

**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 WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF NEW YORK*

---

**SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES  
AS AMICUS CURIAE**

---

The supplemental brief for respondent in *State Tax Commission of Utah v. Van Cott*, No. 491, October Term, 1938, calls to the attention of the Court the legislative developments with respect to H. R. 3590, 76th Cong., 1st Sess., subsequent to the time that the main briefs were filed. Respondent reads these legislative developments as indicative

of a Congressional understanding and intention that the compensation of federal officers and employees should be exempt from state income taxation prior to January 1, 1939. The bill, which has passed the House and is now pending before the Senate, together with the reports of the House Ways and Means Committee (H. Rpt. No. 26) and the Senate Finance Committee (S. Rpt. No. 112), are reprinted in the Appendix of the supplemental brief for the respondent in the Van Cott case.

We have no thought to disparage the strength of the implications which respondent draws from this bill and the statements of the Committees which have reported it. We feel, however, that a somewhat fuller examination of these legislative developments indicates, not that the Congress intended there to be an immunity for federal officers and employees prior to January 1, 1939, but that the Congress was doubtful as to the existence of such an exemption in the past and wished to make it plain that in the future there should be no immunity from state income taxation.

Section 3 of H. R. 3790 provides:

The United States hereby consents to the taxation of compensation, received after December 31, 1938, for personal service as an officer or employee of the United States, any Territory or possession or political subdivision thereof, the District of Columbia, or any agency or instrumentality of any one

or more of the foregoing, by any duly constituted taxing authority having jurisdiction to tax such compensation, if such taxation does not discriminate against such officer or employee because of the source of such compensation.

It will be noted that the bill in terms is directed only to compensation received after December 31, 1938. There is neither prohibition of nor consent to taxation of compensation received prior to that date. The respondent in the *Van Cott* case draws from this an implication that the Congress intended compensation received in 1938 and before to be exempt. This is a permissible implication. At least equally permissible, however, is the inference that the Congress did no more than to withhold its consent to the taxation of compensation received in and before 1938, so that the tax liability for those years should be determined in the absence of any Congressional action as to taxability or immunity. In this view, the question must turn on the force of the Constitution alone.

To resolve these conflicting inferences it is necessary, as respondent in the *Van Cott* case has done, to resort to the Committee Reports. We think that, taken as a whole, these reports show that the Congress was uncertain as to the strength of the foundations which supported the supposed immunity of federal officers and employees, and that, without determining the question as to compensa-

tion received in 1938 and before, it desired to make it plain that there should be no immunity for compensation received after January 1, 1939. We shall discuss the relevant parts of the Committee Reports in sequence.

1. The introductory portion of the House Report shows that the Committee considered federal officers and employees to be exempt under the implications of the Constitution, as construed by this Court, but that the Committee considered that the principles leading to this supposed exemption might be mistaken. It reads:

These exemptions [of State and Federal officers and employees], which are not provided expressly in the Constitution, have been thought to be required by the decisions of the Supreme Court, based upon the implications of the Constitution. Several recent decisions \* \* \* make it clear that many of the assumptions heretofore entertained as to the scope of these tax immunities are erroneous.

2. After discussing the probable liability of state officers and employees to federal taxation, the Committee Report continues that the case of federal officers and employees "however, may be governed by other considerations." It speaks of "certain indications" in *McCulloch v. Maryland* and in *Helvering v. Gerhardt* pointing to a greater immunity on the part of federal officers and employees than

with respect to those of the States. The report then continues:

Your Committee believes that it is essential to a fair solution of the problem presented by intergovernmental tax immunities that Federal officers and employees should, like other individuals, be subject to income taxation under the authority of the States. The bill, therefore, contains an *express* consent to such taxation. [Italics added.]

The Committee hardly would have spoken of an "express" consent to taxation if it had thought that there was an implied prohibition prior to enactment of the legislation.

3. Respondent in the *Van Cott* case finds the House Report, when it speaks of the fact that no provision for subjecting federal officers and employees to federal taxation is necessary, indicative that the Committee considered legislation to be necessary in order to subject federal officers and employees to state taxation. This paragraph of the House Report, however, is equally compatible with the belief that the Congress was uncertain as to their liability to state taxation, while there was no corresponding question as to the liability of federal officers and employees to federal taxation.

4. In the detailed explanation of the particular sections, the House Report describes the purpose of Section 3 as follows:

In order to facilitate reciprocal taxation as between State and Federal Governments,

your committee believes that the United States should expressly consent to the taxation of the compensation of its officers and employees.

Here, again, the House Committee indicates by implication that the section was not certainly necessary; indeed, it suggests that its purpose is simply to make the liability plain, and thus to facilitate reciprocal taxation.

5. Finally, in concluding its technical discussion of Title I, the House Committee says that Section 3 "consents to taxation of Federal officers and employees only with respect to compensation received after December 31, 1938." We have never suggested that the consent was designed to reach back to earlier dates. But the limited nature of the consent does not carry respondent's point, for the question still remains as to the liability of federal officers and employees in the absence of Congressional consent.

6. The introductory portions of the Senate Report state that Title I "grants consent to the States to tax the compensation received after December 31, 1938, by Federal officers and employees." Here, again, there is no indication as to the Committee's understanding of the situation in 1938 and before, in the absence of consent. The failure of the Committee to say that it was granting an "express" consent is unimportant, since later portions of the Report in terms speak of an "express" consent.

7. In discussing the economic aspects of the proposed legislation, the Senate Committee states:

At the present time, Federal employees are subject to Federal income taxes, but are exempt from State income taxes.

This seems more probably to be directed to the supposed implications of the Constitution than to any estimate of the Congressional intention.

8. At a later point, in the first paragraph under the section entitled "Constitutional Aspects," the Committee says:

There is no corresponding problem with respect to the State taxation of the salaries paid to Federal officers and employees, since Congress apparently has power to waive any immunity which might attach to its employees.

This extract shows that the Committee considered the existence of an immunity a matter of at least some doubt. This doubt is incompatible with any understanding that Congress had, by its silence, exempted federal officers and employees from state income taxation.

9. The Senate Committee, in the third of its paragraphs offering possible distinctions of *Collector v. Day*, said that "The proposed legislation does permit the States to tax Federal salaries." This summary statement of Congressional permission should, of course, be read with the portions of the Committee Report which deal in terms with the

consent of Congress, and which indicate that the Committee saw no clear implication of a Congressional intention that there be exemptions for the earlier years.

10. At a somewhat later point in the discussion of the constitutional aspects, the Senate Committee says:

It is believed that the bill will afford to the Court a proper opportunity to redefine and clarify the limits to which governments may go in subjecting the compensation of public employees to taxation.

This paragraph of the Senate Committee suggests that the purpose of the legislation is to clarify rather than to change the existing law.

11. The philosophy back of the legislation is applicable equally to federal as to state officers and employees. In connection with the latter group the Senate Committee, in its description of Section 1, said:

The Committee believes that it is desirable to amend the statute to remove all doubts, so that any presentation of the constitutional question with respect to taxation of Government employees will not be fettered by any problem of statutory construction.

12. In its technical discussion of Section 3, the Senate Committee repeats the discussion in the House Report, explaining that the United States "should expressly consent" to the taxation of its

officers and employees in order to facilitate reciprocal taxation.

We think it difficult to read these various portions of the Committee Reports without coming to the conclusion that, so far as they express the intention of Congress, the legislature has no fixed views or intention as to the liability of federal officers and employees to state taxation on compensation received prior to January 1, 1939. The purpose of the legislation is to present a clear-cut issue looking to the removal of the supposed constitutional exemption of government officers and employees from taxation by another government. As we read the reports, the Committees take some pains to avoid committing themselves as to the liability of federal officers and employees to state income taxation in the absence of an express Congressional consent. In other words, the Committees themselves could read no Congressional intention for exemption of federal officers and employees out of the mere silence of Congress.

There are, indeed, contrary implications to be drawn from some parts of the Committee Reports, which we have discussed above. The contrary implications show a considerable doubt on the part of the Committees as to what, in the absence of Congressional consent, might be the rule of the Court with respect to the state taxation of the compensation paid federal officers and employees. We have

no hesitancy in confessing to a similar doubt. This doubt and confusion traces, of course, to the fact that the decisions of this Court in the field of inter-governmental tax immunity have not followed any very fixed course, with the result that most conclusions will depend upon which of the alternative decisions is chosen as a premise. The situation is one in which clarification is so greatly needed that we feel justified in urging the Court to resolve the conflicting inferences to be drawn from the Committee Reports in the manner best adapted to that end. It would seem unduly artificial to decide this case upon any implication of Congressional intention when that intention, in turn can be implied only from suppositions as to the desire of Congress in a field of shifting principles which have been formulated and modified almost entirely by the courts alone. When the Congress cannot with confidence predict whether the Court in any given case will follow or reject *Collector v. Day*, it is difficult to read into its silence a desire that federal officers have a corresponding immunity.

It is sufficient, we believe, that the Committee Reports, on the whole, disclose no clear indication of a Congressional intention for immunity of federal officers and employees, and that they can with confidence be said to show only that the Congress did not know whether or not federal officers and

employees were liable for state income taxes upon compensation received in and before 1938. The question, in our opinion, remains one to be decided under the Constitution alone.

It is, therefore, respectfully submitted that the decision of the court below should be reversed.

ROBERT H. JACKSON,  
*Solicitor General.*

JAMES W. MORRIS,  
*Assistant Attorney General.*

SEWALL KEY,  
*Special Assistant to the Attorney General.*

WARNER W. GARDNER,  
*Special Attorney.*

MARCH 1939.