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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 478

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSY as Commissioners constituting the State Tax Commission of the State of New York,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK upon the relation of JAMES B. O'KEEFE,

BRIEF FOR RELATOR.

JAMES B. O'KEEFE, a resident of New York, was regularly employed during the year 1934, by the Home Owners' Loan Corporation at a fixed salary. He made a personal income tax return pursuant to law and paid a tax of $57.28 based on his earnings of $2,246.66 at a fixed salary from the Home Owners' Loan Corporation for the year 1934. Thereafter, he applied for a refund of the tax upon the ground that the salary earned by him as an employee of the Home Owners' Loan Corporation was specifically exempt by the Tax Law of New York from the tax because it was earned by him

as an employee of the United States, and upon the further ground that the salary so earned by him was immune from such tax because the Home Owners' Loan Corporation is an instrumentality of the United States.

The application for refund was denied. That determination was reviewed and annulled. By final order and judgment of the Supreme Court of the State of New York entered after decision by the Court of Appeals, that conclusion was affirmed.

The Question Presented.

Whether the fixed salary paid to respondent as a regular employee of the Home Owners' Loan Corporation is subject to income tax imposed by the State of New York?

Statutes Involved.

Section 359 of the Tax Law of the State of New York.

Home Owners' Loan Act of 1933; Chapter 64, 48 U. S. Stat. at large, 128.

POINT I.

The functions of the Home Owners' Loan Corporation are essential to the preservation of the general welfare and the promotion of economic security.

The title of the act expresses the national emergency purpose which prompted the creation of the instrumentality. It is entitled:

> "An act to provide emergency relief with respect to home-mortgage indebtedness, to refinance home mortgages, to extend relief to the owners of homes occupied by them and who are unable to amortize

> their debt elsewhere, to amend the Federal Home Loan Bank Act, to increase the market for obligations of the United States, and for other purposes."

The President in his message to Congress on April 13th, 1933, recommending this legislation, said, in part:

> "As a further and urgently necessary step in the program to promote economic recovery, I ask the Congress for legislation to protect small Home Owners from foreclosure and to relieve them of a portion of the burden of excessive interest and principal payments incurred during the period of higher values and higher earning power. Implicit in the legislation which I am suggesting to you is a declaration of national policy. This policy is that the broad interests of the Nation require that special safeguards should be thrown around home ownership as a guaranty of social and economic stability, and that to protect home owners from inequitable enforced liquidation, in a time of general distress, is a proper concern of the Government."

The statute is an emergency measure, highly remedial in character, with the purpose of extending the greatest measure of relief to home owners. It was an integral part of a comprehensive program enacted at the first session of the 73rd Congress and intended as a broad grant of aid.

The committee reports of Congress further demonstrate the national emergency purpose of the act. (See House Report No. 55, Senate Report No. 91, House Report No. 210, 73rd Congress, 1st Session.)

The Act was intended to supplement the Home Loan Bank System, by setting up a governmental agency to provide direct relief to home owners.

The crisis prompted Congress to exercise its fiscal power and the power to spend for the "general welfare."

The Congress determined that the preservation of the ownership of homes was conducive to the general welfare; that home ownership, as a national objective, would be permanently injured if the thousands of foreclosures then being prosecuted should continue; that home owners should not be subject to the vicissitudes of the general money market; and that, if confidence in realty values were not restored, the credit of hundreds of towns and cities, dependent upon the collection of taxes, would be permanently injured; and that granting loans to assist owners in retaining title to their homes was a proper national emergency purpose essential to the general welfare.

The Corporation was formed to carry on this emergency refinancing, its operations being closely circumscribed by statute.

By the terms of the Act, the bonds of the corporation are exempt, both as to principal and interest, from all Federal, State, Municipal and local taxation (except surtaxes, inheritance, estate and gift taxes), and no taxes may be imposed on the Corporation, its franchise, capital, reserves and surplus, nor upon its loans and income, except that its real property is subject to taxation as other real property is taxed.

The description of the emergency and of the organization, scope, functions and operations of the Home Owners' Loan Corporation contained in the Government brief on file in this Court in the case of *Kay* v. *United States,* 303 U. S. 1, establishes the national public purposes of the Corporation.

The Corporation was not created to compete with private enterprise, but on the contrary, it was formed to rescue home ownership and private business in a national catastrophe.

It is apparent that the provision of relief for distressed home owners cannot be considered competition with private business, for in the promotion of the general welfare, it fosters and encourages all enterprise.

The statutory refunding operations of this Corporation cannot be said to partake of the nature of any private business or to compete with private enterprise, for whenever did or could private capital undertake to refinance home mortgages, to extend relief to the owners of homes who were in default and unable to refinance their home mortgage debt—in other words, the making of hazardous loans to distressed persons.

The corporation was organized and operated in a national emergency at a time when the Government of the United States was the only power that could save the people of the United States from disaster through measures taken by Congress to alleviate the national distress.

The Home Owners' Loan Corporation is a legitimate instrumentality of the United States, created and used by it to perform national public governmental functions to promote the general welfare.

United States v. *Butler,* 297 U. S. 1;
Charles C. Steward Mach. Co. v. *Davis,* 301 U. S. 548;
Helvering v. *Davis,* 301 U. S. 619.

Within the principle laid down in these cases, the purposes of the Home Owners' Loan Act of 1933 are plainly national and a public purpose for which the public funds may be expended to promote the general welfare.

This Court recognized the public interest in the maintenance of homes.

Green v. *Frazier,* 253 U. S. 233;
Block v. *Hirsh,* 256 U. S. 135.

It noted the severity of the economic crisis which we have but briefly described.

Home Building and Loan Association v. *Blaisdell,* 290 U. S. 398.

The Home Owners' Loan Corporation is an agency created, owned and controlled by the United States to enable it to perform governmental functions.

The creation and operation of Home Owners' Loan Corporation is a governmental function well within the constitutional powers of Congress.

By the use of Home Owners' Loan Corporation bonds, guaranteed by it, the United States uses this instrumentality to borrow money in furtherance of general or national as distinguished from local purposes.

The allegedly local character of the welfare which is promoted by the Home Owners' Loan Corporation seems to consist merely in the fact that the home owner is a single individual, who is benefited with respect to his real property, immovably fixed to a single place. The objection does not detract from the national interest in home ownership because there can be no general welfare which is not an aggregate of individual welfares.

In creating this governmental agency and investing it with the broad and comprehensive national functions, Congress relied on its power to borrow and appropriate public money. The power "to borrow money on the credit of the United States" is granted without express limitations (Clauses 2, 8, Constitution; *Juilliard* v. *Greenman,* 110 U. S. 421).

By the use of Home Owners' Loan Corporation bonds, guaranteed by it, the United States uses this instrumentality to borrow money.

The power to borrow can be subject to no greater limitation than that, in its exercise, Congress act in furtherance of general or national as distinguished from local purposes.

Congress might have determined that the government, through an administrator, carry on this emergency refunding by an exchange of government bonds for home mortgages. Congress, however, decided to use the corporation

as an instrumentality or agency and to issue for the same public purposes the bonds of the corporation bearing a guarantee by the United States.

The corporation has no purpose of its own. Freedom of corporate action or power of control is mere fiction. All of its acts are directed and controlled by the United States through public officers (Point VI).

Congress regularly appropriates funds and the United States issues bonds for cash as a normal operation. Through the instrumentality of the Home Owners' Loan Corporation it issued its obligations for the public purpose, taking mortgages in exchange therefor.

Congress has the power to judge what fiscal agencies the Government needs. Its decision of that question is not open to judicial review. Therefore, Congress, at its discretion, may create an agency such as the Home Owners' Loan Corporation, equipped to provide a market, as stated in the act, for the obligations of the United States.

Congress alone has the right to judge as to the degree of necessity which exists for creating welfare and fiscal agencies.

The national authority over credit, finance and currency is derived from the aggregate of all the powers granted to Congress.

> *Norman* v. *B. & O. Railroad Company,* 294 U. S. 240 at 303.

The creation of the Banks of the United States was sustained not only because of the support to the financial operations of the Government but, among other things, by reason of their relation to the general commerce and credit of the United States.

> *McCulloch* v. *Maryland,* 4 Wheat. 316;
> *Osborn* v. *Bank of the United States,* 9 Wheat. 738.

And other banking functions were sustained on that authority for those reasons.

> *First National Bank* v. *Fellows ex rel. Union Trust Co.,* 244 U. S. 416, 419;
> *Smith* v. *Kansas City Title & Trust Co.,* 255 U. S. 180.

It is immaterial that the Home Owners' Loan Corporation is not a bank. For, in passing upon and upholding the power of Congress to create Federal Land Banks and Joint Stock Land Banks, in the case of *Smith* v. *Kansas City Title Co.,* 225 U. S. 180, the Supreme Court said:

> "* * * whether technically banks, or not, these organizations may serve the governmental purposes declared by Congress in their creation. * * *"

If, during an emergency period, the federal government exercises functions, derived from its delegated powers, which it does not find necessary to exercise under normal conditions, it is not departing from the constitutional principles which are the basis of its existence.

This means that our constitutional government expands its functions to fit the conditions of any circumstances which might arise.

The economic interests of the nation justify the exercise in this emergency of every function available to the Government under its continuing and dominant protective power.

This Court has said: "The government within the Constitution has all the powers granted to it, which are necessary to preserve its existence * * *." *Ex Parte Milligan,* 4 Wall. 71. And again: "It is not lightly to be assumed that in matters requiring national action, a power which must belong to and somewhere reside in every civilized government is not to be found." *Andrews* v. *Andrews,* 188 U. S. 14; *Missouri* v. *Holland,* 252 U. S. 433. And, in another

case "Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern." *Block* v. *Hirsch, supra.* And, in still another: "* * * Although an emergency may not call into life a power which has never lived, nevertheless an emergency may afford a reason for the exertion of a living power already enjoyed." *Wilson* v. *New,* 243 U. S. 332.

An emergency does not create power to use instrumentalities, but emergency may furnish the occasion for the exercise of power.

> "Governmental functions are not to be regarded as non-existent because they are held in abeyance, or because they lie dormant, for a time. If they be by their nature governmental, they are none the less so because the use of them has had a recent beginning."
>
> *Brush* v. *Commissioner,* 300 U. S. 352.

The functions and activities of the Home Owners' Loan Corporation are not proprietary.

Subordinate activities will not destroy the authority of Congress to create this corporation.

> *Ashwander* v. *T. V. A.,* 297 U. S. 288, at 333;
> *Osborn* v. *United States Bank, supra,* at 860;
> *United States* v. *Chandler-Dunbar,* 229 U. S. 53 at 73;
> *People ex rel. Rogers* v. *Graves,* 299 N. Y. 401, at 408.

The United States, being exclusively a government of delegated power, has no authority to engage in any form of private business except as an appropriate means of serving a national public interest.

> *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 155, 158.

A federal function must be exercised in a governmental capacity—a delegated power exercised through an appropriate means—otherwise it becomes a mere usurpation in defiance of the law.

The United States being a government which can exercise only those powers derived from the Constitution and not prohibited by it, all of its activities necessarily constitute governmental functions.

> *McCulloch* v. *Maryland, supra;*
> *United States* v. *Cruikshank,* 92 U. S. 542.

In the case of *Osborn* v. *U. S. Bank, supra,* the Court said of the Bank:

> "It was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation."

In *Kay* v. *U. S., supra,* the defendant charged with violation of the Home Owners' Loan Act, asserted that the statute was invalid. The decision held there was no occasion to consider this broad question, but, in the course of the decision, this Court emphasizes the public governmental character of the corporation and its officers, and states:

> "* * * When one undertakes to cheat the Government or to mislead its officers, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction."

The Court in that case also held that the regulations of the Corporation, made pursuant to the Act, could be enforced under the penal provisions of the Act and in that connection the decision states:

> " * * * Meanwhile, the governmental operations go on, and public funds and public transactions re-

> quire the protection which it was the aim of these penal provisions to secure, whatever might be the ultimate determination as to the validity of the enterprise."

When Congress determined to further exercise its authority in the home financing field and created the Federal Savings and Loan Insurance Corporation, it provided by Section 204 B of the Federal Housing Act of 1934 (National Housing Act, 48 Stat. 1257, 12 U. S. C. A. Section 1726) that the Home Owners' Loan Corporation be authorized and directed to subscribe for all the stock of the insurance corporation and make payment therefor with bonds of the Corporation.

This use of the instrumentality further demonstrates the national public purposes of the Corporation. Congress, by this and other legislation, subjected the corporation and its bonds to the authority and direction of Congress. Implicit in such action is the determination that the funds of the Corporation are public funds available for public use.

Under the Home Owners' Loan Act, of 1933, the Treasury was directed to subscribe to the shares of Federal Savings and Loan Associations as part of the permanent home financing system. By subsequent Acts, the Home Owners' Loan Corporation was directed to perform the function first allotted to the Treasury (48 Stat. 128-129; 49 Stat. 293, 296). We point to this as further evidence of the determination of Congress to use this public corporation and government instrumentality for general national and public purposes.

Congress has the power to provide funds and spend for the general welfare. It may create a corporation to perform that function. The description of the economic conditions prevailing before and after the enactment of the Home Owners' Loan Act of 1933 demonstrates that the relief for

home owners and financial institutions afforded by the Act was in aid of the general welfare and necessary to sustain the credit structure of the nation.

The objects of the welfare and fiscal powers are just as closely knit into the fabric of our national government as the object of the defense powers, and the functions performed by the Home Owners' Loan Corporation are just as necessary to the preservation of the general welfare and the promotion of economic security as the Panama Railroad is to the national defense.

People ex rel. Rogers v. *Graves, supra;*
United States v. *Butler, supra;*
Charles C. Steward Mach. Co. v. *Davis, supra;*
Helvering v. *Davis, supra;*
Clallam County v. *United States,* 263 U. S. 341.

The Home Owners' Loan Corporation is an agency created by Congress only to perform the bidding of Congress in matters essential to the preservation of the general welfare and the promotion of economic security.

POINT II.

A wholly-owned instrumentality of the United States, lawfully created and used to carry into effect constitutional powers, the Home Owners' Loan Corporation is immune from State taxation.

The principle that the instrumentalities of the United States, lawfully created and used by it to carry into effect its constitutional powers, are immune from state taxation is firmly established.

McCulloch v. *Maryland, supra;*
Dobbins v. *The Commissioners of Erie County,* 16 Pet. 435;

Van Brocklin v. *Tennessee, supra;*
Clallam County v. *United States, supra;*
New Brunswick v. *United States,* 276 U. S. 547.

The immunity rests upon an entire absence of the power to tax.

Johnson v. *Maryland,* 254 U. S. 151;
People ex rel. Rogers v. *Graves, supra.*

The State cannot by any form of taxation impose any burden upon a national power or function.

Weston v. *Charleston,* 2 Pet. 449;
Home Savings Bank v. *Des Moines,* 205 U. S. 503, 513.

Congress may enlarge the federal immunity if necessary to protect the performance of the functions of the national government.

James v. *Dravo,* 302 U. S. 134, at 160-61.

Although the Court in *Van Alen* v. *The Assessors,* 3 Wall. 573, at 585, suggested that Congress might curtail a federal immunity that might otherwise be implied, the Court, upon full consideration, in the case of *Home Savings Bank* v. *Des Moines, supra,* said:

> "It may well be doubted whether Congress has the power to confer upon the state the right to tax obligations of the United States."

In the case of *Farmers Bank* v. *Minnesota,* 232 U. S. 516, the Court said:

> "The supremacy of the Federal Constitution and the laws made in pursuance thereof and the entire independence of the Federal government from any control by the respective states, were the fundamental grounds of the (McCulloch v. Maryland) decision."

The Home Owners' Loan Corporation, being a wholly-owned instrumentality of the United States, lawfully created and used by it to carry into effect its constitutional powers, it is immune from state taxation.

POINT III.

The Home Owners' Loan Corporation being immune from taxation, the fixed salaries paid to its employees are also immune from State taxation.

Relator readily acknowledges the duty incumbent upon all men to contribute to the support of Government, but if a tax in respect of his compensation from a Federal instrumentality is prohibited by the Constitution, it can find no justification in the taxation of other income as to which there is no prohibition. Doing what the Constitution permits gives no license to do what it prohibits.

The immunity is not a private boon but is a limitation imposed in the public interest.

> *Evans* v. *Gore,* 253 U. S. 245.

It is not to be applied restrictively but must be applied in accord with its spirit and the principle upon which it proceeds.

The instrumentalities of the United States, lawfully created and used by it to carry into effect its constitutional powers, being immune from state taxation, the fixed salaries paid to its employees, in their capacity as such, are also immune from state taxation.

> *Dobbins* v. *Commissioners of Erie County, supra;*
> *People ex rel. Rogers* v. *Graves, supra;*
> *Johnson* v. *Maryland, supra.*

In *Dobbins* v. *Commissioners of Erie County, supra,* plaintiff held his office under the complicated machinery established by Congress to carry out its broad powers to regulate commerce and to lay and collect taxes, imposts, etc. All this legislation, says the Court, is a means necessary to an allowed end, and continues:

> "If it can be taxed by a State as compensation, will not Congress have to graduate its amount with reference to its reduction by the tax? Could Congress use an uncontrolled discretion in fixing the amount of compensation, as it would do without the interference of such a tax? The execution of a national power by way of compensation to officers can in no way be subordinate to the action of the State Legislature upon the same subject."

As a practical matter Congress could not equalize federal salaries so as to offset the divers taxes that might be imposed by forty-eight states.

We further quote from the *Dobbins* case:

> "To allow such a right of taxation to be in the States, would also in effect be to give the States a revenue out of the revenue of the United States, to which they are not constitutionally entitled, either directly or indirectly, neither by their own action, nor by that of Congress."

The salaries of employees and all administrative expenses of the Home Owners' Loan Corporation are fixed by Congress. The budget for personal services limits by "line appropriation" that part of the available funds to be expended for personal service. Congress recognizes that the Corporation can only act through individuals who must be compensated for their services. In this connection we quote again from the *Dobbins* case:

> "The allowance is in its discretion. The presumption is that the compensation given by law is no more than the services are worth, and only such an amount as will secure from the officer the diligent performance of his duties. 'The officers execute their right of reaping from thence the recompense the services they may render may deserve', without that compensation being in any way lessened, except by the sovereign power from which the officer derived his appointment, or by another sovereign power to whom the first has delegated the right of taxation, in common with itself, for the benefit of both. Does not a tax, then, by a State upon the office, diminishing the recompense, conflict with the law of the United States, which secures it to the officer in its entireness? It certainly has such an effect; and any law of a State imposing such a tax cannot be constitutional, because it conflicts with a law of Congress made in pursuance of the Constitution, and which makes it the supreme law of the land."

In *People ex rel. Rogers* v. *Graves, supra,* involving the employee of the Panama Railroad Company, the Court said, at page 404:

> "The question therefore to be answered is whether the Canal is such an instrumentality of the Federal government as to be immune from State taxation, and, if so, are the operations of the Railroad Company so connected with the Canal as to confer upon the Company a like immunity?",

and having established the affirmative, the Court said, at page 408:

> "The railroad company being immune from state taxation, it necessarily results that fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune."

Implicit in this decision is the finding that an income tax upon an employee's salary is a direct burden on the government, and counsel suggests that this was announced on full consideration, the Court having in mind the practical criterion referred to in the decision in *Willcutts* v. *Bunn,* 282 U. S. 216, at 234.

In *Johnson* v. *State of Maryland, supra,* the plaintiff was an employee of the post-office department, driving a government truck. The Court, by Mr. Justice HOLMES, said:

> "With regard to taxation, no matter how reasonable, or how universal and indiscriminating, the state's inability to interfere has been regarded as established since McCulloch v. Maryland, 4 Wheat. 316. The decision in that case was not put upon any consideration of degree, but upon the entire absence of power on the part of the states to touch, in that way, at least, the instrumentalities of the United States (4 Wheat. 429, 430) and that is the law today."

The decision in the case of *Helvering* v. *Gerhardt,* 304 U. S. 405, recognizes that there are many state employees remaining immune despite the fact that the tax affects the state only as the burden is passed on to it. The effect of this decision is to deny immunity when the burden of such taxation on the state is speculative and uncertain to the degree mentioned in that opinion.

If it were necessary to show the burden of state income tax on the Home Owners' Loan Corporation, that can readily be demonstrated.

The diverse provisions in the several states requiring information reports to be filed by the employer and provisions for withholding tax constitute a real burden and expense if the Corporation be required to conform thereto, and the physical labor involved in preparation of information returns will impair, impede and prejudice this governmental function.

National Bank v. *Commonwealth of Kentucky,* 9 Wall. 353, at 362.

In the latter case the Court says in part:

> "The principle we are discussing has its limitation, * * *. That limitation is, that the agencies of the Federal Government are only exempted from state legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that Government."

The bonds of the Corporation, guaranteed as to principal and interest by the United States, bear a fixed interest rate. The revenue to service these bonds must be obtained from the interest accruing upon the mortgages taken by the Corporation, and any deficit must be supplied by the federal government. The state income tax compels consideration in determining salaries and would increase the operating expense of the Corporation.

In attempting to reflect the divers income taxes, an administrative agency is confronted with an impossible task in the matter of classification and equalization of salaries throughout an organization functioning in all the states of the Union, and this would constitute such a handicap as to compel the federal government to abandon the corporate form of agency or instrumentality and function directly in all fields.

To tax the salary is to tax the right of the Home Owners' Loan Corporation to employ the person, and is to levy upon the right of the person to work for the Corporation and receive the salary.

Income is to be distinguished from property. The income tax is not a tax of money in hand but is a tax on the right to receive the money.

The question here is one of power—not economics.

Home Savings Bank v. *Des Moines, supra;*
Evans v. *Gore, supra.*

The decision in *James* v. *Dravo, supra,* suggests that as a general rule, where a tax affecting an independent contractor be held not to impede a governmental function, nevertheless it holds Congress might enlarge the immunity to protect the function in the face of a specific tax so excessive as to be deemed an impediment.

Helvering v. *Gerhardt, supra,* Footnote 1.

The last sentence of this footnote states:

> "Congress may curtail an immunity which might otherwise be implied (*Van Allen* v. *The Assessors,* 3 Wall., 573) or enlarge it beyond the point where, Congress being silent, the court would set its limits (*Bank* v. *Supervisors,* 7 Wall., 26, 30, 31; see *Thomson* v. *Pacific Railroad,* 9 Wall., 579, 588, 590; *Shaw* v. *Gibson-Zahniser Oil Corp'n,* 276 U. S. 575, 581, and cases cited; *James* v. *Dravo Contracting Co.,* 302 U. S., 134, 161)."

The principle set forth a century ago has never since been departed from. Upon this point we quote from the case of *Weston* v. *Charleston*:

> "The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden upon the operations of the government. It may be carried to an extent which shall arrest them entirely."

We also quote from *McCallam* v. *Massachusetts,* 279 U. S. 620:

> "A state tax, however small, upon such securities or interest derived therefrom, interferes or tends to interfere with the constitutional power of the general government to borrow money on the credit of the United States, and constitutes a burden upon the operations of government, and carried far enough would prove destructive."

The right to tax the salary of an employee of a federal instrumentality is of necessity an interference on the instrumentality, and since the extent of the interference depends upon the tax fixed by a state, it could be carried to an extent which would impede the operations of the federal agency or stop them entirely.

We again quote from *Weston* v. *Charleston, supra*:

> "A power which is given by the whole American people for their common good, which is to be exercised at the most critical periods for the most important purposes, on the free exercise of which the interests certainly, perhaps the liberty of the whole may depend; may be burdened, impeded, if not arrested, by any of the organized part of the confederacy."

Blind to the beneficent purpose of the Home Owners' Loan Act and the national welfare which it serves, a state might seek to impede, retard, impair or burden the operation of this appropriate means which Congress has adopted to exercise a delegated power. The end thus sought could be accomplished through taxation of the salaries of the employees of the Corporation, and this means, adopted by Congress in recognition of the national responsibility for the general welfare, could be impeded by taxation in every political subdivision in the Union.

POINT IV.

Congress has not consented to a State income tax on the salaries of employees of Home Owners' Loan Corporation, and such consent will not be implied.

The immunity exists unless Congress expressly consents to a tax.

The immunity need never be carried into express stipulation for this could add nothing to its force.

Evans v. *Gore, supra.*

The immunity from taxation rests upon an entire absence of the power to tax.

Helvering v. *Gerhardt, supra.*

In footnote 1 to this opinion, the Court cites an analogy between immunity from taxation and immunity from judicial process. It said:

> "The analysis is comparable where the question is whether federal corporate instrumentalities are immune from state judicial process (Federal Land Bank v. Priddy, 295 U. S. 229, 234-235)."

Petitioners suggest that the Congress, by failure to specifically declare Home Owners' Loan Corporation salaries exempt, consents to taxation thereof.

> "Immunity of corporate government agencies from suit and judicial process, and their incidents is less readily implied than immunity from taxation." (Federal Land Bank v. Priddy, *supra.*)

Since this Court has suggested that the questions are comparable, we point to the uniform decisions that the United States is not liable to suit except by express legislative consent.

United States v. *Buchanan,* 8 How. (49 U. S.) 83;
Gibbons v. *United States,* 8 Wall. (75 U. S.) 269;
German Bank v. *United States,* 148 U. S. 573;
Schillinger v. *United States,* 155 U. S. 163;
Bigby v. *United States,* 188 U. S. 400;
Basso v. *United States,* 239 U. S. 602;
United States v. *Thompson,* 257 U. S. 419;
Belknap v. *Schild,* 161 U. S. 10;
Peabody v. *United States,* 231 U. S. 530;
Russell v. *United States,* 182 U. S. 516.

A statute under which waiver of sovereign immunity is claimed must be strictly construed. Suit may not be maintained against the United States in any case not clearly within the terms of the statute by which it consents to be sued. Courts cannot go beyond the letter of the statute and enlarge the liability beyond the requirements of the plain language of the statute.

Schillinger v. *United States, supra;*
Berdan v. *United States,* 156 U. S. 552;
Price v. *United States,* 174 U. S. 373;
Pine Hill Coal Co. v. *United States,* 259 U. S. 191;
Eastern Transportation Co. v. *United States,* 272 U. S. 675;
United States v. *Michel,* 282 U. S. 656.

In the case of *Schillinger* v. *United States, supra,* at page 166, the Court said:

> "Beyond the letter of such consent the Court may not go."

In *United States* v. *Hoar,* 2 Mason, 311, at page 314, the Court said:

> "Where the Government is not expressly or by necessary implication included, it ought to be clear

> from the nature of the mischiefs to be redressed, or the language used, that the Government itself was in contemplation of the Legislature, before a court of law would be authorized to put such an interpretation upon any statute."

We have seen that the immunity of federal instrumentalities from suit is less readily implied than immunity from taxation and have observed the strict rule in regard to legislative consent.

The rule as to taxation is absolute in form and stricter in substance.

Although it became the practice after the Civil War for Congress to insert in appropriate acts the express exemption, the immunity, without the statute, is clear and conclusive.

The provision in the Home Owners' Loan Act:

> "The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed."

can only be taken to evidence the measure of Congressional consent to taxation— it is, indeed, a forced construction of a provision designed to "consent to limitation of immunity" to read into the section a wider field than that specifically marked out.

A tax upon the salary of an employee of Home Owners' Loan Corporation is beyond the power of the State to levy and—what perhaps is of lesser moment—within the prohibition of the Home Owners' Loan Act above quoted.

Home Savings Bank v. *Des Moines, supra.*

No tax can be sustained in the absence of express permission:

> "* * * It follows then necessarily from these conclusions that the respective states would be wholly without power to levy any tax, either direct or indirect, upon the national banks, their property, assets, or franchises, were it not for the permissive legislation of Congress."
>
> "* * * This section then, of the Revised Statutes is the measure of the power of a state to tax national banks, their property or their franchises. By its unambiguous provisions the power is confined to a taxation of the shares of stock in the names of the shareholders and to an assessment of the real estate of the bank. Any state tax therefore which is in excess of and not in conformity to these requirements is void."
>
> *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664.

Congressional consent to taxation has not been granted in the Home Owners' Loan Act and it cannot be implied.

Immunity of salaries from State taxation, recognized for a century, has engaged the attention of Congress for many years. Had there been a purpose in adopting the Home Owners' Loan Act to do a thing so unusual as to authorize taxation of the employees of the instrumentality, is it not reasonable to believe that Congress would have given expression to that purpose? It said nothing about taxation of salaries, just as it would have done had no such purpose been in mind. To tax the salaries would be without any precedent in the legislation relating to federal corporations, and it is improbable that Congress either did or would entertain such a purpose with respect to this *one* instrumentality without a specific declaration of a broad public policy on this subject.

POINT V.

The immunity of Federal instrumentalities rests on a different basis from that of State instrumentalities.—It is more extensive.

The petitioners contend that the case of *Helvering* v. *Gerhardt, supra,* is adverse to the immunity of employees of federal instrumentalities from state taxation.

Whatever may be the effect of this decision upon the state immunity, it does not pass upon the immunity of employees of federal instrumentalities from state taxation.

In concluding the opinion the Court said:

> "The immunity, if allowed, would impose to an inadmissible extent a restriction upon the taxing power which the Constitution has granted to the Federal Government."

Instead, it distinguishes the two immunities, both under basic constitutional theory and also as a practical matter, and affirms the rule as to federal immunity announced in prior cases.

In footnote 2, to the *Helvering* v. *Gerhardt* opinion in this connection the Court quotes:

> " 'The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.' Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 435, 436, 4 L. ed. 579, 608, 609."

The court in the *Gerhardt* case distinguished between the entire absence of power of the state to tax a federal

instrumentality on the one hand, and an implied prohibition against an actual interference, through a federal tax, with governmental functions of the state.

The following quotation is taken from footnote 1 of the *Helvering* v. *Gerhardt* opinion:

> "It follows that in considering the immunity of federal instrumentalities from state taxation two factors may be of importance which are lacking in the case of a claimed immunity of state instrumentalities from federal taxation."

The court affirms that the two situations are dissimilar.

And, again, referring to *McCulloch* v. *Maryland,* the Court in this *Gerhardt* case said:

> "In sustaining the immunity from state taxation, the opinion of the Court, by Chief Justice Marshall, recognized a clear distinction between the extent of the power of a state to tax national banks and that of the national government to tax state instrumentalities."

The *Gerhardt* decision does not overrule, question or distinguish the decision in *People ex rel Rogers* v. *Graves, supra,* which is the last announcement of the Court on the direct question of immunity of employees of federal instrumentalities from state taxation. In view of this and of the clear distinction made as to the underlying theories of the two immunities, we urge the *Rogers* case as being applicable to the present inquiry.

The recent decision in the case of *James* v. *Dravo, supra,* emphasizes an exceptional class of cases, where, the court has determined as a question of fact that a tax affecting independent contractors doing business with the federal government would not burden or impede the functions of the federal government. The court points out, however, that

if such a tax were pressed to the point where, as a matter of fact, it did impede the performance of the functions of the national government, Congress might enlarge the immunity to include such independent contractors if Congress deemed it were necessary to do so in order to protect the performance of the functions of the national government.

In the *Gerhardt* case the Court defines the limits of state immunity:

> "It is enough for present purposes that the state immunity from the national taxing power, when recognized in Collector v. Day (Buffington v. Day), 11 Wall. 113, 20 L. ed. 122, *supra,* was narrowly limited to a state judicial officer engaged in the performance of a function which pertained to state governments at the time the Constitution was adopted, without which no state 'could long preserve its existence.' "

The petitioners argue that the narrowed test prescribed for determining the immunity of state instrumentalities from federal taxation should also be applied to the immunity of federal instrumentalities from state taxation.

But in the same opinion the Court emphasizes the difference between the state and the federal immunity and said of the federal government:

> "It was held that Congress, having power to establish a bank by laws which, when enacted under the Constitution, are supreme, also had power to protect the bank by striking down state action impeding its operations; and it was thought that the state tax in question was so inconsistent with Congress's constitutional action in establishing the bank as to compel the conclusion that Congress intended to forbid application of the tax to the Federal bank notes. *Cf.* Osborn v. Bank of United States, 9 Wheat. 738, 865-868, 6 L. ed. 204, 234, 235."

The immunities are claimed to be reciprocal in the sense that as judicial decision expands or contracts the one immunity a corresponding expansion or contraction should be accorded to the other.

We argue that the two situations are completely different, not only under constitutional theory but as a practical matter.

And the Court in the *Gerhardt* case sustains that view in discussing *Collector* v. *Day, supra*:

> "The question there presented to the Court was not one of interference with a granted power in a field in which the Federal Government is supreme, but a limitation by implication upon the granted Federal power to tax."

The supreme federal taxing power is limited only by the guarantee to the states of their traditional government and governmental functions and the state immunity is found in that limitation and only there.

At this point we again quote from the *Gerhardt* opinion:

> "In tacit recognition of the limitation which the very nature of our Federal system imposes on state immunity from taxation in order to avoid an ever expending encroachment upon the Federal taxing power, this Court has refused to enlarge the immunity substantially beyond those limits marked out in Collector v. Day (Buffington v. Day), 11 Wall. 113, 20 L. ed. 122, *supra*."

On the other hand the state taxing power, which is not supreme, must yield to all the federal powers—they are supreme.

Although in many opinions references are found to "reciprocal immunity" it is apparent that the word "reciprocal" has been used as describing the immunity that was "given and received" or the immunity that was due from "each to

each." The context of the several opinions and the facts outlined in the several decisions show that the immunity was not regarded as a "mutual immunity."

The federal taxing power is supreme and the state immunity from federal taxation is narrower than the federal immunity from state taxation.

McCulloch v. *Maryland, supra,* had indeed recognized the plain distinction between the two situations and had based its holding of federal immunity on the principle of delegated federal supremacy. The states, having given to the federal government absolute supremacy in certain fields, have no power by a tax statute, said the Court, to detract from or endanger the supremacy which they have bestowed by the Constitution.

The federal immunity rests entirely upon the great principle that "the Constitution and laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective States and cannot be controlled by them." To urge that the immunity is reciprocal is to deviate from the simple proposition that there can be no state tax of federal instrumentalities because the Constitution declares a federal law under which the instrumentality is created to be supreme over the laws of the state.

In the course of the *McCulloch* v. *Maryland, supra,* opinion, Mr. Justice MARSHALL said:

> "It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence (p. 427).
>
> * * * * * * * *
>
> The American people have declared their constitution and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states (p. 432).

> * * * The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government is conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, an empty and unmeaning declaration (p. 433).
>
> * * * The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole —between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme."

We find that the supreme authority of the federal government to tax is only limited by the provision which guarantees to each State Government its sovereign structure.

The Court in *Helvering* v. *Gerhardt, supra,* discussing the decision in *Collector* v. *Day,* said:

> "The immunity which it implied was sustained only because it was one deemed necessary to protect the states from destruction by the federal taxation of those governmental functions which they were exercising when the Constitution was adopted and which was essential to their continued existence."

A state is without power to tax persons, instrumentalities, or agencies engaged in exercising a power granted by the Constitution to the federal government, but the federal government can exercise its delegated powers of taxation equally against all men so long as it does not actually interfere with traditional governmental functions of the State.

There is in one case a complete absence of power; in the other a limitation upon the exercise of an admitted power.

If this Court in *Helvering* v. *Gerhardt, supra,* noted that the immunity first announced in *Collector* v. *Day, supra,* had been so extended as to be erroneously regarded as

reciprocal and coextensive with the federal immunity, this decision does not justify a state tax upon federal instrumentalities or upon the salaries of persons engaged in the discharge of the sovereign functions of the United States.

In *Helvering* v. *Therrell,* 303 U. S. 218, the Court said:

> "The constitution contemplates a national government free to use its delegated powers; also state governments capable of exercising their essential reserved powers; both operate within the same territorial limits; consequently the constitution itself, either by word or necessary inference, makes adequate provision for preventing conflict between them.
>
> "Among the inferences which derive necessarily from the constitution are these: No state may tax an appropriate means which the United States may employ for exercising their delegated powers; the United States may not tax instrumentalities which a state may employ in discharge of her essential governmental duties—that is, those duties which the framers intended each member of the Union would assume in order adequately to function under the form of government guaranteed by the constitution.
>
> "By definition precisely to delimit, 'delegated powers' or, 'essential governmental duties' is not possible. Controversies involving these terms must be decided as they arise, upon consideration of all the relevant circumstances."

The distinction between the federal delegated powers and those governmental functions exercised by the states is shown in the case of *United States* v. *California,* 297 U. S. 180.

The suggestion in *Helvering* v. *Therrell, supra,* that a controversy may arise with respect to the definition of "delegated powers" cannot mean that any subordinate activities of a legitimate federal instrumentality might call into question its validity.

A federal function must be exercised in a governmental capacity—a delegated power exercised through an appropriate means—otherwise it becomes a mere usurpation in defiance of the law (Point I).

If the instrumentality created and used by Congress to carry into effect its constitutional powers is adapted to aid it in exercising those powers, the Courts will not question or review the decision of Congress in creating and using the instrumentality (Point I).

Subordinate activities will not destroy the authority of Congress to create this Corporation (Point I).

If the employees of a federal instrumentality are taxable because the functions of the instrumentality are construed to be proprietary, then the instrumentality is unconstitutional since a federal instrumentality can only perform governmental functions.

It will also be observed that the immunity of the employees of a Federal instrumentality rests on a different basis than the immunity which might be claimed by an independent contractor engaged on the work of such an instrumentality.

James v. *Dravo, supra;*
People ex rel. Rogers v. *Graves, supra;*
Metcalf v. *Mitchell,* 269 U. S. 514.

In the case of *James* v. *Dravo, supra,* at page 152, the court sets apart the independent contractor cases from cases arising out of taxation of Government securities, salaries and contracts.

It has been argued that the decision of *James* v. *Dravo, supra,* is authority for the proposition that the court will inquire, as each controversy arises, into the burden or effect of each tax upon the Governmental operation. The decision in *James* v. *Dravo* is confined to an independent contractor. The Court narrowed the decision to the case of an independent contractor and the opinion definitely refused to apply the doctrine of cases relating to securities, property or officers.

Neither did the court adopt or apply the doctrine of cases relating to an instrumentality of government. The court cited with approval the case of *People ex rel. Rogers* v. *Graves, supra,* and held that the tax under consideration in the case of *James* v. *Dravo, supra,* did not interfere in any substantial way with the performance of Federal functions.

The court expressly followed the decision in *Metcalf* v. *Mitchell, supra,* and guided on the principle that government bonds, salaries, property and instrumentalities are not upon the same footing in regard to taxation as independent contractors.

The last two paragraphs of the opinion in *People ex rel. Rogers* v. *Graves,* page 409 rejecting the suggestion that relator was an independent contractor, evidence the wide difference in the approach to cases growing out of taxation upon independent contractors and the cases growing out of taxation on salaries, securities and contracts. In the opinion, *James* v. *Dravo, supra,* page 156, the court refers to the case of *Metcalf* v. *Mitchell, supra,* as a pivotal decision because an independent contractor was involved, and states:

> "The pith of the decision in the case of *Metcalf* is that Government bonds and contracts for the services of an independent contractor are not upon the same footing. The decision was a definite refusal to extend the doctrine of cases relating to Government securities, and to the instrumentalities of Government, to earnings under contracts for labor. The reasoning upon which that decision was based is controlling here."

If, in this case, the employee of the Home Owners' Loan Corporation is taxable then the bonds of the Corporation would be taxable and a grave question would arise as to the validity of the guarantee by the government of the bonds of the corporation.

POINT VI.

The State of New York has exempted relator's salary from taxation by the Tax Law of the State of New York.

Section 359, Paragraph 2-f of the Tax Law of the State of New York excludes from gross income:

> "Salaries, wages and other compensation received from the United States of officials or employees thereof, including persons in the military or naval forces of the United States."

There is no reason to assume that the Legislature of the State of New York intended to differentiate between the employees in the departments of the Government and those in the wholly owned instrumentalities of the Government.

Relator is an employee of the United States within the rule discussed and approved in the case of *Metcalf & Eddy* v. *Mitchell, supra.* The nature of this government instrumentality and the functions which it performs demonstrate that its employees are truly instrumentalities of the United States.

> *James* v. *Dravo, supra*;
> *People ex rel. Rogers* v. *Graves, supra.*

By Act of Congress, 49 Stat. 1597 (deficiency appropriation bill), 74th Congress, Ch. 689, Title IV, Section 7 thereof, it is provided that, notwithstanding any other provision of law, Home Owners' Loan Corporation shall not incur any obligation for administrative expenses, except pursuant to an annual appropriation specifically therefor.

By a succeeding appropriation act, Public 534, 75th Congress, Third Session, and the 4th Section thereof, it was provided that the administrative expenses of Home Owners' Loan Corporation shall be accounted for and audited in accordance with the terms and provisions of the Budget and

Accounting Act of 1921, Ch. 18, 67th Congress, First Session, 42 Stat. 20, and the Home Owners' Loan Corporation comes within the definition of department or establishment contained in the Budget and Accounting Act.

In the light of the statutes dealing specifically with the Home Owners' Loan Corporation and of the administrative practices prevailing, the Corporation is not enabled to employ commercial methods and to conduct its operations as a private corporation.

> *U. S. ex rel. Skinner and Eddy* v. *McCarl*, 275 U. S. 1.

While we insist that respondent's salary is constitutionally immune, nevertheless, inasmuch as the Home Owners' Loan Corporation is but the means by which the United States acts, the salary is received from the United States and is expressly exempt by the New York statute.

CONCLUSION.

The functions of the Home Owners' Loan Corporation are essential to the preservation of the general welfare and the promotion of economic security in the nation.

The Corporation is immune from taxation and the fixed salaries paid by it to its employees are immune from state taxation.

The determination of the Court of Appeals and the judgment entered thereon should be affirmed.

Respectfully submitted,

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