, survivors, and disability insurance (OASDI) tax and the Medicare tax to federal judges on the bench in 1983.³ By bringing judges into the social security system, Congress merely acted to subject judges to the same taxes applicable to the rest of us, or so we argued, not to diminish the judges' compensation in a way forbidden by the Compensation Clause of the Constitution.⁴ Furthermore, we

argued that *Evans v. Gore*,⁵ the 1920 Supreme Court case on which the Federal Circuit had relied in holding for the judges in *Hatter*, had been dead for more than 60 years and deserved an official funeral.⁶

On May 21, the Court issued its decision in *Hatter*. Not surprisingly, the Court tossed the last shovelful of dirt on *Evans's* grave: "We now overrule *Evans* insofar as it holds that the Compensation Clause forbids Congress to apply a generally applicable, nondiscriminatory tax to the salaries of federal judges, whether or not they were appointed before enactment of the tax."⁷ Also not surprisingly, the Court, over the dissents of Justices Antonin Scalia and Clarence Thomas, upheld the application of the Medicare tax to federal judges. But, to our surprise, the Court held that the extension of the OASDI tax to those judges sitting in 1983 was in fact discriminatory and, therefore, invalid under the Compensation Clause, even though Congress hadn't intended to single out the judiciary for unfavorable treatment. All seven participating justices (Sandra Day O'Connor and John Paul Stevens were recused) thought the OASDI tax was constitutionally infirm as applied to Judge Hatter and other judges sitting in 1983.⁸

We think that, given the purpose of the Compensation Clause, the Court got the OASDI issue wrong, as we'll demonstrate later. But in Part I we'll first explain the real significance of *Hatter* — that it's now hard to imagine any realistic situation in which a federal taxing

⁵253 U.S. 245 (1920).

⁶The Court in *Evans* concluded that extending the income tax to federal judges violated the Compensation Clause, but *Evans* was eviscerated in 1939. See *O'Malley v. Woodrough*, 307 U.S. 277 (1939); Entin and Jensen, *supra* note 2, at 1548. Because the Supreme Court hadn't explicitly overruled *Evans*, however, the Federal Circuit reasonably treated the case as if it had effect. See *Hatter*, 121 S. Ct. at 1790; Entin and Jensen, *supra* note 2, at 1550.

⁷*Hatter*, 121 S. Ct. at 1790. Six of the seven participating justices voted to overturn *Evans*. In his opinion concurring on the OASDI tax issue but dissenting on the Medicare tax, Justice Scalia wrote, "The Court's decision today simply recognizes what should be obvious: that *Evans* has not only been undermined, but has in fact collapsed." *Id.* at 1798. Only Justice Thomas thought *Evans* was rightly decided. See *infra* notes 17-18 and accompanying text.

⁸The Court added that the infirmity of the tax wasn't cured by later increases in judicial compensation. *Hatter*, 121 S. Ct. at 1796-97.

¹The Court's opinion is at 121 S. Ct. 1782 (2001), *Doc* 2001-14515 (33 original pages), 2001 TNT 99-8.

²Jonathan L. Entin and Erik M. Jensen, "Taxation, Compensation, and Judicial Independence: *Hatter v. United States*," *Tax Notes*, Mar. 12, 2001, p. 1541.

³Before 1983, most federal employees, including judges, were exempt from social security taxes because of the retirement systems established by the federal government on their behalf. But the Tax Equity and Fiscal Responsibility Act of 1982 subjected federal judges to the Medicare tax, Pub. L. No. 97-248, tit. II, subtit. E, pt. III, section 278, 96 Stat. 324, 559-63 (amending 26 U.S.C. section 3121), and the Social Security Amendments of 1983 imposed the OASDI wage tax on the judges. Pub. L. No. 98-21, section 101(b)(1), 97 Stat. 65, 69 (amending 26 U.S.C. section 3121).

⁴The Compensation Clause provides that federal judges "shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, section 1.

statute could be deemed to violate the Compensation Clause. If we're right about that, the OASDI tax analysis, discussed in Part II of the article, is an historical artifact; it matters to the judges involved, of course, but it will have no effect on the development of the law.

I. Compensation and Taxation After *Hatter*

The most important part of *Hatter* is the repudiation, once and for all, of the core of *Evans v. Gore* and the acceptance of the proposition that the Compensation Clause affects only those taxes that discriminate against the judiciary. The narrow holding involving the OASDI tax, which depended on a determination that there was discrimination, reflected a set of special facts that can't be duplicated, or even approached, in the future. The Compensation Clause should therefore never again have any serious effect on the national taxing power.

As we argued in our first article, the Compensation Clause was part of the constitutional structure designed to protect the judiciary against interference from other governmental branches, particularly Congress. The concern was judicial independence, not preserving the economic positions of federal judges.⁹ A tax of general application, one that isn't directed at the judiciary in general or at individual judges in particular, shouldn't implicate the clause.

The Court's general pronouncements in *Hatter* are perfectly consistent with that understanding of the Compensation Clause. As Justice Stephen G. Breyer wrote for the Court, "In our view, the Clause does not prevent Congress from imposing a 'non-discriminatory tax laid generally' upon judges and other citizens, . . . but it does prohibit taxation that singles out judges for specially unfavorable treatment."¹⁰

When taxation is involved, the Compensation Clause analysis is therefore different from that used in examining congressional actions affecting judicial salaries. In 1980 the Court had decided, in *United States v. Will*,¹¹ that Congress may not reduce judicial salaries, even if done as part of a nondiscriminatory cost-cutting move. But, with taxation, the only concern is whether there has been discrimination against the judiciary in a way that might damage judicial independence. As Justice Breyer wrote in *Hatter*,

[T]here is no good reason why a judge should not share the tax burdens borne by all citizens. We concede that this Court [in *Will*] has held that the Legislature cannot *directly* reduce judicial salaries even as part of an equitable effort to reduce all Government salaries But a tax law . . . affects

⁹See Entin and Jensen, *supra* note 2, at 1543-45.

¹⁰*Hatter*, 121 S. Ct. at 1787 (quoting *O'Malley v. Woodrough*, 307 U.S. 277, 282 (1939)). Five of the seven justices agreed with this proposition. Justices Scalia and Thomas both think the Clause could forbid an increase in tax burdens that is nondiscriminatory in nature. See *infra* notes 16-18 and accompanying text.

¹¹449 U.S. 200 (1980).

compensation indirectly, not directly [The] prophylactic considerations that may justify an absolute rule forbidding direct salary reductions are absent here In practice, the likelihood that a nondiscriminatory tax represents a disguised legislative effort to influence the judicial will is virtually nonexistent. Hence the potential threats to judicial independence that underlie the Constitution's compensation guarantee cannot justify a special judicial exemption from a commonly shared tax, not even as a preventive measure to counter those threats.¹²

We agree completely. Where we differ with the Court is in its conclusion that the extension of the OASDI tax to sitting judges — the elimination of a tax exemption to which judges had been entitled — was in fact discriminatory. As we'll discuss in Part II, we're unconvinced that Congress "single[d] out judges for specially unfavorable treatment"¹³ in a way that should implicate the Compensation Clause.

With Evans overruled, no longer can anyone seriously argue that federal judges are exempt from a generally applicable income tax or from, say, an increase in rates under a generally applicable income tax.

But whatever the merits of the Court's consideration of the OASDI tax, that analysis should have no effect on the subsequent treatment of taxation under the Compensation Clause. A *Hatter*-like set of facts, involving the repeal of a tax exemption for federal judges, can't arise again: As far as we know, no similar exemptions remain on the books, and Congress is unlikely to exempt federal judges from any other generally applicable tax in the future.¹⁴ Moreover, as Justice Breyer noted in *Hatter*, the likelihood that a facially nondiscriminatory tax could represent an attack on the judiciary is "virtually nonexistent."¹⁵ As a result, a federal income tax could raise Compensation Clause

¹²*Hatter*, 121 S. Ct. at 1792 (citations omitted). In our first article we noted that the Court had yet to decide whether a facially neutral statute motivated by a congressional intent to influence the judiciary could ever fail constitutional requirements. See Entin and Jensen, *supra* note 2, at 1543 n.6 (citing *United States v. Will*, 449 U.S. 200, 226 n.30 (1980)). The quoted language from *Hatter* seems to resolve that issue, at least for taxing statutes.

¹³*Hatter*, 121 S. Ct. at 1787. Justice Scalia thinks that discrimination is unnecessary to invalidate a tax under the Compensation Clause, see *infra* note 16, and Justice Thomas apparently thinks that *any* income tax unconstitutionally diminishes judicial compensation. See *infra* notes 17-18 and accompanying text.

¹⁴We doubt there would be political support for such an exemption to begin with, and the result in *Hatter*, making it difficult for Congress to get rid of an exemption once it's on the books, is an additional deterrent to creating any new exemption.

¹⁵See *supra* text accompanying note 12.

issues after *Hatter* only if Congress were to target the tax (or part of the tax) at federal judges. Such a discriminatory tax makes for a nice classroom hypothetical, but it's not a real world possibility.¹⁶

With *Evans* overruled, no longer can anyone seriously argue that federal judges are exempt from a generally applicable income tax or from, say, an increase in rates under a generally applicable income tax. Although Justice Thomas, in a two-sentence opinion, wrote that the "Court was correct in *Evans v. Gore* . . . when it held that any tax that reduces a judge's net compensation violates Article III of the Constitution,"¹⁷ that statement is far removed from the common understanding of the last 60 years.¹⁸

II. The OASDI Tax Analysis

As we've suggested, the Court's analysis of the OASDI tax is unlikely to have significance for the development of the law. But it's still worth explaining why we think the Court's position isn't persuasive.

The difficulty with the extension of the OASDI tax to federal judges, concluded the Court, was that the extension did in fact discriminate against the judges. We'll explain below that the Court's conclusion places Congress in a kind of Catch-22: Judges were the main targets of the 1983 OASDI extension in part because the Court itself had suggested that Congress couldn't apply the OASDI tax to the federal judiciary when the Social Security Act was passed in 1935. Even without that problem, though, the Court's reasoning is questionable.

The conclusion that the extension of the OASDI tax discriminated against federal judges resulted from a complicated, four-step analysis presented by Justice Breyer. First, because of retirement plans already in place, federal employees had been outside the social security system before enactment of the 1983 changes. Second, the 1983 changes in fact didn't increase the

financial obligations of nearly all (96 percent) federal employees in office at that time because those employees were given the choice whether to enter the social security system or not.¹⁹ While in form the remaining 4 percent of the federal employees seemed to have no such choice, it was in fact only the federal judges and a few insignificant other officials (like the president)²⁰ — people whose government retirement plans were noncontributory — who were hurt financially by the 1983 changes in the law.²¹ Third, the federal judges had to pay more, and got nothing in return. Because of pre-judicial employment, nearly all were already fully insured under the social security system. Finally, said the Court, the changes didn't serve to "equaliz[e]" the retirement-related obligations that pre-1983 law imposed upon judges with the retirement-related obligations that pre-1983 law imposed upon other current high-level federal employees."²²

To put the argument more simply: federal judges, and (with an exception or two) only federal judges, had increased tax obligations from the 1983 changes, with no compensating benefits. That's discriminatory and therefore inconsistent with the Compensation Clause.

We're not convinced. The Court's analysis required a lengthy series of steps, and suppositions, to come to the determination that the statutory effects were discriminatory. The level of detail required to conclude that the Compensation Clause was violated was extraordinary when, as Justice Breyer noted, there was no evidence whatsoever that Congress was acting to single out the judiciary for unfortunate consequences, and the effect of the legislation was merely to bring the judiciary into the broadly applicable social security system. It's true that sitting judges were harmed economically by the 1983 changes, but we don't see how judicial independence was implicated by these congressional actions.

Justice Breyer supplied a response to that criticism, but it was totally unsatisfactory. He suggested that if

¹⁶Justice Scalia's position also appears to be irrelevant to future analysis. Scalia criticized the Court's emphasis on discrimination, which the Compensation Clause doesn't mention. Instead, he would seek to determine whether a tax exemption has become part of judges' "compensation." *Hatter*, 121 S. Ct. at 1798. If so, the exemption couldn't be eliminated for sitting judges, whether or not discrimination against the judiciary is involved. Moreover, Scalia determined that "a tax-free status conditioned on federal employment is compensation," *id.* at 1799, leading to his conclusion that the imposition of the Medicare tax on sitting judges was impermissible. But since judges no longer have such "compensatory" tax exemptions, none of this should matter for the future.

¹⁷*Id.* at 1800 (citation omitted).

¹⁸In the context of *Hatter*, that position meant only that Justice Thomas thought the Medicare tax should have been struck down as well as the OASDI tax. But the implications of Justice Thomas's statement are astonishing. He seems to be suggesting that federal judges are constitutionally exempt from all income tax obligations. One of us (Jensen) has originalist leanings, but even he thinks the idea that the Compensation Clause bars application of a tax of general application to federal judges is totally inconsistent with the original purpose of the Clause.

¹⁹Newly hired employees were given no such choice.

²⁰The President's pension is noncontributory . . . And the President himself, like the judges, is protected against diminution in his "[c]ompensation." . . . These facts may help establish congressional good faith. But, as we have said, we do not doubt that good faith. And we do not see why, otherwise, the separate and special example of that single individual, the President, should make a crucial difference here.

Hatter, 121 S. Ct. at 1796 (citations omitted). That single individual indeed!

²¹The retirement plan for judges is noncontributory, wrote Justice Breyer, because the Constitution permits judges to "draw a salary for life simply by continuing to serve . . . That fact means that a contributory system, in all likelihood, would not work." *Id.* at 1794 (citation omitted). That likelihood, said Breyer, gave a constitutional dimension to the plan arrangements: "The 1983 statute consequently singles out judges for adverse treatment solely because of a feature required by the Constitution to preserve judicial independence." *Id.* Whatever the difficulties with a contributory plan, we don't see how a noncontributory plan is "required" by the Constitution.

²²*Id.*

the rules were otherwise, Congress could secretly punish the judges while professing high-minded goals:

The Government also argues that there is no evidence here that Congress singled out judges for special treatment in order to intimidate, influence, or punish them. But this Court has never insisted upon such evidence. To require it is to invite legislative efforts that embody, but lack evidence of, some such intent, engendering suspicion among the branches and consequently undermining that mutual respect that the Constitution demands. . . . Nothing in the record discloses anything other than benign congressional motives. If the Compensation Clause is to offer meaningful protection, however, we cannot limit that protection to instances in which the Legislature manifests, say, direct hostility to the Judiciary.²³

The posited concern about a vast congressional conspiracy is hard to take seriously. It's inconceivable that Congress — a group of 535 very independent, very voluble people — could ever take an action motivated by such hostility without leaving traces along the way. Judicial independence wasn't affected one whit by the 1983 changes, and that should have been enough to decide the case.²⁴

At a more fundamental level, the Court's elaborate analysis of the OASDI tax issue ignores the context in which Congress was legislating. Now that *Hatter* has been decided, we know that the OASDI tax could constitutionally have been imposed on federal judges at the same time it was imposed on other Americans. Judicial income can be reached by a generally applicable, nondiscriminatory tax, and the OASDI tax could have been structured in a nondiscriminatory way. But the long shadow of *Evans v. Gore* perhaps helps to explain why federal judges were exempted from the OASDI tax when the Social Security Act was

adopted: *Evans* strongly suggested that extending this new tax to sitting judges, like the extension of the income tax to the judiciary that was rejected in 1920, would have run afoul of the Compensation Clause.²⁵

Hatter seems to mean that after Congress forwent the opportunity to tax judges, it was stuck with that result. Already sitting judges were entitled to the benefit of the exemption for the rest of their judicial lives; taking the exemption away would have been discriminatory. That's a difficult result to justify. In a very real sense, the Court was responsible for the exemption that it now says Congress couldn't eliminate without affecting judicial independence.

III. Conclusion

The congressional taxing power is very broad, despite the specific limitations on that power contained on the Constitution. For many years, the Compensation Clause was considered such a limitation, and, in fact, the Supreme Court used the Clause in *Hatter* to strike down one exercise of the taxing power affecting the federal judiciary. But that specific result in *Hatter* is misleading. The real significance of *Hatter* is this: With the explicit (and long overdue) repudiation of *Evans v. Gore*, we should now be able to forget about the Compensation Clause as a limitation on the taxing power.

²⁵When the social security system was developed, the Court hadn't yet expressed doubt about *Evans*. It wasn't until 1939 that the Court eviscerated *Evans* without overruling it. See *O'Malley v. Woodrough*, 307 U.S. 277 (1939).

²³*Id.* at 1795-96 (citations omitted).

²⁴We understand that the Court continues to insist that the Compensation Clause serves a function in addition to furthering judicial independence:

Evans properly added that these guarantees of compensation and life tenure exist, "not to benefit the judges," but "as a limitation imposed in the public interest." . . . They "promote the public weal," . . . in part by helping to induce "learned" men and women "to quit the lucrative pursuits" of the private sector, . . . but more importantly by helping to secure an independence of mind and spirit necessary if judges are "to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty . . ."

Id. at 1791 (quoting *Evans*, 253 U.S. at 253, 248; 1 James Kent, *Commentaries on American Law* *294; and Woodrow Wilson, *Constitutional Government in the United States* 143 (1911)). We'll have more to say about this Compensation-Clause-as-recruitment-perk rationale in another forum. Suffice it to say for present purposes that we don't think that the Clause was originally intended to convince well-to-do lawyers to forgo their "lucrative pursuits," and, original understanding aside, we don't want a federal bench made up of people who subordinate public service to the desire for economic gain. See also Entin and Jensen, *supra* note 2, at 1549.

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