

COMMENTARY

Was the Case Really About Pensions or Judicial Independence?

By Frank Askin

Was it mere coincidence that none of the three members of the New Jersey Supreme Court majority striking down the increase in judicial pension/health care co-pays supported by Gov. Chris Christie are subject to reappointment, while the two dissenters have the threat of gubernatorial retaliation hanging over their heads?

Obviously, no one can know what was really motivating the justices' decisions.

But it is striking that Justices Barry Albin and Jaynee LaVecchia have tenure and Judge Dorothea Wefing will be mandatorily retired in the fall, while dissenting Justices Anne Patterson and Helen Hoens will have to come up for reappointment after they have served seven years on the high court. It is also of note that Chief Justice Stuart Rabner, who is also nontenured, ducked the issue by recusing.

Let me make clear that I have no dog in this hunt. I think it is a very close case, and really do not know how I would have voted if I had the opportunity. But at bottom, I think the decision says more about judicial independence than anything else.

Then again, it's also about conflict of

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interest. There can be no doubt that every sitting judicial officer in the state has a conflict. The majority opinion concedes that upholding the law would have cost judges some \$17,000 a year.

But the court had no option to deciding the case. No one else could. Federal courts have no authority to interpret the New Jersey Constitution. It would have been nice if New Jersey had a rule that would have allowed the court to appoint five retired justices to do so, but there is no such provision.

So the court fell back on "the rule of necessity [which] forbids the disqualification of the entire judiciary from hearing a case even if there is some perception that the result may be tinged by self-interest."

On the merits, there are several close and interesting issues that divided the court:

- The issue of judicial independence and scope of review. The dissent says this is an issue of economic policy that required judicial deference to legislative policy-makers. The majority held it was a question of constitutional protection for judicial independence "to prevent the other branches from placing a chokehold on the livelihood of jurists who might be required to oppose their actions," and thus required a heightened scope of review.

As the majority said: "We can no more uphold a law that violates the Judicial article of the Constitution than

one that violates the right to free speech or freedom of the press ..."

I would give this point to the majority.

- The difference between "salary" and "compensation." The majority likened the clause in the New Jersey Constitution prohibiting the diminution of "salaries" of sitting members of the judiciary to the prohibition in the federal constitution to reduction in "compensation."

The opinion noted that the word "salary" had replaced "compensation" in the 1947 Constitution from the previous provision, but insisted that the convention's annals indicated that the two words had been used interchangeably and that no meaningful change was intended.

And the majority found some arcane federal decisions it said supported its position. The dissenters said that the replacement of "salary" for "compensation" spoke for itself and that salary did not include all "compensation." They further denied that the federal case law was relevant. Without careful examination of this history, I mark this as a draw.

- The difference between nondiscriminatory taxes and targeted decreases in compensation. There can be no doubt that if members of the judiciary were specifically targeted by the other branches as punishment for their decisions, that would be a no-no. On the other hand, everybody agreed that across-the-board tax increases for the general public were equally appli-

cable to the judiciary.

But this case was not either. It was sort of in the middle. The increase in co-pay affected not the general public but all state and local public employees. But it is highly unlikely that the Legislature would impose sanctions on half a million public workers

just to get at some 400 judges. So it seems to me it's closer to a tax increase than targeted discrimination. I would give this one to the dissent.

Looks like a tie to me. But in baseball, the tie goes to the runner; and if the plaintiff is considered to be the runner, then

maybe the majority got it right.

Anyway, it looks like this one is going into extra innings with the Legislature poised to put it to a referendum on amending the Constitution to endorse the dissenters' position. Let the policy debate begin. ■