



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Federal Judges V—Compensation—Implied Repeal of Appropriations Rider Limitation on Pay Increases

File: B-261589

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DIGEST

A law that bars pay increases for federal judges and justices except as specifically authorized by Congress was not impliedly repealed by a subsequent act amending the method by which automatic annual pay adjustments are to be calculated for judicial branch employees. Repeals by implication are strongly disfavored and may be found only where Congress' intent to repeal is clear and manifest.

DECISION

The Honorable Barefoot Sanders, United States Circuit Judge,¹ asks whether a limitation on pay increases included in section 140 of the Continuing Resolution Act of December 15, 1981, Pub. L. No. 97-92, 95 Stat. 1183 was impliedly repealed by the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716.² We think not.

BACKGROUND

Before Congress adopted section 140, salaries for justices, judges, officers and magistrates in the judicial branch were subject to annual cost-of-living adjustments as provided by 28 U.S.C. § 461. This section essentially granted individuals whose salaries were subject to adjustments by that section the same percentage salary increase authorized for general schedule employees, which generally took effect with the first pay period of each fiscal year. Because justices and judges have a monthly pay period, their increases under this plan took effective at midnight on October 1.

¹Judge Sanders has written in his capacity as the Chairman of the Judicial Conference Committee on the Judicial Branch.

²This law amended a number of sections of the United States Code. The sections discussed in this decision primarily are found at 5 U.S.C. § 5318 note and 28 U.S.C. § 461 note (1994).

In 1976, Congress attempted to repeal the automatic cost-of-living adjustments for senior executives, including justices and judges. However, the bill was not signed into law until sometime during the day of October 1, 1976. In United States v. Will, 449 U.S. 200 (1980), the Supreme Court held that, since the justices' and judges' salary increases already had taken effect at the beginning of the day, the attempted repeal of the scheduled salary increase "diminished" their pay in violation of Article III of the Constitution. Thus, federal justices and judges kept the automatic salary increases that were denied to executives in the other branches of government.

To prevent these so-called "backdoor" increases, Congress passed section 140 in 1981, which provides, in part, that "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"

We have had several occasions to interpret section 140. In Federal Judges, 62 Comp. Gen. 54 (1982), we concluded that section 140, although included in an annual appropriation bill, nonetheless had sufficient words of futurity to constitute permanent legislation, thus effectively exempting justices and judges from the automatic salary increases in the absence of a specific authorization by Congress. Subsequently, we considered separate acts of Congress to determine whether they met this requirement, finding in one case that it did, Federal Judges II, 62 Comp. Gen. 358 (1983), and in one case that it did not, Federal Judges III, 63 Comp. Gen. 141 (1983).

We reexamined our initial determination that section 140 constituted permanent legislation in Federal Judges IV, 65 Comp. Gen. 552 (1986), and reached the same result. We also noted in that case our doubt that Congress intended to deny federal justices and judges the same salary adjustments granted to other federal employees. We urged the Congress to clarify the situation by repealing section 140 and amending the statutes governing judicial pay to prevent backdoor increases by delaying the effective date of the pay increase for judges until 30 days following the effective date of pay increases for other high-level officials, but making the justices' and judges' pay increases retroactive to that effective date. Id. at 357. To assist the Congress, we submitted proposed language to the Chairmen of the Appropriations and Judiciary Committees of the Senate and House of Representatives. However, Congress has not acted on this recommendation.

The Ethics Reform Act

Among other things, the Ethics Reform Act addressed a number of compensation issues. Section 702 of the act reinstated scheduled salary adjustments for

government executives that would have taken effect automatically in 1989 and 1990 but for special legislation exempting them from the increases. To extend these salary adjustments to federal judges and justices, this section also stated, "For purposes of section 140 . . . appropriate salary increases are hereby authorized for federal judges and justices of the Supreme Court . . ." § 702(c). Section 703 of the act, among other things, authorized a 25 percent increase in salaries for federal judges and justices effective the first pay period on or after January 1, 1991. Of most importance here is section 704, which substituted the Economic Cost Index (ECI) for the then existing method of determining annual salary adjustments under section 461 and other sections in the United States Code adjusting salaries for various federal employees. Before enactment of the Ethics Reform Act, the relevant portion of section 461 stated (with the deleted language underlined):

"(a) Effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5305 of title 5 in the rates of pay under the General Schedule (except as provided in subsection (b)), each salary rate which is subject to adjustment under this section shall be adjusted by an amount, rounded to the nearest multiple of \$100 (or if midway between multiples of \$100, to the next higher multiple of \$100) equal to the percentage of such salary rate which corresponds to the percentage of such salary rate which corresponds to the overall average percentage (as set forth in the report transmitted to the Congress under such section 5305) of the adjustments in the rates of pay under such Schedule." 28 U.S.C. § 461(a) (1988).

As amended, the section now states (with the new language underlined):

"(a) Effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5303 of title 5 in the rates of pay under the General Schedule (except as provided in subsection (b)), each salary rate which is subject to adjustment under this section shall be adjusted by an amount, rounded to the nearest multiple of \$100 (or if midway between multiples of \$100, to the next higher multiple of \$100) equal to the percentage of such salary rate which corresponds to the most recent percentage change in the ECI (relative to the date described in the next sentence), as determined under section 704(a)(1) of the Ethics Reform Act of 1989. The appropriate date under this sentence is the first day of the fiscal year in which such adjustment in the rates of pay under the General Schedule takes effect." 28 U.S.C. § 461(a) (1994).

The effect of this change was to provide a method for determining cost-of-living increases for senior government officials that was not tied to the method used to determine similar increases for general schedule employees then described at 5 U.S.C. § 5305.³ The Bipartisan Task Force on Ethics, whose report was adopted in lieu of a formal House committee report,⁴ gave this explanation for the change:

"Future COLA Adjustments.—Because the current system of considering comparability adjustments for top officials is tied to the procedure for other Federal workers under the General Schedule, these senior officials in all three branches have been the most vulnerable to and the most hurt by riders to appropriations bills to deny them COLAs when other Federal employees receive theirs. This is the single most important explanation for the growing disparity between top salaries in government and the private sector, and the 38% loss of purchasing power by these officials since 1969.

"For this reason, the task force recommends that, beginning in 1991, a separate index be used to determine whether or not there should be an annual salary adjustment for these top officials. Specifically, the task force recommends that prospective adjustments be pegged to the rate in the Economic Cost Index (ECI) minus one-half a percent (0.5%). The ECI is a quarterly index of wages and salaries for private industry workers prepared by the Bureau of Labor Statistics." 135 Cong. Rec. 30,753 (1989), Report of the Bipartisan Task Force on Ethics on H.R. 3660, Government Ethics Reform Act of 1989.

As we noted, Judge Sanders believes that section 704 may have repealed section 140 by implication. His letter includes a quotation from the Congressional Record from the Honorable Robert Kastenmeier, the then-Chairman of the House Judiciary Subcommittee on Courts, Intellectual Property and the Administration of Justice, who asserted that, because section 704 positively amends section 461 and does not codify section 140, "I think it is fair to conclude that section 140 is impliedly repealed." 135 Cong. Rec. H87671 (daily ed. Nov. 16, 1989) (statement of Rep. Kastenmeier). Judge Sanders also states that Congress' express reference to section 140 in section 702, which restored the 1989 and 1990 pay increases, and the failure of Congress to refer to section 140 in section 704, which amended

³Just 1 year after the Ethics Reform Act, Congress made substantial changes in section 5305 and other sections in Chapter 53 of title V with the enactment of the Federal Employees Pay Comparability Act of 1990 (locality pay), Pub. L. No. 101-509, § 529, 104 Stat. 1389, 1427 (1990).

⁴See H.R. Rep. No. 101-362, 101st Cong., 1st Sess. (1989).

section 461, shows that the Congress no longer believed that specific compliance with section 140 was necessary. Judge Sanders acknowledges that Congress expressly granted pay adjustments to the judges in 1991, 1992 and 1993. However, he suggests that this may reflect Congress' "abundance of caution," rather than the view that section 140 still required such measures.

OPINION

Repeals by implications are not favored and will not be found unless an intent to repeal is clear and manifest. Rodriguez v. United States, 480 U.S. 522 (1987). "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." Morton v. Mancuri, 417 U.S. 535 at 548 (1974). See also Watt v. Alaska, 451 U.S. 259 (1981). We do not believe section 704 meets this test.

By its own terms, with respect to judicial branch officers and employees, section 704 of the Ethics Reform Act changed only the method of calculating annual pay adjustments for those persons whose pay is "subject to adjustment" under section 461. As a result of this change, senior government officials who are entitled to cost-of-living increases no longer have their increases tied to the increases approved for General Schedule employees. The act did nothing to increase or decrease the class of senior officials entitled to automatic salary increases.

As we noted in Federal Judges, *supra*, section 140 removed federal judges and justices from among the classes of persons whose pay was adjusted by section 461, but this did not render section 461 superfluous since the salaries of officers and magistrates remained subject to adjustments under that section. Therefore, there also is nothing irreconcilable between sections 704 and 461. Notwithstanding Rep. Kastenmeier's remark, nothing in the text of section 704 or its legislative history indicates that Congress intended to reverse itself and again place justices and judges among the persons whose salaries are subject to adjustments under section 461.

Congress' subsequent enactment of specific measures granting judicial pay raises may be regarded simply as an abundance of caution, as Judge Sanders suggests. On the other hand, it is equally plausible to regard such enactments as acknowledgements of section 140's continued authority. We need not resolve this dilemma. The very existence of differing reasonable interpretations is sufficient to establish that Congress' intention to repeal section 140 was not "clear and manifest."

As we noted above, in Federal Judges IV, section 140 produced the unintended consequence of denying federal judges and justices the salary adjustments authorized for General Schedule workers, and we submitted draft legislation to the Congress that would provide for such increases while addressing Congress' concern

about backdoor increases. Congress' failure to act on this recommendation when revising the very statutes they addressed is further evidence that Congress did not intend to repeal section 140. United States v. Riverside Bevy Homes, Inc., 474 U.S. 121 (1985).⁵

Accordingly, we conclude that section 704 of the Ethics Reform Act did not repeal section 140 of the Continuing Resolution Act of December 15, 1981.

/s/Robert P. Murphy
for Comptroller General
of the United States

⁵We note that the Senator Orrin Hatch, Chairman, Senate Judiciary Committee, has introduced legislation explicitly to repeal section 140. See S. 1011, 104th Cong., 1st Sess. § 504 (1995).