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Judicial Salaries; Changes
Me. (Const.) Art 4 § 2

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March 24, 1977

Honorable Merle Nelson
House of Representatives
State House
Augusta, Maine

Dear Representative Nelson:

We have received from you a request for an opinion concerning the constitutionality of proposed legislation which is designed to expedite the judicial disposition of cases. Modeled after Colorado Revised Statutes § 13-5-135 and Wisconsin Statutes Annotated § 256.025, the proposed legislation would cause a withholding or forfeiture of the salary of a judge who fails to decide a case within ninety (90) days of its presentation before him.

The question presented for our opinion is whether the proposed legislation would effect an unlawful postponement or diminution of salary in violation of Article VI, § 2 of the Constitution of Maine. Article VI, § 2 declares:

"The Justices of the Supreme Judicial Court and the judges of the other courts shall, at stated times receive a compensation, which shall not be diminished during their continuance in office, but they shall receive no other fee or reward for their services as justices or judges."

This provision received its current form from Amendment XCIV to the Constitution of Maine, effective November 18, 1964. The effect of Amendment XCIV was to extend the protection of judge's salaries, formerly accorded only to Justices of the Supreme Judicial Court, to Justices of the Superior Court and Judges of the District Court.

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The Supreme Judicial Court has never recorded a formal opinion construing the provisions of Article VI, § 2 in its original or amended version. The Court has commented upon its protections, in contrasting its protections with the absence of any for other judicial offices. Farwell v. City of Rockland, 62 Me. 296, 299 (1872). These comments, unfortunately, shed little light on the present question to be resolved.

The courts of other jurisdictions, however, have recorded opinions construing constitutional provisions similar or identical to Article VI, §2. Because the courts of Maine have traditionally looked to the opinions of other courts in deciding cases of first impression, these opinions would likely control the outcome of a constitutional test of the proposed legislation.

Based upon our review of the relevant decisions in other jurisdictions, our opinion is that the proposed legislation would violate the provisions of Article VI, § 2 and is therefore unconstitutional. Our conclusion is premised upon the following reasons:

A statute which authorized the forfeiture of a judge's salary for unexcused failure to hold court during a statutorily-prescribed period was found by one court to be repugnant to a constitutional provision declaring that "the judges of the Supreme and Circuit Courts shall, at stated times, receive a compensation for their services, to be ascertained by law, which shall not be diminished during the time for which they are elected." Ex parte Tully, 4 Ark. 220 (1842). The principle defect of the statute, in the court's view, was that it vested the determination of whether the failure to hold court was excusable in an executive officer, thereby compromising the independence of the judiciary. To our knowledge, this decision remains good law. See 26 Am. Jur. 2d, Judges 68 (1966).

Likewise, a statute which diminished the salary of an absent judge by an amount paid to his substitute, without regard to the reason for the former's absence, was held by one court to be repugnant to a constitutional provision which proscribed the diminution of a judge's salary, except where the legislature shall have prescribed deductions from salary for neglect of official duty. White v. State, 26 So. 343 (Ala. 1899). The court determined that the negligence which would constitutionally authorize a diminution of

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judge's salary presented a mixed factual-legal question which could only be resolved by a judicial tribunal, and not an arbitrary legislative determination.

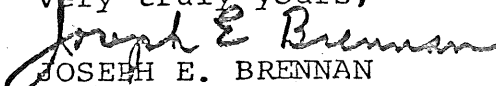
The principle of law to be derived from the above two cases is that the legislature may not prescribe contingencies which relate the payment of a judge's salary to performance in office, unless expressly authorized by another provision of the constitution. Accord, State ex. rel. Conway v. Elrod, 234 N.W. 2d 354 (Wisc. 1974) (state formula relating state-paid salary to county-paid salary held unconstitutional). There is no such provision qualifying the protections of Article VI, § 2 in the Constitution of Maine.

On the other hand, statutes which tax the income of judges at a non-discriminatory rate, or which vary the rate of compensation with the population or property tax base within a court's jurisdiction, have been upheld by some, but not all, courts. O'Mally v. Woodrough, 307 U.S. 277 (1938). State ex. rel. Mack v. Guickenberger, 39 N.E. 2d 840, 11 ALR 728 (Ohio 1942). Contra, Evans v. Gore, 253 U.S. 245 (1919); Gordy v. Dennis, 5 A2d. 69 (1939). In each instance the court has applied a functional test in determining that the statutes before it would not affect the independence of the judicial branch.

The proposed legislation, however, would fail this functional test, because, by its enactment, the legislature would attempt to prescribe the maximum time period for rendering a decision. Such an exercise of the power of the purse to control the manner in which the judicial power is exercised is precisely the kind of legislation that Article VI, § 2, and Article III, §§ 1 and 2, declaring the separation of powers, was intended to prohibit. Goetting v. N. Y., 61 NYX 334 (1899) (dictum).

Our attention has been drawn to the statutes of Wisconsin and Colorado which are similar to the proposed legislation. The mere existence of these laws is not conclusive of their constitutionality. Because these statutes have yet to be construed or tested in the supreme court of the relevant states, we venture no opinion on their constitutionality under their respective constitutions.

Very truly yours,


JOSEPH E. BRENNAN
Attorney General