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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :  
Petitioner :  
v. : No. 99-1978  
TERRY J. HATTER, JR., JUDGE, :  
UNITED STATES DISTRICT COURT :  
FOR THE CENTRAL DISTRICT OF :  
CALIFORNIA, ET AL. :  
- - - - -X

Washington, D.C.  
Tuesday, February 20, 2001

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
1:00 p.m.

APPEARANCES:

PAUL R. Q. WOLFSON, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.; on  
behalf of the Petitioner.  
STEVEN S. ROSENTHAL, ESQ., Washington, D.C.; on behalf of  
the Respondents.

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2  
3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 99-1978, United States v. Terry J. Hatter.  
5 Mr. Wolfson.

6 ORAL ARGUMENT OF PAUL R. Q. WOLFSON  
7 ON BEHALF OF THE PETITIONER

8 MR. WOLFSON: Mr. Chief Justice, and may it  
9 please the Court:

10 When Congress brought Federal judges within the  
11 coverage of the Social Security and Medicare programs,  
12 they began to share with the vast majority of all other  
13 Americans the costs and benefits of a universal program of  
14 social insurance that benefits society at large. The  
15 obligation to participate in those programs posed no  
16 threat to the central purpose of the Compensation Clause,  
17 which is to protect the judiciary from interference from  
18 the other political branches.

19 As this Court recognized in O'Malley v.  
20 Woodruff, judges are also citizens, and the Compensation  
21 Clause does not grant them an immunity from participating  
22 in the burden of Government, whose Constitution and laws  
23 they are charged with administering.

24 A nondiscriminatory tax that falls on judges as  
25 well as most other citizens does not violate the

1 Compensation Clause. The concern that the Framers had  
2 with Congress' possibly abusing its power to set judges'  
3 statutory salaries does not apply to Congress' application  
4 and extension of a nondiscriminatory tax on income.

5 Now, the Framers understood that when Congress  
6 exercised its authority to enact statutory salaries, it  
7 would have the opportunity for mischief.

8 QUESTION: Excuse me, how does that  
9 nondiscriminatory get into it? Suppose Congress simply  
10 reduces the salaries of all Federal employees, officers  
11 and employees, and judges among them. Surely the fact  
12 that it was nondiscriminatory wouldn't prevent it from  
13 violating the Compensation Clause, would it?

14 MR. WOLFSON: That is correct, Justice Scalia.

15 QUESTION: Although you could say they're  
16 clearly not trying to impair the independence of judges.

17 MR. WOLFSON: That's the holding, of course, of  
18 Will, which is that a nondiscriminatory reduction in  
19 Federal employees' salaries that includes judges does  
20 violate the Compensation Clause, but it's one thing to say  
21 that a direct reduction of judges' salaries violates the  
22 plain language of the clause, because it is, after all, a  
23 diminution of their compensation that is owed to them for  
24 their services, but it's another thing -- and -- but it's  
25 another thing to say that a tax, which is not a direct

1 reduction of their compensation but is an obligation that  
2 they must share with all other citizens, implicates the  
3 Compensation Clause.

4 QUESTION: Why is that, because a tax doesn't  
5 have anything to do with their compensation, and therefore  
6 it doesn't count? Why would a discriminatory tax violate  
7 the Compensation Clause, then?

8 MR. WOLFSON: First of all, I think --

9 QUESTION: If it doesn't have anything to do  
10 with compensation, you could do it discriminatorily, I  
11 assume.

12 MR. WOLFSON: I'm not sure it would violate the  
13 Compensation Clause itself. It very likely would violate  
14 fundamental principles underlying Article III, a  
15 discriminatory tax, even if it didn't fall on judges'  
16 compensation.

17 If -- one -- there are two, essentially two  
18 different principles here. One is a reduction of judges'  
19 compensation, and another is discriminatory treatment of  
20 judges in some way which might or might not be directed at  
21 their salary or at their income. I think the same  
22 principles would apply, a discriminatory tax principle  
23 would apply if Congress --

24 QUESTION: Well, what cases support the -- your  
25 second hypothesis? We've had cases involving, you know,

1 the Compensation Clause and decided them one way or the  
2 other, but what cases support this second line of  
3 argument?

4 MR. WOLFSON: Mr. Chief Justice, I think the  
5 cases like *Plaut v. Spendthrift Farm* show that there are  
6 broader principles protecting the independence of the  
7 judiciary that go beyond some political interference, that  
8 go beyond just the Compensation Clause, but I want to add,  
9 even if I'm wrong, and even if one should analyze the  
10 discriminatory tax on judges' salaries under the  
11 Compensation Clause, that doesn't mean one would have to  
12 also conclude that a nondiscriminatory tax violates the  
13 Compensation Clause, because the clause would still be  
14 interpreted in light of its central purpose, which is to  
15 protect judges from interference with their function by  
16 the political branches.

17 Now --

18 QUESTION: Well, but maybe -- you call it a  
19 central purpose, but it's not the only purpose, and it's  
20 clear that another purpose is to enable those who come to  
21 the bench, setting aside a lucrative profession, to be  
22 able to be sure that they will get so much money over the  
23 term of their lifetime service. You acknowledge that's  
24 one of the purposes.

25 MR. WOLFSON: I certainly acknowledge that that

1 is a benefit that the Compensation Clause has, but I think  
2 it's -- I think it's --

3 QUESTION: A purpose. I mean --

4 MR. WOLFSON: Well, I'm not sure that I agree  
5 that that is a central purpose of the Compensation Clause.

6 QUESTION: You disagree with Alexander Hamilton,  
7 then?

8 MR. WOLFSON: But I -- Hamilton said that that  
9 would certainly be a benefit of the clause, but I think  
10 that even if that's -- even if that's so, and even if I  
11 agree with you, it doesn't necessarily follow -- it  
12 doesn't follow, in fact, that every expectation that a  
13 judge had, that he brought with him, or her, when taking  
14 office, was protected from any disparagement or any  
15 adverse effect by later action in Congress.

16 After all, the same claim was made in Will. The  
17 judges argued that the formula for adjusting the statutory  
18 salary had been built into the statute at the time they  
19 took the judges, and they fully expected that those  
20 adjustments in salaries would come automatically each  
21 year, and yet Congress in 2 years prevented those salaries  
22 from taking effect.

23 QUESTION: But there, it was because they had  
24 not yet become effective, and therefore they were not part  
25 of the compensation that the judges had --

1 MR. WOLFSON: But the broader point is that it  
2 just is not the case that every single expectation that a  
3 judge has about his financial position when he takes  
4 office is something that the Compensation Clause freezes  
5 in place.

6 For example, Congress surely could have raised  
7 the rate of the general applicable income tax on all  
8 citizens in the exact same amount as was the amount of the  
9 Medicare and Social Security taxes in this case, and  
10 Congress could have done so, in fact, because it had  
11 decided that from this point on these programs of social  
12 insurance should be financed out of general income tax  
13 revenues instead of a separate tax on income.

14 QUESTION: Perhaps, but is it fair to equate  
15 payments into a retirement system with general taxes? I  
16 mean, when employers offer compensation, they offer a  
17 compensation package, which very often includes retirement  
18 plans. Some of them are contributory, some of them are  
19 noncontributory, but that is part of the whole scheme of  
20 compensation, and it may well be the case that the general  
21 taxes are something entirely different, but does that  
22 necessarily show that contributions to retirement schemes  
23 are entirely different? Isn't that much closer to  
24 involving the compensation of the judges?

25 MR. WOLFSON: Well, I think that they bear

1 elements, Social Security bears some analogizing to a  
2 contribution to a retirement scheme, but it also is  
3 principally a tax that is laid on the wages and salaries  
4 of every earner.

5 QUESTION: It's quite -- it's actually quite  
6 different from other compensation schemes, where you get  
7 out what you --

8 MR. WOLFSON: Right --

9 QUESTION: -- a fraction of what you paid in.  
10 Social Security, you can go for just a few quarters and  
11 get the whole deal, and pay 60 years and get nothing more.

12 MR. WOLFSON: The -- not only that, but there's  
13 both a floor and a ceiling in Social Security benefits.  
14 Congress has also made clear by statute that it can adjust  
15 Social Security benefits, and that there are no  
16 contractual or vested rights in a particular level of  
17 benefit, so --

18 QUESTION: And you could be -- you can be a  
19 bachelor, or you could have nine children, and it would be  
20 the same. It's a tax. It's not like the Civil Service  
21 retirement system that's also a piece of this case.

22 MR. WOLFSON: Right.

23 QUESTION: It's not a tax.

24 MR. WOLFSON: It's a pay-as-you-go system,  
25 principally, and it operates on a principle that a large

1 fund is being financed by all taxpayers, and that all  
2 taxpayers -- and that all wage-earners also derive a  
3 benefit from it, but there's no direct connection.

4 QUESTION: This was meant to replace for these  
5 judges the Civil Service retirement system, wasn't it,  
6 which they previously had been entitled to participate in?

7 MR. WOLFSON: Actually, no. The judges -- the  
8 judges themselves, while judges, did not participate in  
9 the Civil Service retirement system. Now, Federal  
10 employees did participate in an entirely separate, self-  
11 contained system, CSRS, and Congress did not bring  
12 incumbent Federal employees into Social Security on a  
13 mandatory basis.

14 QUESTION: Congress replaced that element of  
15 compensation with the Social Security system for other  
16 Federal employees, right?

17 MR. WOLFSON: For Federal employees --

18 QUESTION: And yet you say that it really has  
19 nothing to do with --

20 MR. WOLFSON: Well, I --

21 QUESTION: -- retirement or compensation for  
22 retirement. It seems to me Congress thought it very much  
23 did.

24 MR. WOLFSON: Well, I -- no, I don't think that  
25 Congress thought that Social Security is a Civil Service

1 retirement system. It is not a contributory retirement  
2 system. It is -- it obviously does, as does a Civil  
3 Service retirement system, go to the -- go to citizens'  
4 interests in retirement income security, and Congress  
5 didn't want Federal employees to have to pay twice for  
6 retirement income security.

7 QUESTION: Why is the contributory versus  
8 noncontributory factor, whether you get out as much as you  
9 put in, why does that have anything to do with whether it  
10 is realistically regarded as part of your total  
11 compensation? Does it make a difference, when an employer  
12 hires you and promises you a certain retirement system,  
13 whether you contribute to it or not, or whether, you know,  
14 somehow it is tied to your wages or not? It seems to me  
15 it's part of the total employment package.

16 MR. WOLFSON: Well, first, the question here is  
17 not whether judges' Social Security benefits are part of  
18 their compensation. I mean, the question that we are  
19 presenting here is whether Congress could ask judges, or  
20 could require judges to participate in the financing of a  
21 system that operates for the benefit of society at large,  
22 and that is the obligation that was extended to judges for  
23 the first time in 1983 and 1984.

24 And the reason why that is different from a  
25 statutory form of compensation, or why, I should say, that

1 the concerns that the Framers had with diminishing direct  
2 reductions of statutory salary don't apply here, is that  
3 when Congress enacts and shapes a general tax like Social  
4 Security, it legislates with the broad perspective of  
5 society at large, and it doesn't have a narrow focus on  
6 the judiciary, and when Congress sets the generally  
7 applicable tax rate, it is also constrained by political  
8 checks, by the popular political objection to --

9 QUESTION: But you could say that Congress did  
10 have a focus on the judiciary here, since judges weren't  
11 included until 1983, and then it was decided to bring  
12 judges in, who had not been in before.

13 MR. WOLFSON: Mr. Chief Justice, Congress --  
14 it's true Congress brought judges -- Congress eliminated  
15 the exemption. It did bring judges within the Social  
16 Security system, and that is part of a general progress of  
17 extension of the Social Security system over time since  
18 1934 to the present. I mean, it's one of many extensions  
19 that Congress has made.

20 In 1984, along with Federal judges and new hires  
21 in the Federal Government, it brought in employees of  
22 nonprofit organizations. In 1986, it extended mandatory  
23 coverage to employees of State and local governments who  
24 weren't otherwise covered by a system similar to CSRS.

25 QUESTION: That may be, but when they do come to

1 the step of extending it or not extending it to this very  
2 discrete group of individuals, judges, you're confronted  
3 with the problem that they may be induced to extend it or  
4 not to extend it on the basis of whether they like judges  
5 or not, on the basis of whether they think these judges  
6 have been coming out with decisions of the sort they like  
7 or not.

8           Once you allow Congress, whether it's part of a  
9 step-by-step proceeding or not, to single out judges for  
10 an imposition of this sort, you run the risk that, you  
11 know, that they're doing it for a wrong reason, and we  
12 can't inquire case-by-case whether they did it because  
13 they were mad at judges or not.

14           MR. WOLFSON: Well, first of all, there is no  
15 claim in this case that Congress did this for that reason,  
16 that Congress extended the coverage of the programs to  
17 judges.

18           QUESTION: I don't know how you'd find that out,  
19 to tell you the truth.

20           MR. WOLFSON: Well, second, this isn't -- excuse  
21 me. This is not the imposition of a special tax. This is  
22 the -- this is eliminating an exemption that had precluded  
23 judges from both the costs and benefits of the Social  
24 Security program, so that is a --

25           QUESTION: Well, but many judges, speaking

1 generally, had already qualified for the Social Security  
2 system in private practice.

3 MR. WOLFSON: Many judges -- many judges might  
4 have, Mr. Chief Justice. Some judges might have not.  
5 Judges also get a benefit that society at large has from  
6 having a fiscally sound Social Security program that  
7 benefits everybody.

8 After all, the logic of Social Security is not  
9 just that it benefits the people who pay in specifically  
10 for what they paid in. It benefits -- it is a program of  
11 social insurance. It benefits us all that other people  
12 obtain Social Security benefits and are not impoverished,  
13 do not have to draw on public welfare resources --

14 QUESTION: The figures that I have said that 95  
15 percent of those who were judges in 198 -- '82, '92 --  
16 '82 -- '82, 95 percent had already maxed out, so as to  
17 that 95 percent, this had the effect of nothing but a tax.

18 MR. WOLFSON: I don't think it would matter.

19 QUESTION: That's at least the figures I saw.  
20 Do you have anything to the contrary, or do you think  
21 they're not right?

22 MR. WOLFSON: I think that there was a wide  
23 variety in judges' experience, and --

24 QUESTION: You think these figures are not  
25 right?

1 MR. WOLFSON: I think it probably is the case  
2 that the majority of judges, majority of judges were  
3 already fully insured.

4 QUESTION: Now, is it also right that -- is it  
5 also the case that when this was extended to, let's say --  
6 how many million in Federal employees were there in --  
7 there were about, say, 5, 10 million Federal employees,  
8 extended --

9 MR. WOLFSON: A couple of million, I think.

10 QUESTION: A couple of million, all right.  
11 As -- if there were 2 million, let's say, 1,950,000 it  
12 didn't apply to, because there it was just for the future.

13 As to the remaining 50,000, there were probably  
14 less, probably 5,000, maybe 2,000, it did apply to them,  
15 but they were given the choice whether to opt in or not.  
16 But for 800, there were only 800 out of that 50 million,  
17 or 5 -- 2 million that didn't -- that had no choice, that  
18 had to take it, is that right, and those 800 were the  
19 Federal judges then sitting, so everybody else could opt  
20 out --

21 MR. WOLFSON: Well, that's not quite --

22 QUESTION: -- but in fact only a few had to opt  
23 out because it didn't cover any sitting employee but for  
24 those few.

25 MR. WOLFSON: Well, first of all it's not quite

1 right, which is that in the first place one has to  
2 remember that close situation of employees of the  
3 legislative branch and Members of Congress, who before  
4 1984 were not mandatorily covered by either CSRS or Social  
5 Security, and they were required, as of '84, basically to  
6 choose one, and so they were in roughly the same situation  
7 as Federal judges, which is that beforehand they were not  
8 subject to any mandatory contribution, and the other  
9 person who is similarly situated is the President of the  
10 United States.

11 QUESTION: The President of the United States  
12 and the 800 judges had to accept this Social Security. No  
13 one else did.

14 MR. WOLFSON: Members of Congress and  
15 legislative employees --

16 QUESTION: They had to go into the Federal --

17 MR. WOLFSON: They had to accept one or the  
18 other.

19 QUESTION: So -- all right. So, but as to this  
20 particular tax at issue, the only ones that had to accept  
21 it were the judges and the President.

22 MR. WOLFSON: Well, they're the only ones who  
23 had to --

24 QUESTION: Is that right? I just want to know  
25 if that's right.

1 MR. WOLFSON: They're the only ones who had to  
2 accept it then, yes, but of course 90 percent of the  
3 civilian labor force had to accept it.

4 QUESTION: No, no --

5 MR. WOLFSON: Right. No, I understand, but  
6 that's right.

7 QUESTION: Isn't that, what you just said,  
8 totally irrelevant, in that isn't the issue whether or not  
9 a person who was already employed at that time had to  
10 accept it? I'm trying to just get the facts right.

11 MR. WOLFSON: I understand.

12 QUESTION: I'm not making an argument, yet. I  
13 want to get the facts right.

14 MR. WOLFSON: They were the only people who were  
15 newly required, as incumbent employees.

16 QUESTION: Now, this is my question, if those  
17 facts are right. Suppose Congress said, I want a general  
18 tax, everyone in the United States will pay it, the tax is  
19 equal to \$100,000 a person. It's a big tax, but everybody  
20 pays it. No problem with that for judges, right? I'm --  
21 the answer is right, no problem. Okay.

22 Now, what they do is say --

23 MR. WOLFSON: I'm thinking about the end of the  
24 question.

25 QUESTION: No -- everybody in the United States

1 happens to get a rebate, exactly of \$100,000, or to make  
2 it -- and, by the way, our reason for this is not to  
3 discriminate against judges. It's that everybody else in  
4 the United States doesn't have this marvelous, guaranteed,  
5 nonpayable in retirement system, so we're only leaving out  
6 those who have this -- who happen to be judges, of course.

7 Now, a) is that okay, in your view, under the  
8 Constitution?

9 MR. WOLFSON: I doubt that would be okay. I  
10 mean --

11 QUESTION: If that's not okay, and I don't think  
12 it is either, what's the difference?

13 MR. WOLFSON: Well, the question is -- well,  
14 first of all, it seems to me that even though Congress is  
15 calling that a tax, it really is not a tax. It's not  
16 raising revenue. It is what is, in effect, a reduction in  
17 judges' salaries. That is to say, if -- what it is, is  
18 basically is if Congress had done the same thing that it  
19 did in Will, but had just called it a tax.

20 That is, I don't think it would have mattered to  
21 the decision in Will if, instead of passing a law that  
22 said, this tax -- this salary increase is rescinded, if  
23 Congress had said, there shall be imposed a tax on Federal  
24 judges in the amount equal to the salary increase that  
25 they received on October 1, 1979, so I mean, I think the

1 first question is, is that really a bona fide tax of any  
2 kind, and so I think that's one question.

3 Then the second question, even if one gets that  
4 point, the second question is, is there a legitimate  
5 reason for Congress to treat Federal judges differently  
6 from everybody else?

7 QUESTION: Well, there is. The reason is that  
8 they have, guaranteed by the Constitution, a retirement  
9 system, and no one else does. Now, is that a legitimate  
10 reason, or not?

11 MR. WOLFSON: I don't think it would be in the  
12 situation that you present, because it doesn't -- I  
13 mean --

14 QUESTION: No, no, no. I mean, it's easy to  
15 manipulate the hypothetical. We don't call it 100,000,  
16 call it 50,000, have it come out of the retirement  
17 committees of Congress, have it viewed as some kind of  
18 effort to help people who don't have guaranteed  
19 retirement. I mean, you know, we could fix that up.

20 MR. WOLFSON: Justice Breyer, I agree that when  
21 Congress treats judges for tax purposes differently than  
22 other people who are similarly situated, it has to have a  
23 significant reason for doing so, but I would say two  
24 things. First of all, I think that tax equalization,  
25 bringing judges into line with the vast majority of other

1 people and also extending, of course, the benefits of  
2 the -- the attendant benefits of the coverage that I  
3 discussed earlier to them as well as everybody else, as  
4 well as 90 percent of the civilian labor force, I believe  
5 that that is a significant reason for tax equal -- for  
6 treating judges for tax purposes equally, as all other  
7 citizens.

8 Now, the hypothetical that you gave me is not  
9 tax equalization. I mean, it's -- it is imposing a  
10 special tax on judges.

11 So that, I think is -- I think that is almost  
12 always, perhaps always, a legitimate objective of  
13 Congress, which is to treat judges equally with all other  
14 citizens for tax purposes, because the Constitution does  
15 not require Congress to grant judges a perpetual exemption  
16 from taxes. What it does require Congress to do is to  
17 recognize that when judges take office with a particular  
18 salary, that they cannot reduce that level of salary.

19 QUESTION: Mr. Wolfson, do I understand your  
20 argument to be essentially, this is no different than if  
21 Congress had initially given Federal judges an exemption  
22 from income tax, and they enjoy that exemption -- say, a  
23 judge when he took office got that exemption. 10 years  
24 later, the Congress decides that judges shouldn't be  
25 exempt from the Federal income tax, so puts it on.

20

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1                   Now, we decided a case that deals with the  
2 prospective aspect of it and said that's okay if someone  
3 was coming on the bench, once the tax is in. We didn't  
4 decide the part that says, what about people who are  
5 already there.

6                   MR. WOLFSON: Right. I --

7                   QUESTION: Is it your view that these two cases  
8 are the same?

9                   MR. WOLFSON: Yes, they are, and that case that  
10 you mentioned is basically the case that was decided by  
11 the Fourth Circuit in Baker v. Commissioner, after this  
12 Court decided O'Malley, and in that case, a panel in which  
13 Chief Justice Stone sat, it raised the situation that  
14 after this Court's decision in Miles against Graham,  
15 Congress exempted judges from the income tax and then,  
16 after O'Malley, it brought them back within the income  
17 tax --

18                   QUESTION: And that's okay, you say.

19                   MR. WOLFSON: Yes, I think that is okay.

20                   QUESTION: That's okay.

21                   MR. WOLFSON: Yes, and --

22                   QUESTION: You know, there's some science  
23 fiction book I read once that had a devilishly clever plot  
24 in which one of the protagonists is poisoned, but he has a  
25 poison scanner that detects all sorts of poison, so you

1 couldn't get to him that way, and the way they get to him  
2 is that they give him something that isn't poison, but  
3 that is very addictive, and then withhold it from him, and  
4 if he doesn't get it, he will die. You're saying that you  
5 can do the same thing with Federal judges.

6 (Laughter.)

7 QUESTION: You cannot put a new tax just on  
8 judges, but when they come in, you can say, hey, guys,  
9 we're going to give all of you a special tax exemption,  
10 and if you behave yourselves, you can keep that tax  
11 exemption, but you get us mad, and you're not going to  
12 have that special exemption any more. You really think  
13 that that's okay?

14 MR. WOLFSON: Justice Scalia, I think the  
15 problem with analyzing it that way is that there's no  
16 question that Congress could have raised everybody's  
17 income taxes in the exact same amount that it raised  
18 judges, that it was equal to the Medicare and Social  
19 Security taxes in these cases.

20 So judges did not have any expectation -- if  
21 they came into office at the salary of \$100,000 and the  
22 income tax rate was 30 percent, there's no question, or it  
23 isn't disputed in this case, I don't think, that Congress  
24 could have raised the general income tax on everybody 5,  
25 10 percent. It might have required -- it might have been

1 required to by economic distress, by wartime.

2 Not only that, Congress could have imposed what  
3 it has called from time to time a surtax, which is, you  
4 know, a special kind of tax that is found necessary to  
5 impose from time to time.

6 Now, that has the exact same economic effect as  
7 a -- as the elimination of the 5.4 -- the exemption for  
8 the 5.4 percent for Social Security taxes and the Medicare  
9 tax, so I think it's just wrong to say that the judges had  
10 an enforceable entitlement that required Congress to  
11 freeze this in place, because their economic situation  
12 could have been changed in exactly the same way.

13 QUESTION: Isn't the reason that judges were  
14 distinguished from some other categories in this general  
15 revision of the Federal retirement system, isn't one of  
16 the reasons that they had a guaranteed retirement income,  
17 and that was the basis for narrowing the focus to judges?  
18 Do you think that's a fair basis for saying, well, since  
19 you have this retirement income, which the Constitution  
20 guarantees you, we're going to use that guaranteed income  
21 as the basis for treating you differently from other  
22 people?

23 MR. WOLFSON: I think it would be accurate to  
24 say that Congress realized that if it was -- if it  
25 extended the Social Security taxes -- and we're only

1 talking about the old age tax here. I mean, the Medicare  
2 tax applies to everybody across the board, so that's  
3 completely nondiscriminatory, but as for the OASDI tax, if  
4 Congress had required incumbent Federal employees to pay  
5 that, they would have been subject to double deductions,  
6 and Congress realized that that in itself was unfair.  
7 That is, it would be required to treat alike things that  
8 were not, in fact, alike, so the fact that judges had the  
9 guaranteed retirement annuity was a difference for  
10 treating them differently.

11 I'd like to reserve my time for rebuttal.

12 QUESTION: Very well, Mr. Wolfson.

13 Mr. Rosenthal, we'll hear from you.

14 ORAL ARGUMENT OF STEVEN S. ROSENTHAL

15 ON BEHALF OF THE RESPONDENTS

16 MR. ROSENTHAL: Mr. Chief Justice, and may it  
17 please the Court:

18 We believe that the Court determined the  
19 liability issues in 1996 and need not reach them now, but  
20 if this Court does reach the liability issues, we believe  
21 this case presents the question whether a tax can ever be  
22 a diminution in judicial compensation. We contend that it  
23 can in at least two circumstances. Circumstance number 1  
24 is where Congress or the political branches change the  
25 economic tradeoff that a judge makes when assuming the

1 bench, and secondly, where Congress discriminates against  
2 Federal judges.

3 QUESTION: What authority in our cases is there  
4 for either of those, Mr. Rosenthal?

5 MR. ROSENTHAL: Well, with respect to the  
6 discrimination, the latter, virtually every one of these  
7 cases, especially the Woodrow case, refers to a  
8 nondiscriminatory tax.

9 With respect to the issue of the tradeoff, the  
10 tradeoff is derived from both Will and Evans, which refer  
11 to the fact that one of the primary purposes, an equal  
12 purpose of the clause, was to bring judges -- bring  
13 qualified judges into the judiciary. To quote Alexander  
14 Hamilton, one of the purposes of the clause was to get  
15 people with the requisite knowledge, combined with the  
16 requisite integrity. That was a primary purpose, as he  
17 indicated in Federalist 78.

18 Therefore, the purpose was so that -- and I'm  
19 again quoting Hamilton. It was so that a man knew what  
20 ground he stood on, and the ground that these judges stood  
21 on was, they didn't get -- they got a lot of  
22 disadvantages, Your Honors, from when they became Federal  
23 judges, but one of the small advantages they did get was,  
24 all of the plaintiffs were free from OASDI and HI, and  
25 that was retroactively changed.

1           QUESTION:  So would you say on that reasoning  
2           that when the Social Security tax came in and everybody in  
3           the general population was exposed to it, and the judges  
4           were not, that the judges' compensation went up, they had  
5           an increase -- they had an increase in compensation,  
6           therefore, that couldn't be decreased later on.

7           MR. ROSENTHAL:  Well --

8           QUESTION:  You would have to say that, that  
9           exempting them from the tax increased their compensation.

10          MR. ROSENTHAL:  Well, I would prefer to say it  
11          the other way.  Our view is that compensation refers,  
12          Justice Ginsburg, to what's available for the support and  
13          sustenance of a judge.  When our clients, when these  
14          plaintiffs took office they had available to them the  
15          stated salary, but the stated salary without a deduction  
16          for OASDI and HI, and --

17          QUESTION:  But if they couldn't diminish the  
18          compensation, and this is a diminution, you argue --

19          MR. ROSENTHAL:  Yes.

20          QUESTION:  -- then equally, it had to be an  
21          augmentation when the Social Security first came in and  
22          the judges were exempt from it.  If it didn't increase  
23          their salary, how did it decrease their salary?

24          MR. ROSENTHAL:  Well, I -- I'm not sure how I  
25          answer the question about whether it was -- the exemption

1 constituted an increase. It may have, but it's quite  
2 clear to me that the imposition of the tax definitely  
3 constituted a decrease, and this was a policy decision,  
4 Justice Ginsburg, that was made by Congress in 1935.

5 QUESTION: What about a judge who has served --  
6 this is perhaps a rather -- a very old judge, who was  
7 serving in '37. When they came in, they're exempted, so  
8 unlike the rest of the population the judge gets a benefit  
9 that the rest of the population doesn't get. Then he  
10 continues to serve until 1982. Then the exemption is  
11 taken away. Now, he's in no worse shape now than he was  
12 when he went on the bench in 1936.

13 MR. ROSENTHAL: Your Honor, that is admittedly  
14 not this particular case. What that is is actually the  
15 evidence case itself. That was a case in which the judge  
16 took office before the tax was imposed on the general  
17 public.

18 Our position is that the -- that a general rate  
19 increase which is uniform for the entire population does  
20 not -- and applies to everybody, does not change judicial  
21 compensation, and although we believe that the principle  
22 of evidence is correct, we believe there is a possibility,  
23 Mr. Chief Justice, that the particular facts of evidence  
24 might have been different, depending on whether Evans was  
25 appointed in 1912 or 1915.

1 QUESTION: What about a change in the tax rate?

2 MR. ROSENTHAL: No. Your Honor, if it's a  
3 uniform change in the tax rate, that doesn't go to the  
4 purpose of the clause. What we're looking for are changes  
5 in taxation which will induce justices who are in office  
6 to leave office, or lead potential candidates not to join  
7 the bench.

8 QUESTION: It seems to me that's really  
9 stretching Article III. I mean, it's a perfectly good  
10 policy reason, but I don't think our cases have -- at  
11 least in their holdings haven't extended Article III to  
12 that length.

13 MR. ROSENTHAL: Well, I think, with respect, I  
14 think that a fair reading of Hamilton -- Hamilton's --

15 QUESTION: Well, Hamilton's not a case.

16 MR. ROSENTHAL: No, I understand, it's not a  
17 case. But in reality, the only case that is here, the  
18 only case which has dealt with this issue is Evans v.  
19 Gore, and Evans v. Gore might have used broader language,  
20 but it didn't deal with this particular case.

21 QUESTION: Well, O'Malley casts some doubt on  
22 Evans against Gore, didn't it?

23 MR. ROSENTHAL: On the broad reasoning of Evans  
24 v. Gore, but O'Malley does -- because the Court overturned  
25 Miles but didn't overturn Evans, I think a fair reading of

1 this Court's case law, reading the three cases together,  
2 is that the principle we're advocating, a change for a  
3 sitting judge in -- that changes the economic tradeoff, is  
4 prohibited by the Compensation Clause. That's the  
5 principle we derive from reading those three clauses  
6 together, and I --

7 QUESTION: All that was involved in O'Malley is  
8 it was somebody who came on board --

9 MR. ROSENTHAL: After --

10 QUESTION: -- after the tax, so the Court didn't  
11 have to deal with somebody who was already a judge when  
12 the tax came on, but is your --

13 MR. ROSENTHAL: That's correct, Your Honor.

14 QUESTION: I think I grasp your argument  
15 correctly that you would say, if the -- there is no income  
16 tax, and there are sitting judges, and then Congress puts  
17 an income tax on the general population, everybody, you  
18 can't put it on the judges who were appointed to the bench  
19 before the tax came in.

20 MR. ROSENTHAL: No, that isn't -- our position  
21 is, this Court doesn't have to reach that question. Our  
22 position is that if Congress were to adopt a new tax  
23 today, and were to impose it uniformly on both judges and  
24 nonjudges, there would be no incentive for a judge to want  
25 to leave the bench. There would have been no disincentive

1 for him going on to the bench.

2 QUESTION: But it changes the tradeoff. You  
3 were making a tradeoff argument before, and it seems to me  
4 that Justice Ginsburg's question goes right to the  
5 tradeoff, and if your tradeoff argument is right, it seems  
6 to me you've got to say, no, it can't -- that tax can't  
7 be imposed --

8 MR. ROSENTHAL: Well, I may have misunderstood  
9 Justice Ginsburg's question.

10 QUESTION: I'm deciding whether to take a  
11 judgeship.

12 MR. ROSENTHAL: Yes.

13 QUESTION: And there's no tax on my income.

14 MR. ROSENTHAL: In the private sector or on the  
15 bench.

16 QUESTION: Right, and then I take the bench, and  
17 they -- but I know what my salary is.

18 MR. ROSENTHAL: That's right.

19 QUESTION: And then there is a tax.

20 MR. ROSENTHAL: Imposed on --

21 QUESTION: Imposed on everybody, so my take-  
22 home pay is less, because of this tax.

23 MR. ROSENTHAL: I would submit, Justice  
24 Ginsburg, that on that fact pattern there is no incentive  
25 to leave the bench because the tax is the same on both

1 sides of the equals sign.

2 QUESTION: Sure, but the income isn't. When I --  
3 the theory of the tradeoff is that I go on the bench, I  
4 take less money, but I know where I stand, and it seems to  
5 me that argument is just as strong when the tax goes on  
6 everybody. It's quite true, I can go out and start  
7 earning a living under different conditions, but I -- the  
8 deal is being changed.

9 MR. ROSENTHAL: Our position is that, although  
10 that additional category might be covered, we don't need  
11 to reach that question in this case. At least in our view  
12 of the tradeoff, Justice Souter, we don't need to deal  
13 with a case where there is a uniform change in rates or a  
14 uniform change in --

15 QUESTION: But I think it does cut against your  
16 tradeoff argument. A judge can go on the bench, no income  
17 tax anywhere, saying, I'm getting 100,000 a year for this  
18 job, I've got so many kids to educate, I can just make it  
19 the way it is, and I'm willing to sacrifice whatever I  
20 would have -- more I would have made in the profession.

21 But then the tax comes along and the tradeoff,  
22 what he had bargained for is no longer there.

23 MR. ROSENTHAL: Well, Your Honor, I understand  
24 that position.

25 QUESTION: I really don't think Hamilton would

1 have bought your argument there. I think -- you know, the  
2 judge knows where he stands --

3 MR. ROSENTHAL: Well, I think the imposition  
4 of -- this Court held in Evans v. Gore and that the  
5 imposition of a new tax does violate the Compensation  
6 Clause. We don't reach that issue because we have a more  
7 limited circumstance. We have a case where judges take  
8 office during a 50-year period in which Congress had a  
9 policy in effect that a tax would not be applied.

10 This is not a transitory issue, I might add.

11 QUESTION: Well, under that same reasoning, if  
12 the judges take office and there's no tax for Social  
13 Security, and there's a Social Security tax on everybody  
14 else, under that reasoning, if Congress decides to repeal  
15 the Social Security tax on everybody else, the tradeoff  
16 has now been changed as well.

17 MR. ROSENTHAL: And if it did -- if it did  
18 repeal the tax on everybody else and left it in effect --

19 QUESTION: No, so -- even if the judges still  
20 don't pay it, they're still in a less advantageous  
21 position vis-a-vis everybody else under your tradeoff  
22 argument. Congress can't repeal the tax on anybody else,  
23 either --

24 MR. ROSENTHAL: Well --

25 QUESTION: -- without violating your tradeoff

1 theory.

2 MR. ROSENTHAL: Well, you would have to be  
3 adversely affected by the tradeoff, not advantageously.

4 QUESTION: Well, you're still disadvantaged vis-  
5 a-vis the public where you -- compared to what it was when  
6 you took the bench.

7 QUESTION: This is my poison example, it's the  
8 same thing.

9 MR. ROSENTHAL: Look --

10 QUESTION: The poison example depends on the  
11 idea that judges are addicted to money.

12 (Laughter.)

13 QUESTION: Given the present state of judicial  
14 salaries you really can't say that, I think.

15 (Laughter.)

16 QUESTION: I take it your basic point, I mean,  
17 whether you're right or you're wrong, I thought it's  
18 well-established law that a uniform tax applied to  
19 everybody is constitutional, and you agree with that, I  
20 take it.

21 MR. ROSENTHAL: We agree with --

22 QUESTION: Whether it fits your reasoning or  
23 whether it doesn't, that's still the law.

24 MR. ROSENTHAL: We agree that a uniform  
25 imposition of a tax, a uniform change of tax --

1 QUESTION: All right. Now, we have two things  
2 here in addition. One is, it's not a uniform tax. It's  
3 only applying to some people and not others, in your view.

4 MR. ROSENTHAL: That's correct.

5 QUESTION: And the second thing is, the third  
6 thing is, it's not only not uniform, it is also  
7 discriminatory.

8 MR. ROSENTHAL: And if I could -- because I  
9 don't want to lose the discriminatory point, let me  
10 provide you the facts, because I've been involved in this  
11 case for 12 years. First of all, of the Federal  
12 employees --

13 QUESTION: Are there any plaintiffs still left?  
14 (Laughter.)

15 MR. ROSENTHAL: Thank God, there are.

16 We have -- we had 2-1/2 million, approximately,  
17 Federal employees to whom this tax was not applied. Those  
18 were incumbent Federal employees who were not required to  
19 join OASDI. That represented 99-1/2 percent --

20 QUESTION: But they were required to join that  
21 or something else.

22 MR. ROSENTHAL: No, actually, they were already  
23 in CSRS, and they were allowed to simply stay where they  
24 were, but they were not required to join OASDI.

25 QUESTION: But they were already having a bigger

1 bite taken out for the CR -- the Civil Service retirement  
2 was a larger percentage of their salary than the Social  
3 Security would be.

4 MR. ROSENTHAL: I believe --

5 QUESTION: So if you were socking them with  
6 Social Security on top of the 7 percent for Civil Service,  
7 and then putting 5.7 -- I think those employees would say,  
8 we've been discriminatorily impacted.

9 MR. ROSENTHAL: All of that, I -- we view as  
10 being form over substance, because -- well, because the  
11 Government sets the salaries and then takes 6, 7, 8  
12 percent out. They could have just as easily have set the  
13 salary at the lower level and said, we give you this  
14 benefit, which is what they did with judges. Instead of  
15 saying, you get paid X dollars and we take out 10 percent  
16 for your retirement annuity, they simply set the salary  
17 and say you get the retirement annuity.

18 We view that as essentially artificial. It's  
19 just -- the fact that it's taken out is just a matter of  
20 the semantics of the way the statute was enacted.

21 QUESTION: But you were just giving the numbers  
22 that I was quite interested in. I'm sorry --

23 MR. ROSENTHAL: Let me give you the numbers --

24 QUESTION: -- the right numbers. That is to  
25 say --

1 MR. ROSENTHAL: -- Your Honor. 2-1/2, 90 --

2 QUESTION: -- before you tell me the numbers --

3 MR. ROSENTHAL: I'm sorry.

4 QUESTION: -- is it right to this? I'm trying  
5 to think of people in the Federal Government who get a  
6 paycheck once a month. Now, most of these people don't  
7 have as good a retirement program as judges, so it's  
8 already -- that paycheck is right there. It's already  
9 reflecting a great thing for judges, okay.

10 Now, we look at that paycheck. Now, I want to  
11 know -- I'm just thinking, some people will get a smaller  
12 one because of Social Security. Other people won't get a  
13 smaller one at all than they had been getting.

14 Okay, I want to know who's getting a smaller one  
15 than they had been getting, and who is getting the same  
16 one they had been getting?

17 MR. ROSENTHAL: I'm happy to answer that  
18 question. The Article III judges and the President of the  
19 United States are in that category. The -- in the reply  
20 brief, the Government for the first time in this  
21 litigation suggested that there might be a small component  
22 of congressional employees that might also be in that  
23 category.

24 QUESTION: Let me be clear.

25 MR. ROSENTHAL: Yes.

1                   QUESTION:  There are 2-1/2 million.  800 of  
2 those, namely the Federal judges, plus the President, are  
3 getting a smaller paycheck.  Nobody else is.

4                   MR. ROSENTHAL:  That is correct.

5                   QUESTION:  That is contrary to what the SG just  
6 said, because the SG just said there are also some people  
7 in Congress.  Now, who are those people?

8                   MR. ROSENTHAL:  Well, there was a theoretical  
9 possibility that you had not been in CSRS before, and the  
10 Government for the first time in the reply brief raised  
11 this issue.

12                   I've done some inquiries, and I am informed that  
13 that set of people who did not elect CSRS is either very  
14 few or none at all, and the reason for that is, it was  
15 almost irrational not to elect CSRS because it's  
16 refundable, so if you were a youngster who was just out of  
17 school and went to work for Congress in 199 -- 1983, you  
18 elect CSRS because 2 years later you can get the money  
19 back.

20                   QUESTION:  You're saying, as of the date that  
21 this took effect, there might have been some people in  
22 Congress who were not already having a deduction from  
23 their paycheck, but you believe that number is zero.

24                   MR. ROSENTHAL:  Zero or --

25                   QUESTION:  But if it is more than zero, it's

1 very small.

2 MR. ROSENTHAL: It's very small, Your Honor.  
3 But of the 2-1/2 -- of the 2-1/2 million, we're talking  
4 about, a number in the three digits or the low four  
5 digits.

6 The fact is -- and that is the basis of our  
7 discrimination argument, and I would point out that the  
8 election that was given was not just given once, it was  
9 given three times, so if you were fool enough to miss it  
10 the first time, you were given a number of opportunities  
11 to opt out of the deduction from your salary, and that is  
12 the basis for our discrimination argument.

13 The Government says, oh, we have a rationale for  
14 discrimination, and that is equalization. I would answer  
15 that, number 1, this Court's decision in the Will case  
16 said, equalization can't justify a diminution, because the  
17 Government made the same argument in Will. They said, oh,  
18 we lowered Federal judges' salaries, but we were lowering  
19 all Federal employees' salaries at the same time, and this  
20 Court said, equalization can't be a rationale.

21 But secondly, the fact is that it doesn't take a  
22 very creative legislature to come up with some reasonably  
23 sounding rationale to justify a diminution in a particular  
24 case, and equalization, which is an argument concocted --  
25 excuse me, an argument presented by the Solicitor

1 General's office, nowhere appears in the legislative  
2 history of any of these statutes.

3 There's nothing -- this equalization doctrine,  
4 as we point out in our brief, is nothing that appears in  
5 the statute or in its legislative history. They didn't  
6 say, we need to tax Federal judges because we need  
7 equalization. We think, at a bare minimum, for this  
8 argument to be honored by this Court, at least Congress  
9 ought to say, we wanted to equalize Federal judges. We  
10 still don't think it's constitutional, but --

11 QUESTION: Is there any evidence in the  
12 legislative history, or any evidence that might have been  
13 admissible in this case, that there was a discriminatory  
14 intent?

15 MR. ROSENTHAL: No, and this Court has never  
16 required discriminatory intent. In Will, recall, Justice  
17 Souter, there was an increase for a mere 12 hours, and  
18 then the salaries dropped back down again. There was no  
19 fleeing from the Federal judiciary.

20 QUESTION: No, that's quite true, but I mean,  
21 that was a case in which it was -- in effect, it was easy,  
22 because it was stated salary, and you could say, however  
23 you literally read the Compensation Clause, this had to be  
24 within it.

25 Now we're not in such a situation. We're

1 saying, well, this isn't so clearly literally within the  
2 core of the Compensation Clause, and maybe one of our --  
3 maybe our principle criterion ought to be to determine  
4 whether this is also prohibited, since it gets away from  
5 the core, is a discrimination criterion, was it used to  
6 discriminate for purposes of cowing the judges and so on,  
7 so the fact that in the core case we didn't look to it  
8 doesn't mean that we shouldn't look to it here.

9 MR. ROSENTHAL: If I could suggest a case which  
10 I think is quite analogous, and that's Davis v. Michigan  
11 Department of Revenue.

12 As the Court may recall, that was a case in  
13 which State employees were exempted -- State retirees were  
14 exempted from a tax on their retirement benefits. Federal  
15 employees and the rest of the Michigan public had to pay  
16 income taxes on retirement benefits. This Court held,  
17 under the intragovernmental immunity doctrine, that that  
18 was discriminatory. There was no intent to discriminate  
19 against Federal employees.

20 QUESTION: But isn't that because that's what  
21 the intragovernmental immunity doctrine means? In other  
22 words, it was discriminatory as a matter of law, rather  
23 than discriminatory as a matter of intent.

24 So I guess you would have to say, on that  
25 analogy, anything which is unequal to the extent of a

1 penny is, on the discrimination criterion, going to be  
2 discriminatory as a matter of law, and I guess that's what  
3 you are saying.

4 MR. ROSENTHAL: I think that is what we're  
5 saying, and obviously the penny -- I mean, if there were a  
6 penny drop in stated salary, that obviously would be  
7 unconstitutional, but we infer the intent from the facts.

8 QUESTION: Well, if we get outside the  
9 Compensation Clause, several recent congressional pay  
10 raises in 1989 gave district judges a higher percentage  
11 pay raise than court of appeals judges, court of appeals  
12 judges a higher percentage pay raise than Supreme Court  
13 justices. Now, would that be grounds for saying that  
14 maybe Congress had it in for the Supreme Court?

15 MR. ROSENTHAL: No, Your Honor. I mean --

16 QUESTION: Well, why not, under your theory?

17 MR. ROSENTHAL: Well, because first of all we're  
18 dealing -- all of those cases are by common consent  
19 increases, and this Court's holding in various cases give  
20 Congress very broad power when one is dealing with an  
21 increase. The discretion with Congress is how much to  
22 increase.

23 There is no dispute -- there is a factual  
24 finding by a rather unsympathetic trial court that there  
25 was a reduction in our salary in this case. There was a

1 reduction in take-home pay, so we're dealing here with a  
2 reduction in take-home pay, and the question in this case  
3 is, was it an unconstitutional reduction?

4 So we distinguish it from cases where there are  
5 different levels of increase, where, frankly, political  
6 factors do play a role, but that was a decision made by  
7 the Framers, that when you deal with increase Congress has  
8 a much greater role than with a decrease, where a  
9 prophylactic rule has to be --

10 QUESTION: Is the word discrimination applicable  
11 here or not?

12 My check is \$200 smaller this month. No one  
13 else's is but for judges and four other people, and the  
14 reason is not that they don't like my opinion. The reason  
15 is because I have a constitutionally guaranteed pension,  
16 something that judges only have.

17 Now, those are the facts. Is that  
18 discrimination?

19 MR. ROSENTHAL: Well --

20 QUESTION: In a sense, it's not, because they're  
21 not doing it because they don't like my opinion. In a  
22 sense it is, because they're picking on a characteristic  
23 that belongs only to judges.

24 MR. ROSENTHAL: Well, I agree --

25 QUESTION: What is it?

1 MR. ROSENTHAL: Well, I think the word  
2 discrimination is used to cover a number of things. It  
3 doesn't necessarily, Justice Breyer, just include an  
4 intent by Congress. It includes exactly the circumstance  
5 you're describing, in which a distinction is made between  
6 Federal judges.

7 Suppose the distinction weren't merely based on  
8 the pension, but the fact that we think you should get  
9 less because you've got a lifetime job and everyone else  
10 holds their job at the pleasure of the President of the  
11 United States. Any factor that inheres peculiarly within  
12 the judiciary, and is a basis for a distinction, I think  
13 could also be a basis for finding discrimination. In  
14 other words it covers a broad mix of factors.

15 QUESTION: Mr. Rosenthal, does this targeting of  
16 judges almost exclusively apply to both programs, or just  
17 to one of them?

18 MR. ROSENTHAL: No. This would only apply to  
19 the OASDI.

20 QUESTION: Okay.

21 MR. ROSENTHAL: We agree with that. The HI was  
22 more universal. Our first argument about the tradeoff  
23 would have to apply to the --

24 QUESTION: But you're saying the second tax is  
25 no good, either, then -- as I understand it -- or are you

1 just saying the OASDI?

2 MR. ROSENTHAL: The discrimination argument,  
3 Justice Ginsburg, only applies to the OASDI, because it  
4 doesn't apply to the HI.

5 QUESTION: So then to that extent you're saying,  
6 Congress has a choice. Either it taxes -- it gives no  
7 exemption, ever, to judges, because if it gives them an  
8 exemption, it can never take it away, so it's got to treat  
9 judges -- it can't give them preferential treatment, in  
10 other words, if it gives them preferential treatment, that  
11 it's stuck with that, but you --

12 MR. ROSENTHAL: Well, that's correct, Your  
13 Honor. If I could just give you an analogy, suppose  
14 Congress next year, instead of providing an increase in  
15 stated salaries, said, all judges can take \$10,000 tax-  
16 free, \$10,000 of their income is tax-free. I point out  
17 this is not so unusual. Congress for a number of years  
18 gave the President \$50,000 for expenses tax-free.

19 I would submit that becomes part of a judge's  
20 compensation, and Congress -- the Congress can't, 10 years  
21 later, decide to take it away.

22 QUESTION: Explain how that -- you've answered  
23 my question, did the judge's compensation go up when  
24 everybody else was exposed to this tax and the judges  
25 weren't, and you resisted saying that yes, they got an

1 increase in compensation, even though their salary  
2 remained the same.

3 MR. ROSENTHAL: I resist it because exemption  
4 from a tax -- I think now that I've used my hypothetical,  
5 I think if there were at least one directed to judges, if  
6 there were an exemption, that might be interpreted to be  
7 an increase in --

8 QUESTION: You wouldn't say, as I understand  
9 your argument -- I don't understand why you wouldn't --  
10 that if everybody in the country had a \$10,000 exemption,  
11 your first \$10,000 is for free, okay, and then they took  
12 it away for the whole country, is it your contention that  
13 judges alone would have to be --

14 MR. ROSENTHAL: If it were uniform throughout  
15 the United States, we're not contending that that would  
16 constitute a diminution --

17 QUESTION: I understand that's your position,  
18 and it's a reasonable outcome, but I don't see why the  
19 logic of your argument supports that.

20 MR. ROSENTHAL: Because, at least on the  
21 discriminatory point, it wouldn't be discriminatory.

22 QUESTION: No, on the discriminatory point I  
23 understand --

24 MR. ROSENTHAL: But I --

25 QUESTION: -- but you're using this argument for

1 the aspect of your case in which there is no  
2 discrimination.

3 MR. ROSENTHAL: I admit that these represent  
4 close cases, but our position -- first of all, it's not  
5 this particular case, but moreover, I think changes in  
6 taxing, if they were uniform and taken away from judges,  
7 my inclination is not to be arguing here that that's part  
8 of compensation.

9 QUESTION: In other words, you're saying for the  
10 10,000 exemption just what you were saying for the  
11 original tax, which is nondiscriminatory.

12 MR. ROSENTHAL: Yes.

13 QUESTION: Yes.

14 MR. ROSENTHAL: Let me briefly touch on the last  
15 point, the claim of the Government that this increase was  
16 terminated by subsequent increases. Our position is very  
17 simple. A congressional action doesn't remedy or  
18 terminate an unconstitutional diminution if the judge's  
19 compensation is the same, unless it is the same as it  
20 would have been but for the unconstitutional diminution.  
21 We are subscribing to a but-for test.

22 It's quite clear that the increases that took  
23 place after OASDI and HI were imposed were general cost-  
24 of-living increases that applied not just to judges but to  
25 broad categories of Federal employees. We would have

1 gotten those anyway, and in that circumstance it can  
2 hardly be said that those terminated or remedied our  
3 particular diminution in this particular case.

4 We do contend, however, that if Congress were to  
5 provide us with the amount of our diminution plus  
6 interest, that would compensate us for past periods.

7 We urge this Court to affirm the Federal Circuit  
8 and hold that in order to vindicate both the text, which  
9 we believe is clearly applicable in this particular case,  
10 and the purposes of the Compensation Clause, that the  
11 plaintiffs are entitled to the relief that's ordered.

12 QUESTION: Thank you, Mr. Rosenthal.

13 Mr. Wolfson, you have 5 minutes remaining.

14 REBUTTAL ARGUMENT OF PAUL R. Q. WOLFSON

15 ON BEHALF OF THE PETITIONER

16 MR. WOLFSON: Thank you, Mr. Chief Justice.

17 When Congress extended Social Security taxes to  
18 Federal judges and to other Federal employees in 1984 it  
19 had several objectives that had to be balanced. One  
20 objective was to bring as many people as possible within  
21 the Social Security system, people who had been exempted  
22 from it in order to sustain the fiscal soundness of the  
23 system.

24 Another objective was to treat Federal -- people  
25 in Federal service similarly in that each should be

1 subjected to one, but only one, contribution for  
2 retirement income security, and a third was, Congress  
3 understood that Federal employees in the Civil Service  
4 retirement system had a large vested interest in that  
5 system, which had been in place since 1920, and that it  
6 would be extremely disruptive just to terminate it and  
7 start as if it had never existed, especially because many  
8 Federal employees would not have been able to accrue  
9 enough service in Social Security after that point to  
10 become eligible in Social Security, especially if they  
11 were older. The Federal -- the Civil Service retirement  
12 system allows retirement at age 55.

13 It also is more expensive on the cost side for  
14 Federal employees than Social Security in some sense,  
15 because the contribution rate is higher, and there was no  
16 earnings cap on Social Security -- on CSRS, as there was  
17 under the old age tax system, so all of those factors had  
18 to be balanced.

19 The point is, at the end of the day, Federal  
20 judges joined virtually everybody else in our society in  
21 being subject to a 5, 6 percent mandatory contribution for  
22 a retirement income security system, and that's what I  
23 mean when I say that the overall objective of Congress was  
24 equalization, and that Congress treated them no  
25 differently at the end of the day than it treated

1 everybody else.

2 Now, it is true, there are issues that come up  
3 in a transition, as there are any time when Congress  
4 extended Social Security, or where a State might adjust --  
5 a State might adjust an exemption, for example, the  
6 intragovernmental tax immunity system doctrine was alluded  
7 to.

8 Well, there was a time when States exempted all  
9 Federal employees and Federal contractors from their taxes  
10 because they thought they were required to under this  
11 Court's decisions in Collector v. Day. Then along came  
12 Graves, and the Court said that States could tax Federal  
13 employees and Federal contractors on an equal rate. The  
14 States were required to adjust their systems, or had the  
15 opportunity to adjust their systems, and they were able to  
16 do so in many different ways.

17 It required some -- it required a lot of  
18 adjustment because of the ways that different people had  
19 been treated differently, and this Court has many cases on  
20 that point, reviewing the adjustments that the States  
21 made, but the point is, the principle that emerged from  
22 those cases was, what was required at the end of the day  
23 was nondiscriminatory taxation of those who dealt with the  
24 Federal Government, and that principle we think is the  
25 same principle that should govern here. That is, at the

1 end of the day, Congress is required to do more than treat  
2 Federal judges on par with the vast majority of American  
3 citizens.

4 I do want to touch on the termination of  
5 violation point, which is, even if we're wrong about  
6 everything that I just said, it seems to me the only  
7 expectation that judges could have had when they took  
8 office was that their net pay would not have been reduced  
9 below the level at which they took office.

10 So the expectation -- the expectation that  
11 judges had was not that they remain exempt from Social  
12 Security taxes in a kind of indefinite number that is  
13 just, they have an interest in an exemption, quia  
14 exemption, but a particular number has to be put on that,  
15 so if a violation did occur, the violation came to an end  
16 when Congress brought judges' net pay back up above the  
17 highest level that it had ever been at any earlier time.

18 If the Court has nothing further --

19 QUESTION: Well, yes, as long as you're at it,  
20 the part that was bothering me was not the part, treating  
21 judges the same. It was the part of treating judges  
22 differently. So what -- I mean, they're treated  
23 differently in that everybody else is allowed to opt out  
24 but judges. Now --

25 MR. WOLFSON: Well --

1                   QUESTION:  -- the reason is clear, I guess.  
2    They weren't angry.  They didn't dislike our opinions.  
3    It's just that they thought judges already have this  
4    pension plan, which is perfect.  That's why they did it.  
5    But that only applied --

6                   MR. WOLFSON:  It's not just that judges had the  
7    pension plan.  It's also that judges didn't have to pay  
8    anything and everybody else had to pay something.  All  
9    Federal employees also had to pay something, so they were  
10   not brought in mandatorily.

11                   Thank you.

12                   CHIEF JUSTICE REHNQUIST:  Thank you,  
13   Mr. Wolfson.

14                   The case is submitted.

15                   (Whereupon, at 1:55 p.m., the case in the above-  
16   entitled matter was submitted.)

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