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Judge Paul G. Mast (Ret.)

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Judges Retirement System
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Attention: Jim Niehaus
Lead Analyst

Dear Mr. Niehaus:

Thank you for your recent telephone call. As communicated to you previously, I elect to have the salary at the time of my retirement adjusted by unlimited cost-of-living increases. I understand that your office is handling hundreds of pensions, all of which are being paid based upon the current salary of a sitting judge. The purpose of this letter is to address your concerns by explaining that I am entitled to the benefits which I am electing to receive and demonstrating that I am the only pensioneer so entitled.

Before reviewing the California Supreme Court holding presented in *Olson v. Cory*, 27 Cal. 3d 532 (1980), consider the following brief history of the legislative changes in the law regarding judicial compensation:

Prior to January 1, 1970 (1969 change in the law):
No provision for any cost-of-living increases in the compensation of judges or any other automatic increases.

Effective January 1, 1970:
Legislature instituted cost-of-living increases without any limitation or cap as to the amount of annual increase.

Effective January 1, 1977 (the 1976 change in the law):
Legislature imposed a 5 percent limitation or cap on the amount of annual increase.

In 1980:
Legislature linked the annual increase in judicial compensation to the compensation increases of

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salaries of State Employees, might be greater than the CPI increase provided for under the pre-1976 law.

Other pertinent portions of *Olson v. Cory* follow.

> [W]e deal here with the right to compensation by persons serving their term of public office to which they have undisputed rights. '[Public] employment gives rise to certain obligations which are protected by the contract clause of the Constitution....' . . .
>
> Promised compensation is one such protected right. . . .
>
> Once vested, the right to compensation cannot be eliminated without unconstitutionally impairing the contract obligation. . . .
>
> A judge entering office is deemed to do so in consideration of -- at least in part -- salary benefits then offered by the state for that office. If salary benefits are diminished by the Legislature during a judge's term, or during the unexpired term of a predecessor judge (see Cal. Const., art. VI, @ 16; Gov. Code, @@ 71145, 71180), the judge is nevertheless entitled to the contracted-for benefits during the remainder of such term. The right to such benefit accrues to a judge who served during the period beginning 1 January 1970 to 1 January 1977, whether his term of office commenced prior to or during that time period.
>
> 'An employee's contractual pension expectations are measured by benefits which are in effect not only when employment commences, but which are thereafter conferred during the employee's subsequent tenure.' . . .
>
> [I]t is clear a pensioner's contractual benefits are merely derivative from covenants of employment. Moreover, as will be seen in our discussion of Proposition 6, that constitutional provision forecloses any salary reduction during a judge's term in office, including reduction in a cost-of-living provision enacted during the same term in office.
>
> The word 'salaries' in the last sentence of Proposition 6 is thus intended to mean cost-of-living salaries because the appropriating law then provided for annual cost-of-living adjustments. It follows that the provision in Proposition 6 that "[salaries] of elected state officers may not be reduced during their term of office" forecloses during that term any limitation on cost-of-living increases even though such increases were first provided by the Legislature during that same term. To the extent that the 1976 amendment to Government Code section 68203 contemplates such limitations it is unconstitutional.

> **Judicial pensioners whose benefits are based on judicial services terminating while section 68203 provided for unlimited cost-of-living increases in judicial salaries, acquired a *vested* right to a pension benefit based on some proportionate share of the salary of the judge or justice occupying the particular judicial office including the incumbent judge's or justice's unlimited cost-of-living increases.**

You have asked whether I received any compensation after *Olson v. Cory*. Apparently there was some question in your office whether there was a payment made to judges in consideration of their waiving their rights under the old law. During the pendency of *Olson v. Cory*, the State Controller partially withheld salary from judges whose terms began prior to the 1976 change in the law. After *Olson v. Cory* was decided, the State Controller paid the salary which previously had been withheld. In my case, this payment was only for the differential in the salary from July 1, 1978 (the date the salary differential first began) until January 15, 1979 (the date I retired). The amount was very small, I believe about $200. There was no payment as consideration for giving up any rights which had been vested under the former law, as in fact there could not have been, as no such consideration or settlement was provided for by law or by court decision.

As you confirmed I am the only retired judge with a deferred retirement whose rights are still vested under the old law. The question is whether there are vested rights held by a large number of pensioners already receiving compensation who would be entitled to a recalculation, resulting in increased current and future pension benefits and an award of underpaid prior benefits. Obviously such a situation would cause administrative and fiscal burdens.

Any judge who has already begun receiving retirement benefits without requesting that his or her benefits be calculated under the old law to which he or she has vested rights, has elected to receive benefits under the new law. The Supreme Court recognized that a "protected" judge, upon beginning to receive benefits may make an *election* as to whether to receive benefits under the pre 1976 compensation plan, or under the plan existing at the time he received benefits. This election is referred to in Note 9 to *Olson v. Cory* quoted below.

> n9 The Legislature has clearly indicated its intent, in recognition of vested interests, to provide minimum levels or **to afford elections** by which **differing levels of compensation may become available to judicial pensioners.**

Upon receiving retirement benefits calculated under the law as it existed at the time of retirement, without requesting that retirement benefits be paid under the pre-1976 law, a judicial pensioner may be held to have made a *de facto* election to receive benefits under the then existing law.

When viewed prospectively, from the 1970's, and particularly after the change in the law in 1980, a judge would not know with a certainty whether his or her retirement benefits would be greater under the pre-1976 law or under the then prevailing law. This is because the legislature might increase the salaries of incumbent judges at any time (as it had several times before) or the automatic increase system as tied to the

State employees. This change is not relevant to our discussion.

Olson v. Cory holds that the rights of judges and judicial pensioners, whose terms began prior to the passage of the 1976 law are vested contractual rights and may not be abrogated. This holding is based upon the United States Constitution, Art. 1, § 10, the California Constitution Art. 1, §9 and Art. III, §4, and an initiative measure added to the California Constitution in 1972, which is referred to in *Olson v. Cory* as Proposition 6. As such, the compensation of judges may not be diminished during their term of office, nor may the compensation paid to judicial pensioners, or their rights thereto, be diminished, if they retired prior to beginning a new term of office.

The *Olson v. Cory* decision holds that the 1976 amendment impaired the vested rights of judicial pensioners as well as those of judges in office. As your records show the last term of judicial office which I held began January 1, 1975. During the middle of my term of office I retired January 15, 1979. Having retired during my term that began in 1975, I not only fall within the class of judges in office with vested rights, but as of the date of my retirement, January 15, 1979, I became a judicial pensioner.

The *Olson v. Cory* decision clearly holds that for all judges that retired during a term that began prior to the 1976 change in the law, the contractual rights for judicial pensioners are vested in accordance with the law as it was at the time the judges term began,. As a Judge who was elected to and began a term of office prior to the 1976 change in the law, and retired prior to the expiration of that term, my pension rights were completely vested in accordance with the law as it was at the time my term of office began on January 1, 1975. Pertinent portions of *Olson v. Cory* follow. Please note that the emphasis and highlighting of sections are mine and are not in the original.

> In the present case the state has purported to modify pension rights with the amendment of section 68203. Between 31 December 1969 and 1 January 1977, a judicial pensioner was entitled to receive benefits based on a specified percentage of the salary of a judge holding the judicial office to which the retired or deceased judge was last elected or appointed. (Gov. Code, @ 75000 et seq.) The salary for such a judicial office – if the retired or deceased judge served in office during the period 1970 to 1977 – was convenanted to increase annually with the increase in the CPI. The 1976 limitation on increases in judicial salaries is, in turn, calculated to diminish benefits otherwise available to those judicial pensioners. Such modification of pension benefits works to the disadvantage of judicial pensioners by reducing potential pension increases, and provides no comparable new benefit. Again, we conclude that defendants have failed to demonstrate justification for impairing these rights or that comparable new advantages were included and that section 68203 as amended is unconstitutional as to certain judicial pensioners.

Based upon the law established by the California Supreme Court in *Olson v. Cory* I am in a unique set of circumstances. I elect calculation of my pension benefits under the old law to which I have vested rights.

Very truly yours,

Paul G. Mast