Courts -- Constitutional Law -- Power of Congress to Diminish the Retired Salaries of Federal Judges

E. D. Kuykendall Jr.

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.unc.edu/nclr/vol12/iss4/9

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

Plaintiffs, retired judges of a circuit and district federal court respectively, bring separate suits to recover a portion of their salaries, which had been withheld pursuant to an act of congress providing for a 15 per cent reduction in the retired pay of judges, "whose pay prior to retirement could not have been diminished under the Constitution." Plaintiffs contend that such act is in violation of Article III, Section 1 of the Constitution, which forbids diminution of the compensation of federal judges during their continuance in office.  

Held, judgment for plaintiffs. A federal judge does not relinquish his office by retirement and the reduction of retired pay as provided for in that act is unconstitutional.

The constitutional provision forbidding diminution of judicial salaries applies only to officers of constitutional courts created by congress by virtue of the power given it in Article III, Section 1. It is not applicable to those of legislative courts created by virtue of the power delegated to congress in other constitutional provisions. Concededly the courts involved in the instant case belong to the former class, and plaintiffs' salaries before retirement could not have been reduced.

The underlying principle behind the provision and decisions upholding it is deduced from the Constitution itself which sets up three branches of government essentially separate and independent, with neither department possessing an overruling influence in the administration of their respective powers. So careful have the courts bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise.

The North Carolina constitution contains a similar provision. N. C. Const. (1868) Art. IV §18.


9 Supra note 3.

been to preserve this protection that state as well as federal courts have repeatedly held judges' salaries exempt from taxation on the theory that the "power to tax is the power to destroy." It is difficult to see how an income tax, a burden which is borne by all citizens alike, as distinguished from an occupational tax on the judiciary alone, is a menace to the independence or existence of the judiciary, and one court proceeds on this theory in holding judges' salaries subject to income taxes.

The most extreme holdings, however, deal with the situation that arises where no legislative appropriation is made for judges' salaries. Some courts have gone as far as to hold legislative appropriations authorizing payment of such salaries unnecessary where the constitution prohibits their increase or diminution, on the theory that such provision is self-executing and *ex proprio vigore* makes the necessary appropriation by law, although the majority view is that such appropriation is required before the salaries can be drawn.

It is submitted that the court in the principal case has enforced the rule where the reason no longer exists. While an independent judiciary is to be desired and jealously guarded, it would seem unnecessary to maintain an expensive safeguard where judicial independence is not threatened. Under the federal retirement statute it is clear that a retired judge cannot be forced to undertake any duty unwillingly. Under no circumstances is his duty after retirement obligatory. It would seem then that the court has taken a step,
the direction of which is decidedly questionable, when it holds that a retired judge is still in office to such an extent that a diminution after an increase is banned, notwithstanding the reduced salary remains in excess of the salary payable when the incumbent took office. Furthermore, the provision in that act for the appointment of a successor, who would be in fact in office, and whose "subsistence" could not be controlled by the legislature, would seem to be inconsistent with the theory that his predecessor was still "in office," and would seem to furnish adequate comfort to those who fear for the independence of our judiciary.

The wisdom of such a decision is rendered more doubtful in view of the emergency which prompted the legislation diminishing the retired pay of federal judges. "The interpretation of constitutional provisions is to be made in view of the history of the times, the evil to be remedied, and the purpose to be accomplished,"—a timely rule of construction which the court in the instant case seems to have ignored.

E. D. Kuykendall, Jr.

Criminal Law—Effect of a Plea of Nolo Contendere.

The defendant was convicted in New Jersey under a plea of nolo contendere to an indictment for false pretense. He was subsequently convicted in New York on a plea of guilty to an indictment for forgery, and, on information brought of the former conviction, was sentenced under the second offender statute. On appeal, held, that a conviction under a plea of nolo contendere is not such a conviction as to come within the contemplation of the second offender statute.

In the instant case, the plea of nolo contendere is of common-law origin, and may be on the bench, and the President shall... appoint a successor;... but a judge so retiring may nevertheless be called upon by the senior circuit judge of his circuit and be by him authorized to perform such judicial duties... as such retired judge may be willing to undertake..."

1 Supra note 13; cf. Board v. Lee, 76 N. J. L. 327, 70 Atl. 925 (1908) (The court said, "to assert that a term of office of a deceased or an impeached officer continues, is to assert that there may be two terms of office running together, although the office can be filled but by a single person." It would seem that the same could be said of a resigning or retiring judge.) N. C. Code Ann. (Michie, 1931) §3884a (North Carolina retirement statute). Investigation discloses no North Carolina cases similar to the principal one where judges, retired pursuant to that statute, bring action to recover a portion of their salaries withheld by the state.


1 People v. Daiboch, 269 N. Y. S. 321 (1934). (Three-to-two decision.)