DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-200923 DATE: November 23, 1982

MATTER OF: Federal Judges - Applicability of October 1982 Pay Increase

DIGEST: Question presented is entitlement of Federal judges to 4 percent comparability adjustment granted to General Schedule employees in October 1982. Section 140 of Public Law 97-92 bars pay increases for Federal judges except as specifically authorized by Congress. Since section 140, a provision in an appropriations act, constitutes permanent legislation, Federal judges are not entitled to a comparability increase on October 1, 1982, in the absence of specific congressional authorization.

ISSUE

The issue presented is whether section 140 of Public Law 97-92 precludes a comparability adjustment of 4 percent on the salaries of Federal judges. We hold that since section 140 is permanent legislation and since it precludes pay increases for Federal judges unless specifically authorized by Act of Congress, Federal judges are not entitled to a comparability adjustment of 4 percent effective on October 1, 1982, in the absence of specific congressional authorization.

BACKGROUND

This decision is in response to a request from the Honorable William E. Foley, Director, Administrative Office of the United States Courts. The Administrative Office seeks reconsideration of our letter of October 1, 1982, B-200923, to the Chairmen of the Senate and House Appropriations Committees in which we interpreted section 140 of Public Law 97-92 as permanent legislation precluding any comparability adjustment to the salaries of Federal judges unless the increases are specifically authorized by the Congress.

Pay Adjustments for Federal Judges

The salaries of Federal judges are subject to adjustments by two mechanisms. First, the Federal Salary Act of 1967, Public Law 90-206, Title II, 81 Stat. 624, provides for a quadrennial review of executive, legislative, and judicial salaries. See 2 U.S.C. §§ 351-361 (1976). Second, the Executive Salary Cost-of-Living Adjustment Act, Public Law 94-82, Title II, 89 Stat. 419 (1975), provides that salaries covered by the Federal Salary Act of 1967 will receive the same comparability adjustment on October 1 of each year as is made to the General Schedule under the provisions of 5 U.S.C. § 5305. See 5 U.S.C. § 5318 and 28 U.S.C. § 461.

Since 1976 the Congress has imposed a series of "caps" on executive, legislative, and judicial branch salaries by limiting the use of appropriated funds to pay the salaries of high-level executive, legislative, and judicial branch officials to the rate payable on September 30 of that year. However, with respect to Federal judges covered by Article III of the Constitution, certain of these pay caps have been held to have "diminished" their compensation which, by operation of Public Law 94-82, automatically increased each October 1 by the amount of comparability adjustment granted to the General Schedule. In United States v. Will et al., 449 U.S. 200 (1980), the Supreme Court held that pay caps enacted on or after October 1 violated the compensation clause of Article III of the Constitution by purportedly repealing a pay increase that had already taken effect.

Thus, the Supreme Court overturned the pay caps enacted in 1976 and 1979 as to Federal judges, and, pursuant to the Will decision, the salaries of Federal judges were also increased in 1980 and 1981 for the same reason.

Section 140

Subsequent to the October 1981 pay increase, the Congress enacted Public Law 97-92, December 15, 1981,

95 Stat. 1183, a continuing appropriations act which provides in section 140 as follows:

> "Sec. 140. Notwithstanding any other provision of law or of this joint resolution, none of the funds appropriated by this joint resolution or by any other Act shall be obligated or expended to increase, after the date of enactment of this joint resolution, any salary of any Federal judge or Justice of the Supreme Court, except as may be specifically authorized by Act of Congress hereafter enacted: Provided, That nothing in this limitation shall be construed to reduce any salary which may be in effect at the time of enactment of this joint resolution nor shall this limitation be construed in any manner to reduce the salary of any Federal judge or any Justice of the Supreme Court."

Since the pay cap for 1982 is contained in Public Law 97-276, § 101(e), October 2, 1982, a measure enacted after October 1, Federal judges would receive the comparability adjustment of 4 percent pursuant to the Will decision except for the operation of section 140, quoted above. There has been no specific authorization by Congress of a pay increase for Federal judges this year.

Arguments of Administrative Office

The Administrative Office urges that we modify our interpretation of section 140 and rule that Federal judges are entitled to a 4 percent increase effective October 1, 1982. The Administrative Office argues that, in view of the presumption against permanent legislation contained in appropriations measures, the presumption against implied repeals of preexisting statutes, and the weight of the statutory cost-of-living adjustment mechanism contained in Public Law 94-82, Federal judges are entitled to this recent pay increase.

DISCUSSION

As we stated in our opinion letter of October 1, 1982, we have held that a provision contained in an annual appropriations act may not be construed to be permanent legislation unless the language or the nature of the provision makes it clear that such was the intent of the Congress. Usually when the word "hereafter" or other words indicating futurity are used, or when the provision is of a general character bearing no relation to the object of the appropriation, the provision may be construed to be permanent legislation. 36 Comp. Gen. 434, 436 (1956); 32 Comp. Gen. 11 (1952); 26 Comp. Gen. 354, 357 (1946); and 10 Comp. Gen. 120 (1930). Section 140 of Public Law 97-92, quoted above, contains such words of futurity, and the provision bears no direct relation to the object of the appropriations act in which it appeared, a continuing appropriations act for fiscal year 1982. Thus, we conclude that section 140 is permanent legislation.

The only legislative history we have discovered on this provision supports that interpretation. The provision was introduced for the stated purpose of precluding pay increases for Federal judges unless they are specifically authorized by Congress. Cong. Rec. S13373 (November 13, 1981) (statement of Sen. Dole).

Furthermore, an interpretation that section 140 is not permanent legislation would strip the section of any legal effect. Section 140 was included in a continuing resolution which was enacted on December 15, 1981, and which expired on September 30, 1982. The next applicable cost-of-living pay increase under existing law for Federal judges would be effective October 1, 1982, after the expiration of the continuing resolution. Thus, if section 140 were not held to be permanent legislation, the section would have no legal effect since it would have been enacted to prevent increases during a period when no increases were authorized to be made. There exists a presumption against interpreting a statute in a way

which renders it ineffective. Federal Trade Commission v. Manager, Retail Credit Co., 515 F.2d 988, 994 (D.C. Cir. 1975).

In that regard, we are unable to agree with the view of the Administrative Office of the United States Courts that the inclusion of section 141 in House Resolution 370, which raised certain executive salaries, is sufficiently correlated to section 140 of that resolution so as to permit an interpretation different than expressed in this decision. Section 141 dealt exclusively with salaries of persons whose pay corresponds with the rate of basic pay for levels III, IV, and V of the Executive Schedule; we do not believe that Members of Congress voting on the continuing resolution needed any reassurance that section 141 did not also deal with salaries of Federal judges. Nor do we find the fact of the possibility of later enactment of a regular appropriation measure for the judiciary as persuasive in this matter.

As noted by the Administrative Office, our interpretation of section 140 constitutes an implied repeal of that portion of Public Law 94-82 providing annual comparability adjustments to Federal judges, and implied repeals are not favored by the courts, particularly when contained in appropriations acts. See Will, supra, and cases cited therein. However, it is well settled that Congress can amend substantive legislation by a provision in an appropriations act. United States v. Dickerson, 310 U.S. 554 (1940); City of Los Angeles v. Adams, 556 F.2d 40 (D.C. Cir. 1977); Skoko v. Andrus, 638 F.2d 1154 (9th Cir. 1979); and Bickford v. United States, 656 F.2d 636 (Ct. Cl. 1981).

The Administrative Office has cited numerous cases in which the courts have overturned appropriations measures which would essentially override or repeal substantive legislation. Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978); Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346, 353-354 (8th Cir. 1972); Environmental Defense Fund v.

Tennessee Valley Authority, 468 F.2d 1164 (6th Cir. 1972). However, in each of these cases the courts addressed whether continuing appropriations for certain public works projects constituted a congressional decision to complete the projects despite the provisions of various environmental statutes. For example, in TVA v. Hill, the Supreme Court ruled that expressions of the appropriations committees in committee reports could not be equated with statutes enacted by Congress, and a mere lump-sum appropriation providing continued funding for the project would not override the protection of the Endangered Species Act. 437 U.S. 153, 190-191.

The provision in question in this case, section 140 of Public Law 97-92, is specific in nature and by its express terms serves to bar future pay increases for Federal judges except as specifically authorized by Congress. We do not find that section 140 is similar or analogous to appropriations measures which the courts have overruled in prior cases.

Finally, we note that our interpretation of section 140 has been adopted by the Executive Branch in publishing the pay schedules effective on or after October 1, 1982. Exec. Order No. 12,387, October 8, 1982, 47 Fed. Reg. 44981, October 13, 1982.

Accordingly, we conclude that section 140 of Public Law 97-92 bars implementation of any pay increase for Federal judges as of October 1, 1982, in the absence of a specific authorization by Congress.

Milton J. Socolar

Acting Comptroller General
of the United States