STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

December 21, 2018

ATTORNEY GENERAL OPINION NO. 2018- 19

The Honorable John E. Barker
State Representative, Seventieth District
103 Wassinger Avenue
Abilene, KS 67410

Re: Constitution of the State of Kansas—Judicial—Compensation of Justices and Judges; Certain Limitation

Synopsis: The 2.5% salary increase given to judges under L. 2017, Ch. 104, §177(f)(4) did not violate Article 3, § 13, of the Kansas Constitution, even though some other state employees received a 5% salary increase under L. 2017, Ch. 104, §177(f)(1). Rather, the enactment of L. 2017, Ch. 104, §177(f)(4) was based on the Kansas Legislature's delegated power in Article 2, § 24, of the Kansas Constitution to fix and, periodically, increase judicial compensation. It did not diminish the compensation of judges. Thus, the Compensation Clause in the Kansas Constitution was not violated. K.S.A. 75-3120g; K.S.A. 2018 Supp. 75-3120g; 75-3120h; 75-3120k, 75-3120l; L. 2017, Ch. 104, §177; Kan. Const., Art. 1, §§ 1, 15; Art. 2, § 24; Art. 3, § 13.

* * *

Dear Representative Barker:

As the State Representative for the Seventieth District, you ask for an opinion on whether the differential treatment of salary increases as set forth in L. 2017, Ch. 104, §177(f) between judges and justices and unclassified and classified employees violates the Compensation Clause set forth in Article, 3, § 13, of the Kansas Constitution. For the reasons set forth below, the answer is no.

Pursuant to Article 2, § 24, of the Kansas Constitution, the Kansas Legislature sets forth specific appropriations made by law. The Legislature enacted L. 2017, Ch. 104, §177,

which made the following appropriations for salary increases to state employees for the fiscal year ending June 30, 2018:

> (f) A state employee shall be eligible for a salary increase under this section based on only one of the following:
>
> (1) 5% salary increase, including associated employer contributions, for all state employees in the classified and unclassified service who have not received an increase in salary after July 1, 2012, and who have been continuously employed by the state since July 1, 2012, except as provided in paragraph (3) or (4);
>
> (2) 2.5% salary increase, including associated employer contributions, for all state employees in the classified and unclassified service who first became employed by the state after July 1, 2012;
>
> (3) 2.5% salary increase, including associated employer contributions, for all non-judicial employees of the judicial branch; or
>
> (4) 2.5% salary increase, including associated employer contributions, for all justices of the supreme court, judges of the court of appeals, district court judges and district magistrate judges.

Additionally, other specified state employees and officials, including members of the legislature, were prohibited from receiving salary increases. L. 2017, Ch. 104, §177(e)(1), (2)(A)-(D).

Your concern is the 2.5% differential in salary increase between subsections (f)(1) for certain state employees and (f)(4) for justices and judges in L. 2017, Ch. 104, § 177. In other words, you question whether the Compensation Clause in § 13 of Article 3 of the Kansas Constitution requires the legislature to raise the salaries of justices and judges by a percentage that is equal to or greater than the largest percentage given to any other state employees.

Article 3, § 13, of the Kansas Constitution states:

> The justices of the supreme court and judges of the district courts shall receive for their services such compensation as may be provided by law,[1]

[1] The Kansas Legislature has enacted statutes regarding the annual compensation of the justices, court of appeal judges, district court judges, and magistrate judges. *See* K.S.A. 75-3120f (chief justice and justices of the supreme court); K.S.A. 2018 Supp. 75-3210g (chief judge and judges of the district courts); K.S.A. 2018 Supp. 75-3120h (chief judge and judges of the court of appeals); and K.S.A. 2018 Supp. 75-3120k for district magistrate judges. The annual salaries for all of these justices and judges are subject to percentage increases when the rates of compensation in the steps of the pay plan for employees in the classified service under the Kansas Civil Service Act are increased. *See* K.S.A. 2018 Supp. 75-3120l. However, the 2.5% salary increase given to judges and justices in L. 2017, Ch. 104, §177(f)(4) was not based upon such increases.

> *which shall not be diminished during their terms of office unless by general law applicable to all salaried officers of the state*. Such justices or judges shall receive no fees or perquisites nor hold any other office of profit or trust under the authority of the state, or the United States except as may be provided by law, or practice law during their continuance in office.[2]

The above italicized language is known as a Compensation Clause. Article 1 of the Kansas Constitution includes an identical Compensation Clause, which applies to the governor, lieutenant governor, secretary of state, and attorney general.[3] However, the 2017 law prohibited salary increases for these officials.[4]

In Attorney General Opinion No. 87-2, our office found that the Compensation Clause for judges was added to our constitution in 1972 and taken from the Alaska Constitution. Thus, we relied upon an Alaska Supreme Court case, *Hudson v. Johnstone*,[5] to interpret this language. Based on language in *Hudson*, our office opined that the underlying purpose of the proscription against diminishing judicial compensation was to assure a judiciary independent from the domination of the executive and legislative branches. The *Hudson* court was quoting the United States Supreme Court in *United States v. Will*[6] regarding the purpose of the Compensation Clause in the federal constitution.[7] In other words, the compensation clauses in the Kansas Constitution and the United States Constitution have the same purpose.

In your request, you cited other cases in which courts had held specific legislation violated a constitutional judicial compensation clause with language similar to that in the Kansas Constitution.[8] Those cases involved legislation that made an indirect decrease in the compensation paid to judges. *See United States v. Hatter,*[9] *Hudson v. Johnstone*,[10] *Goodheart v. Thornburgh*,[11] and *DePascale v. New Jersey*.[12] However,

---

[2] Emphasis added. The Compensation Clause does not protect Court of Appeals judges and District Magistrate Court judges who received a 2.5% salary increase under L. 2017, Ch. 104, §177(f)(4). Because your question was limited to Article 3, § 13, of the Kansas Constitution, we limit our opinion to whether L. 2017, Ch. 104, §177(f)(4) violates the Compensation Clause for Kansas Supreme Court justices and State District Court judges (collectively referred to as "judges").

[3] Kan. Const., Art. 1, §§ 1, 15.

[4] L. 2017, Ch. 104, §177(e)(2)(D) (The salary increase "shall not apply to the . . . State officers elected on a statewide basis.").

[5] 660 P. 2d 1180 (Alaska 1983).

[6] 449 U.S. 200, 101 S. Ct. 472, 66 L. Ed. 2d (1980).

[7] 449 U.S. at 217-18. The Compensation Clause in the United States Constitution states: "The Judges, both of the supreme and inferior Courts . . . shall, at stated Times receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Art. III, § 1.

[8] The Honorable John Barker, Correspondence, March 8, 2018.

[9] 532 U.S. 557, 121 S. Ct., 149 L. Ed. 2d 280 (2001) (Compensation Clause did not prohibit Congress from enacting a law imposing a nondiscriminatory Medicare tax upon federal judges regardless of appointment before or after enactment of the tax law but did prevent Congress from collecting Social Security taxes from salaries of judges who held office before Congress extended the Social Security taxes to federal employees).

[10] 660 P. 2d 1180 (Alaska 1983) (the legislature violated the constitutional judicial compensation clause by implementing a mandatory contribution into the judicial retirement system via a salary deduction for those judges who were appointed prior to the effective date of the legislation but did not violate the

our analysis focuses upon a federal case addressing legislation that involved direct increases and decreases in compensation paid to judges.

United States v. Will

In *Will*, the Supreme Court addressed appropriation acts for four consecutive fiscal years (described below as Year 1, Year 2, Year 3, and Year 4) that modified or rescinded pay increases for federal judges that were calculated pursuant to three different acts: the Postal Revenue and Federal Salary Act of 1967[13] (the Salary Act); the Federal Pay Comparability Act of 1970[14] (the Comparability Act); and the Executive Salary Cost-of Living Adjustment Act[15] (the Adjustment Act). These interwoven acts provided for base salaries adjusted annually for civil service employees and again quadrennially for higher-rank positions.

Year 1: In October 1976, under the Comparability Act, the salaries in the General Schedule (GS salaries), which is a matrix of grades and steps that determines the salaries of most federal employees,[16] were increased by an average of 4.8%. On October 1, 1976, the first day of the new fiscal year and the first day of the relevant pay period, the President signed an appropriation act.[17] The appropriation act also included a provision that prohibited any appropriated funds to pay the salary of an individual in a position or office referred to in § 225(f) of the Salary Act; by referencing this provision in the Salary Act, the appropriation act prohibited paying the 4.8% raise under the Adjustment Act effective on October 1, 1976, to federal judges, Members of Congress, and high-level officials in the Executive Branch.[18] The Supreme Court found that the 4.8% salary increase under the Adjustment Act had already taken effect when the President signed the appropriation act during the business day on October 1, 1976, thereby repealing a salary increase already in effect. Thus, the Court concluded the appropriation act violated the Compensation Clause because it diminished the compensation of federal judges.[19]

Year 2: The GS salaries were scheduled to increase an average of 7.1% on October 1, 1977, under the Comparability Act. In July 1977, the President signed an appropriation act that provided the salary adjustment under the Comparability Act that would be

---

constitution under the equal protection clause for the judges appointed on or after the effective date of the legislation.).

[11] 521 Pa. 316 (1989) (legislation eliminating retirement benefit options and increasing the contribution rates to the retirement plan for judges appointed after its effective date denied those judges the constitutionally required adequate compensation to judges).

[12] 211 N.J. 40 (2012 (legislation increasing pension and health care contributions without any corresponding increase in salaries to all employees, including judges, was an unconstitutional diminution of salaries as applied to judges holding office at time of enactment).

[13] 81 Stat. 642, as amended, 2 U.S.C. §§ 51-361 (1976 Ed. and Supp. III.)

[14] 5 U.S.C. §§ 5305-5306.

[15] Pub. L. 94-82, 89 Stat. 419.

[16] 449 U.S. at 203.

[17] Legislative Branch Appropriation Act. 1977, Pub. L. 97-440, 90 Stat. 1439.

[18] 449 U.S. at 205-06.

[19] *Id*. at 225-26.

effective after the date of the enactment of the appropriation act (i.e., the 7.1% increase in October 1977) would not become effective for the compensation of judges. The overall effect of the appropriation act was to nullify the scheduled 7.1% increase for the high-level executive employees, Members of Congress, and federal judges.[20] The Supreme Court found this act was signed into law prior to the date the 7.1% increase was to take effect on October 1, 1977. The Court stated:

> [T]he Compensation Clause does not erect an absolute ban on all legislation that conceivably could have an adverse effect on compensation of judges. Rather, that provision embodies a clear rule prohibiting decreases but allowing increases, a practical balancing by the Framers of the need to increase compensation to meet economic changes, such as substantial inflation, against the need for judges to be free from undue congressional influence. The Constitution delegated to Congress the discretion to fix salaries and of necessity placed faith in the integrity and sound judgment of the elected representatives to enact increases when changing conditions demand.
>
> Congress enacted the Adjustment Act based on this delegated power to fix and, periodically, increase judicial compensation. It did not thereby alter the *compensation* of judges; it modified only the formula for determining that compensation. Later, Congress decided to abandon the formula as to the particular years in question. For Year 2, as opposed to Year 1, the statute was passed before the Adjustment Act increases had taken effect—before they had become a part of the compensation due Article III judges. Thus, the departure from the Adjustment Act policy in no sense diminished the compensation Article III judges were receiving; it refused only to apply a previously enacted formula.
>
> A paramount—indeed, an indispensable—ingredient of the concept of powers delegated to coequal branches is that each branch must recognize and respect the limits on its own authority and the boundaries of the authority delegated to the other branches. To say that the Congress could not alter a method of calculating salaries before it was executed would mean the Judicial Branch could command Congress to carry out an announced future intent as to a decision the Constitution rests exclusively in the Congress.[21]

The Supreme Court concluded that, for purposes of the Compensation Clause, a judges' salary increase "vests" only when it takes effect as part of the compensation due and payable to the judges. Thus, the Court held that the Compensation Clause did not prohibit Congress from repealing the planned, but not yet effective, October 1, 1977, cost-of-living adjustment when it did so prior to the time it was scheduled to become a

[20] *Id*. at 206-07.
[21] *Id*. at 227-28. Emphasis in original.

part of the judges' compensation. The October 1977 appropriation act was a constitutionally valid exercise of legislative authority.[22]

Year 3: The President approved increasing GS salaries under the Adjustment Act an average of 5.5% for the fiscal year beginning October 1, 1978. However, one day before the effective date of this increase, the President signed an appropriation act that had the effect of prohibiting the payment of the 5.5% increase to any individual in the legislative, executive, or judicial branch for the fiscal year that began on October 1, 1978.[23] The Supreme Court concluded the issues were indistinguishable from the issues in Year 2; the elimination of the salary increases contemplated under the Adjustment Act occurred prior to the date the increases were to take effect. The Court held the legislation in Year 3 did not violate the Compensation Clause.[24]

Year 4: On August 31, 1979, the President approved a 7% salary increase beginning on October 1, 1979, pursuant to his authority under the Comparability Act. Because the prohibition against paying the 5.5% increase under the Adjustment Act applied only to Year 3, that 5.5% increase also became effective for Year 4—making the total increase over 12%. Eleven days after the 7% salary increase had taken effect, the President signed an appropriation act prohibiting any funds from being used to pay any sum in excess of the 5.5% increase for the fiscal year to executive employees, Members of Congress, and the judiciary.[25] The Court concluded that the issues were the same as those in Year 1; the prohibition against paying the 7% increase became effective after the increases had become effective. Thus, because the appropriation act diminished the compensation of the judges, it violated the Compensation Clause.

In summary, under *Will*, the Compensation Clause is not violated if the legislation directly diminishing judicial salaries became effective before the salary increases became effective. A violation occurs only if the legislation directly decreasing the compensation of judges became effective after the salary increase became effective or had "vested."

United States v. Hatter

Although the *Hatter* case did not involve a direct decrease or increase in judicial salaries, it is helpful in answering your question.

In *Hatter*, Congress enacted statutory amendments that withheld Social Security and Medicare taxes from judicial salaries for the first time. Regarding the Medicare taxes, the statutory amendments meant all federal judges, as well as all federal employees, had to contribute a part of their salaries to the Medicare program, thereby treating judges the same way other citizens were treated.[26] The Court held that the Medicare

[22] *Id*. at 228-29.
[23] *Id*. at 207-08.
[24] *Id*. at 229.
[25] *Id.* at 208, 229-30.
[26] 532 U.S. at 560-61.

taxes did not violate the Compensation Clause; it was a nondiscriminatory tax imposed upon judges regardless of whether they were appointed before or after the effective date of the Medicare tax.[27]

When the Social Security law was enacted in 1935 it did not cover federal employees. The 1983 amendments to the Social Security law required new employees to participate in Social Security and gave about 96% of current federal employees an option to decline participation in Social Security, which avoided any increased financial obligation.[28] The remaining 4% of current federal employees were required to participate in Social Security in such a manner that avoided any increased financial obligation *if* they had previously participated in a federal retirement system requiring the employee to contribute. The current federal employees whose retirement system was non-contributory were not permitted to decline participation in Social Security, resulting in an increased financial obligation for those employees. This last class of employees consisted almost exclusively of federal judges because the federal judiciary retirement system was noncontributory for judges.[29]

To determine whether the Social Security tax was discriminatory, the Supreme Court reviewed four features of the law[30] and concluded that the 1983 Social Security tax laws discriminated against the federal judges.[31] The Court held that the laws requiring current judges to participate in Social Security and pay Social Security taxes violated the Compensation Clause.[32] In rejecting the Government's arguments, the Court noted when it had previously upheld a non-discriminatory tax,[33] it had strongly implied in that case, and in *Will*, the Compensation Clause would bar a *discriminatory tax*.[34]

Additionally, in his dissenting opinion on the Court's conclusion that the Medicare taxes were not discriminatory, Justice Scalia noted that fluctuations in the value of money affected the value of compensation. But, he stated:

> The Framers had this distinction well in mind. Hamilton, for example, wrote that as a result of "the fluctuations in the value money," "[i]t was . . . necessary to leave it to the discretion of the legislature to vary its provisions" for judicial compensation. Since Hamilton thought that the Compensation Clause "put it out of the power of [Congress] to change the condition of the individual [judge] for the worse," he obviously believed that inflation does not diminish compensation as that term is used in the Constitution.[35]

---

[27] *Id*. at 571-72.
[28] *Id*. at 562.
[29] *Id*. at 563-64.
[30] *Id*. at 572-74.
[31] *Id*. at 576.
[32] *Id*. at 578.
[33] *Id*. at 576 citing *O'Malley v. Woodrough*, 307 U.S. 277, 282, 83 L.Ed. 1289, 59 S. Ct. 838 (1939) and *Will*, 449 U.S. at 226.
[34] *Id*.
[35] 532 U.S. at 583-84 (internal citations omitted).

In short, the United States Supreme Court made it clear in *Hatter* that a different Compensation Clause analysis applied when examining legislation that indirectly decreased the compensation paid to judges through a tax than when examining legislation that directly decreased the compensation paid to judges. In the former instance, the question is whether the tax discriminated against judges; in the latter instance, the question is whether the direct decrease in the judges' compensation occurred after the judicial compensation had vested. Additionally, Justice Scalia's dissent in *Hatter* points out that while inflation may diminish the value of judicial compensation, the Compensation Clause did not prohibit such indirect diminution. Rather, any adjustment to judicial compensation for inflation is left to the legislature's discretion.

Here, the legislation did not involve a tax being applied to the judges' compensation nor did it decrease the judicial compensation that had vested. Rather, L. 2017, Ch. 104, §177(f)(4) increased the compensation paid to judges; thus, the Compensation Clause in the Kansas Constitution was not implicated.

Based upon the above analysis, we opine that the 2.5% salary increase given to judges under L. 2017, Ch. 104, §177(f)(4) does not violate Article 3, § 13 of the Kansas Constitution even though other state employees received a 5% salary increase under L. 2017, Ch. 104, §177(f)(1). Rather, the enactment of L. 2017, Ch. 104, §177(f)(4) was based on the Kansas Legislature's delegated power in Article 2, § 24, of the Kansas Constitution to fix and, periodically, increase judicial compensation. It did not diminish the compensation of judges. Thus, the Compensation Clause in the Kansas Constitution was not violated.

Sincerely,

Derek Schmidt
Attorney General

Janet L. Arndt
Assistant Attorney General

DS:AA:JLA:sb