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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,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
upon the relation of JAMES B. O'KEEFE,
on Certiorari to the Supreme Court of
the State of New York.

PETITIONERS' REPLY MEMORANDUM.

Statement.

This memorandum is primarily intended merely to set forth the facts in respect of the sources from which relator O'Keefe's salary is paid. This is believed called for by reason of the statement appearing at page 15 of relator's brief:

“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." (Citing *Dobbins v. Commissioners, et al.*, 16 Pet. 435.)

From the said statement it may be that relator intends the conclusion to be drawn that his salary in fact is paid from an appropriation for personal service as in the case of an official or employee of the United States government itself. Such is not the case.

Facts bearing on the Home Owners' Loan Corporation and relator's salary.

The independent offices appropriation act for the fiscal year 1939 (Chapter 259—3d Session—H. R. 8837—Public No. 534—75th Congress) makes an appropriation as follows:

“Home Owners' Loan Corporation”
 “Not to exceed \$26,500,000 of the funds of the Home Owners' Loan Corporation, established by the Home Owners' Loan Act of 1933 (48 Stat. 128), shall be available during the fiscal year 1939 for administrative expenses of the Corporation, including personal services in the District of Columbia and elsewhere; * * *.” (Emphasis supplied. Public 534, page 24.)

The funds are those of the Corporation, held in the Treasury as a depository. And this procedure of a Congressional limitation, it is believed, dates only from 1937, when the Corporation ceased its financing and began the process of liquidating its operations and holdings.

The salary of relator is and has heretofore been paid by the Corporation pursuant to Section 4 (j) of the Home Owners' Loan Act of 1933—(Public 43—73rd Congress), which section clearly delineates the distinction between officers or employees like relator and officers or employees of the United States:

“(j) The Corporation shall have power to select, employ, and fix the compensation of such officers, employees, attorneys, or agents as shall be necessary for the performance of its duties under this Act, without regard to the provisions of other laws applicable to the employment or compensation of officers, employees, attorneys, or agents of the United States.”

In view of the clear distinction thus drawn by Congress, it cannot be said that relator is an employee of the United States.

The Home Owners' Loan Corporation has all the earmarks of a regular private business corporation. It is operated by a board of directors, has issued capital stock and bonds for its funds, even though derived from the Treasury. The Corporation was established by the Federal Home Loan Bank Board (Act of 1932) and its primary purpose in the field of home finance may be compared to the commercial banking purposes of the Federal Reserve Banks. There are some twelve home loan banks with assets of over four billion dollars. The report of the Home Owners' Loan Corporation is included in the Annual Report of the Federal Home Loan Bank Board:

“Sixth Annual Report—Federal Home Loan Bank Board for the period of July 1, 1937-June 30, 1938—covering the operations of the

Federal Home Loan Bank System
 Federal Savings and Loan Associations
 Federal Savings and Loan Insurance Corporation
 Home Owners' Loan Corporation."

The report is accompanied by an official letter of transmittal and is an official document printed by the United States Government Printing Office. It shows that the Home Owners' Loan Corporation began in June, 1933 and ceased active refinancing operations (its major purpose) June 12, 1936.

"Its principal activities at present are the collection and servicing of its loans, and the management and sale of the properties acquired." (p. 69)

The operations represent a deficit as of June 30, 1938 of \$40,893,292, as compared with the deficit of \$31,740,151 on June 30, 1937 (p. 91).

The corporation owns (as of June 30, 1938) 82,987 properties valued at \$437,605,041, presumably taken over through foreclosure and from defaulting mortgagors (Report p. V).

Neither relator's position nor his functions differ from those of like persons in the employ of private corporations.

The determination below should be reversed.

Supplemental Reply Addressed to Brief Amicus Curiae of the United States.

We have just received and read the brief of the Department of Justice, filed *amicus curiae* herein. With interest we note the extended and wholly impertinent argument therein addressed to the proposition that this Court should now, in this case, reconsider and overrule *The Collector v. Day*, 11 Wall. 113, and subsequent cases in line therewith. Since the instant case involves no such issue or question; since we

respect the repeated admonition of this Court to confine discussion to the facts and issues of law concerned in the case at bar, and none other; since the issue thus extraneously raised by the government's brief will inevitably come before the Court in a case where the issue may be squarely presented and the vital constitutional questions therein involved fully argued and considered—for these reasons the petitioners must decline to be drawn into a discussion of the proposition thus irrelevantly sought to be injected into the instant appeal. For the same reasons we most earnestly trust and pray that this Court will adhere to its traditional philosophy of the judicial process and decline the government's *invitation* to make the "digression from the particular case before the Court" (government's brief, p. 45). We believe it was one of the former Justices of this Court who once remarked: "Sufficient unto the day is the evil thereof. Let us do our knitting and let the Congress do theirs."

If, perchance, this Court should nevertheless be of the opinion that it wishes to reconsider the doctrine of *The Collector v. Day*, and to do so in connection with the instant appeal—then petitioners respectfully urge that opportunity be afforded for briefing the issue thus presented—and that another time be set by the Court for argument thereon.

Respectfully submitted,

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