



FEDERAL MAGISTRATE JUDGES ASSOCIATION

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Payment of United States Magistrate Judges if Judiciary Budgetary Resources are Depleted During a Lapse in Appropriations

In an April 15, 2019 memorandum to all United States Judges, the Administrative Office of U.S. Courts (AO) explained that it was proposing to change the Guide to Judiciary Policy's provisions on judicial pay during a lapse in appropriations. The prior version of the Guide to Judiciary Policy provided that the AO would request the Treasury Department ("Treasury") to authorize payment to all judges if judiciary budgetary resources were depleted. The proposed new version would provide that the AO would request such payment only for Article III Judges, and not for United States Magistrate Judges, among other non-Article III judges. The AO invited comment on the proposed revised policy.

The AO has determined that payment to Article III Judges during a lapse in appropriations is required to avoid violating the constitutional guarantee against diminution in compensation. The FMJA believes that, under this reasoning, payment is likewise required for United States Magistrate Judges, as they have a nearly identically-worded statutory guarantee against reduction in pay.

Under the AO's Rationale for Paying Article III Judges During a Lapse in Appropriations, United States Magistrate Judges Should Continue to Receive Their Salary Despite Depletion of Judiciary Budgetary Resources.

- A. The AO has determined that Article III Judges must continue to be paid during a lapse in appropriations due to the protection against diminution in their compensation.

The AO has determined that, during a lapse in appropriations, it will certify to Treasury that Article III Judges should continue to be paid despite the depletion of judiciary budgetary resources. The AO states that, to make the required certification, "the Judiciary must make the legal determination that the payment of salary meets an exception under the Anti-deficiency Act, 31 U.S.C. Section 1341, et. seq. and certify only those payments that meet this narrow exception for payment." Apr. 15 Memo at 1. The AO then states that it "may certify salary payments to Article III Judges when all other resources are depleted because those salaries are protected from diminution by Article III, Section 1 of the U.S. Constitution." *Id.*¹ The AO further states (*id.*):

The failure to make such timely payments would violate this clause of the Constitution. Therefore, Article III Judges would continue to receive their salaries on schedule regardless of the amount of appropriated funds available.

¹This provision of the Constitution states that such Judges' compensation "shall not be diminished during their Continuance in Office." U.S. Const. Art. III, sec. 1.

The AO does not specify the exception to the Anti-deficiency Act that it is relying on. One possibility is the exception in subsection 1341(a)(1)(B), which provides that an officer of the federal government may not “involve [the federal] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.” 31 U.S.C. § 1341(a)(1)(B). Alternatively, to the extent that the relevant prohibition is on “authoriz[ing] an expenditure ... exceeding an amount available in an appropriation or fund for the expenditure,” *id.* § 1341(a)(1)(A), that prohibition is subject to the exception in the Act’s first sentence, which states that all of the Act’s prohibitions apply “[e]xcept as specified in this subchapter or any other provision of law.” *Id.* § 1341(a)(1). Insofar as the AO is relying on either of the foregoing exceptions, we believe the conclusion it has reached is equally applicable to the salaries of United States Magistrate Judges.²

B. United States Magistrate Judges likewise enjoy protection against diminution in their compensation.

The AO’s prior policy of certifying payment of the salaries of all judges was based on the judges’ statutory entitlement to salary.³ In the April 15 memorandum, however, the AO states that the salaries of non-Article III judges “do not appear to be afforded the same Constitutional protection” as Article III judges and, as a consequence, non-Article III judges, including United States Magistrate Judges, will “not receive their salary payments until Congress enact[s] an appropriation for the Judiciary.” April 15 Mem. at 2. In so reasoning, the AO did not address the fact that the same statutory provision that entitles United States Magistrate Judges to their salary also guarantees that “the salary of a full-time United States magistrate judge *shall not be reduced, during the term in which he is serving*, below the salary fixed for him at the beginning of that term.” 28 U.S.C. § 634 (emphasis added).

Accepting the AO’s conclusion that payments to Article III Judges during a lapse in appropriations are permissible under the Anti-deficiency Act, and assuming it is because such payments fall within the exception for obligations “authorized *by law*,” 31 U.S.C. § 1341(a)(1)(B) (emphasis added), or for payment authorizations “specified in ... any ... *provision of law*,” *id.* § 1341(a)(1) (emphasis added), we submit that the same conclusion applies to salary payments to United States Magistrate Judges. First, the statutory guarantee that United States Magistrate Judges enjoy parallels the constitutional guarantee for Article III Judges. Both the constitutional and statutory guarantees are phrased in mandatory terms (“shall not”); both prohibit reductions in pay (“be reduced” / “be diminished”); and both extend for the duration of the Judge’s service (“during the term in which he is serving” / “during their Continuance in Office”). Payment of United States Magistrate Judges is thus likewise necessary to avoid violating this guarantee against reduction in compensation.

² Because the AO does not identify the relevant exception of the Anti-deficiency Act, it also does not elaborate on the interplay between any exception and the constitutional guarantee. The April 15th memorandum refers to “consult[at]ions” with the Treasury Department, *id.* at 1, but does not disclose their substance. The AO’s conclusion appears to be supported by a Congressional Research Service report, which states that a parallel guarantee against reduction in compensation in Article II, section 1 of the Constitution guarantees payment of the President’s salary during a shutdown. *See* Congressional Research Service, Shutdown of the Federal Government: Causes, Processes, and Effects 19 (Dec. 10, 2018). This report, however, likewise does not elaborate on the basis for its conclusion.

³ Administrative Office of the U.S. Courts, Memorandum, Status of Judiciary Funding and Guidance for Judiciary Operations During a Lapse in Appropriations, September 24, 2013.

Second, the guarantee against reduction in compensation for United States Magistrate Judges is just as grounded in “law” as the guarantee for Article III Judges. Nothing in the phrases “authorized by law” or “specified in ... any ... provision of law” limits these exceptions to constitutional, rather than statutory, law. To the contrary, as the Court of Federal Claims has recognized, “the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created *by statute*.” *Martin v. United States*, 130 Fed. Cl. 578, 583 (2017) (emphasis added). The terms of the Anti-deficiency Act thus provide no basis to apply salary payment guarantees differently depending on whether they are constitutional or statutory in nature.

Indeed, when Congress enacted the Federal Magistrate Judge statute, the Anti-deficiency Act had already been in existence for many years. *See* Act of Mar. 8, 1905, ch. 1484, § 4, 33 Stat. 1257; Federal Magistrates Act of 1968, Pub L. No. 90-578, 82 Stat. 1107 (1968). Congress thus chose to include the guarantee against reduction in salary against the backdrop of the Anti-deficiency Act and could not have thought that payment of United States Magistrate Judges’ salaries during an appropriations lapse would violate that Act. *See, e.g., McQuiggin v. Perkins*, 569 U.S. 383, 398 n.3 (2013) (“Congress legislates against the backdrop of existing law.”).

Moreover, the statutory and the constitutional guarantees against reduction in compensation serve similar ends. The constitutional guarantee “promotes judicial independence by protecting judges from diminishment in their salary by the other branches of Government.” *Beer v. U.S.*, 696 F.3d 1174, 1183 (Fed. Cir. 2012). “The founders of this nation understood the connections amongst protections for Life, Liberty, and the Pursuit of Happiness, protections for judicial independence, and protections for judicial compensation.” *Id.*

The parallel statutory protection against diminution in compensation for United States Magistrate Judges is consistent with the rationale of the constitutional guarantee, given the integral role of United States Magistrate Judges in the Article III process. United States Magistrate Judges disposed of nearly 1,100,000 matters in 2017 alone.⁴ United States Magistrate Judges are among the first judicial officers to handle criminal investigative matters (search warrants and arrest warrants) and early criminal pretrial matters (arraignments and detention hearings). 28 U.S.C. § 636; Fed. R. Crim. Procedure 5, 5.1, 41. Their wide range of authority also includes the power to conduct misdemeanor trials, to enter a sentence for a petty offense, and, with consent of the parties, to enter a misdemeanor sentence. 28 U.S.C. § 636. In addition, upon reference from a District Judge, a Magistrate Judge may “hear and determine any pretrial matter” (except for eight enumerated types of motions) and may hear and recommend findings of fact and a disposition to the District Judge on dispositive motions and on prisoner cases seeking post-trial relief or challenging conditions of confinement. *Id.* Magistrate Judges may also be appointed as special masters in civil cases, may try civil cases upon consent of the parties, may “administer oaths and affirmations . . . and take acknowledgements, affidavits, and depositions,” and may perform any other duty “not inconsistent with the Constitution and laws of the United States.” *Id.*

⁴ U.S. Magistrate Judges – Judicial Business 2017, available at <https://www.uscourts.gov/statistics-reports/us-magistrate-judges-judicial-business-2017>.

The AO's determination that payment to Article III Judges during a lapse in appropriations is required to avoid violating the guarantee against diminution in compensation thus applies equally to United States Magistrate Judges given their parallel legal protection against reduction in pay.

A handwritten signature in black ink, appearing to read 'REY' with a stylized flourish extending from the end.

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