

FORTY-SEVENTH LEGISLATURE OF THE STATE OF ARIZONA V. NAPOLITANO: APPROPRIATIONS OF AUTHORITY

Susan E. Schwem

The Arizona Supreme Court limits its intervention into disputes between the legislative and executive branches of the state government. Therefore, *Forty-seventh Legislature of the State of Arizona v. Napolitano*¹ marks a rare moment in the court's history. In short, this case addresses the constitutional limits of the governor's veto authority,² a topic the court last addressed fifteen years ago.³ The court considered whether legislation exempting some state employees from the state merit system was an appropriation and therefore constitutionally subject to line-item veto. Much of the opinion, however, consists of Chief Justice MacGregor's analysis of whether the court had jurisdiction and the legislature standing.⁴ Without a clear source of its own authority or a clear injury to one branch, the court treads unsteady ground. *Forty-seventh Legislature v. Napolitano*, then, is important for its analysis of both executive and judicial power.⁵

1. 143 P.3d 1023 (Ariz. 2006).

2. ARIZ. CONST. art. V, § 7.

3. Rios v. Symington, 833 P.2d 20 (Ariz. 1992). Another line-item veto case, *Bennett v. Napolitano*, 81 P.3d 311 (2003), was dismissed for lack of standing. See Daniel S. Strouse, *The "Item Veto" Case*, *Bennett v. Napolitano: What About the Merits?*, 37 ARIZ. ST. L.J. 165 (2005). For a general discussion of line-item veto of appropriations, see Daniel S. Strouse, *The Structure of Appropriations Legislation and the Governor's Item Veto Power: The Arizona Experience*, 36 ARIZ. L. REV. 113 (1994).

4. *Forty-seventh Legislature*, 143 P.3d at 1025–1028.

5. Cf. Ted Schneyer, *Who Should Define Arizona's Corporate Attorney-Client Privilege?: Asserting Judicial Independence Through the Power to Regulate the Practice of Law*, 48 ARIZ. L. REV. 419 (2006). In his recent article, Professor Schneyer addresses the balance of power between Arizona's judiciary and legislature, noting that the Arizona Supreme Court usually defers to the legislature even in the development of courtroom procedural rules. *Id.* at 420, 459.

I. FACTUAL BACKGROUND

On January 25 and 26, 2006, the state house passed House Bill 2661, an emergency measure regarding the payment of state employees.⁶ Section 5 of this measure⁷ exempted some state employees from the merit system.⁸

On January 30, Governor Napolitano vetoed section 5 of the bill, declaring that it comprised “an additional expense to the state” because the merit and non-merit employees accrue leave differently.⁹ The Governor’s item veto language was thus couched in appropriations terms.

On February 2, the Senate and the House each authorized a suit to challenge the constitutionality of the item veto, following which Senate President Ken Bennett and Speaker of the House James Weiers brought a special action on behalf of the legislature.¹⁰ This Case Note will address the two threshold questions, jurisdiction and standing, before turning to the matter of constitutional interpretation.

II. JURISDICTION

The court recognized limits placed on its power by the political question doctrine.¹¹ Political questions represent those the constitution allocates to the political branches of government.¹² Judicial review in this area, Chief Justice MacGregor cautioned, cannot be governed by discoverable and manageable standards.¹³ In short, political questions reside squarely outside of the judicial realm of competence.

Legal questions, on the other hand, lie within the judiciary’s power to decide.¹⁴ In fact, as Chief Justice MacGregor emphasized, citing *Marbury v.*

6. *Id.* at 1025.

7. Chief Justice MacGregor noted that section 1 of the bill expressed an intent to raise the pay of state employees, and section 6 explicitly appropriated money for salary adjustments. *Id.* The court did not address these sections elsewhere in the opinion, but their mention early in the decision suggests that an appropriation context does not render all sections of a bill subject to the line-item veto power. *See infra* Part IV.

8. *Id.* The “merit system” is the comprehensive statutory system that governs personnel matters for all Arizona state employees, except those specifically exempted from its provisions. *See* Op. Att’y Gen. 101-010 (Ariz. 2001), *available at* <http://www.azag.gov/opinions/2001/101-010.html>.

9. *Forty-seventh Legislature*, 143 P.3d at 1025.

10. *Id.*

11. *Id.* at 1026.

12. *Id.* The Arizona Supreme Court has discussed “political questions” in few cases. For representative samples, see *State ex rel. Davis v. Osborne*, 125 P. 884 (Ariz. 1912), and *Udall v. Severn*, 79 P.2d 347 (Ariz. 1938). For a recent scholarly discussion about the political question doctrine, see Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441 (2004).

13. *Forty-seventh Legislature*, 143 P.3d at 1026.

14. *Id.*

Madison,¹⁵ the interpretation of law marks the quintessential and traditional function of courts.¹⁶

In this case, Chief Justice MacGregor categorized the issue as a legal rather than a political one.¹⁷ The legislature claimed not that Governor Napolitano's decision-making process leading to the veto was suspect but rather that the exercise of the veto in itself exceeded her constitutional authority.¹⁸ The issue presented squarely called for an interpretation of whether this line-item veto comported with constitutional requirements, a matter within the court's realm of competence.¹⁹

Once the court disposed of the political question issue, Chief Justice MacGregor turned to another facet of jurisdiction: the writ against a state officer via a special action.²⁰ Typically, the court has discretion when deciding whether to take such cases.²¹ Chief Justice MacGregor listed a number of factors present in this case counseling for the exercise of jurisdiction: the public importance of the issue, the necessity of policing separation of powers, and the likelihood that the legislature and executive would continue to differ in their interpretations of the line-item veto, leading to recurring suits.²² Thus, the opinion concluded that "this is one of those rare cases that justify the exercise of [the court's] special action jurisdiction."²³

III. STANDING

Chief Justice MacGregor noted that the question of standing, unlike the question of jurisdiction, is not a dispositive one: the court is "not constitutionally constrained to decline jurisdiction based on lack of standing."²⁴ Nevertheless, here, Chief Justice MacGregor saw standing as an important issue precisely because the court seeks to avoid resolving political disputes.²⁵

Chief Justice MacGregor compared the legislature's standing in this case with that in *Bennett v. Napolitano*,²⁶ the first Arizona case to discuss the legislature's standing.²⁷ In *Bennett*, the legislature lacked standing because none of its members had suffered injury, nor had the body as a whole.²⁸ In that case, four

15. 5 U.S. (1 Cranch) 137 (1803).

16. *Forty-seventh Legislature*, 143 P.3d at 1026.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* (citing *Rios v. Symington*, 833 P.2d 20, 22 (Ariz. 1992)). *Rios* did not address the question of standing because the parties did not raise it. 833 P.2d at 22 n.2; see *infra* Part III.

21. *Forty-seventh Legislature*, 143 P.3d at 1026.

22. *Id.* at 1026–27.

23. *Id.* at 1027.

24. *Id.* (quoting *Sears v. Hull*, 961 P.2d 1013, 1019 (Ariz. 1998)); see ARIZ. CONST. art. VI, § 5.

25. *Forty-seventh Legislature*, 143 P.3d at 1027.

26. 81 P.3d 311 (Ariz. 2003).

27. *Id.* at 316.

28. *Id.* at 317–18.

legislators challenged a line-item veto,²⁹ making the case seem similar to *Forty-seventh Legislature*.

Comparing the situation in *Bennett* to that in two U.S. Supreme Court cases,³⁰ however, had led the court to find no standing in that case.³¹ In *Raines v. Byrd*, six legislators who had voted against the Line Item Veto Act challenged its constitutionality.³² The Court characterized that injury as institutional and political rather than private, emphasizing that the individual legislators did not file the lawsuit on approval from their bodies.³³ In *Coleman v. Miller*, twenty of forty Kansas state senators voted against the ratification of a proposed amendment to the U.S. Constitution.³⁴ Kansas's lieutenant governor broke the tie, voting in favor of ratification, and those opposed filed suit.³⁵ Unlike *Raines*, the court found "illegal interference" in the legislative process, nullifying otherwise proper votes.³⁶

Chief Justice Jones found *Bennett* closer to *Raines* than to *Coleman*.³⁷ The legislators bringing suit, he noted, had suffered an abstract injury only because their legislative action had been completed prior to the governor's action, so there was no interference in the legislative process.³⁸ Moreover, the six legislators had not obtained approval for suit from their respective houses and did not constitute a majority.³⁹

In *Forty-seventh Legislature*, Chief Justice MacGregor found more ties to *Coleman* than to *Raines*, concluding that the legislature had indeed suffered injury.⁴⁰ The veto prevented the bill for which the majority voted from taking effect, concretizing the injury.⁴¹ Standing did not require, as the Governor argued, the legislature to attempt an override; the injury had already occurred at the moment of veto.⁴² The four members who brought suit also acted with the authority of the whole: house and senate resolutions sanctioned the suit.⁴³

IV. CONSTITUTIONAL INTERPRETATION

Since the court had jurisdiction and the legislature standing, Chief Justice MacGregor next addressed constitutional interpretation.⁴⁴ Arizona's constitution restricts the line-item veto to situations involving "items of appropriations of

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29. *Id.* at 313.
 30. *Raines v. Byrd*, 521 U.S. 811 (1997); *Coleman v. Miller*, 307 U.S. 433 (1939).
 31. *Bennett*, 81 P.3d at 316–18.
 32. *Id.* at 316–17 (citing *Raines*, 521 U.S. at 814).
 33. *Id.* at 317 (citing *Raines*, 521 U.S. at 829).
 34. *Id.* (citing *Coleman*, 307 U.S. at 435–36).
 35. *Id.* (citing *Coleman*, 307 U.S. at 436).
 36. *Id.* (citing *Coleman*, 307 U.S. at 446).
 37. *Id.*
 38. *Id.*
 39. *Id.*
 40. 143 P.3d at 1027–28.
 41. *Id.* at 1028.
 42. *Id.*
 43. *Id.*
 44. *Id.*

money.”⁴⁵ The court relied on its interpretation in *Rios v. Symington*,⁴⁶ which defined this phrase as “the setting aside from the public revenue of a certain sum of money for a specified object, in such a manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other.”⁴⁷ Chief Justice MacGregor noted that this rule does not require a magic phrase; no specific language need appear in the statute in order to appropriate.⁴⁸ Instead, the test set out in *Windes v. Frohmiller* to determine what constitutes an appropriation is “whether or not the people have expressed an intention that the money in question be paid.”⁴⁹ Setting aside a certain sum from either a general or a special fund suffices, and if the legislature chooses to use a special fund, no limit need be specified.⁵⁰

For example, the *Rios* court held that the following language constituted an appropriation: “Surcharges [on licenses and certificates of authority] assessed by the director of the department of insurance and deposited in the department of insurance computer system fund pursuant to Laws 1987, chapter 260, section 1 shall be used to complete the computer system of the department.”⁵¹ This language identified a certain sum, the surcharges; for a specified object, the computer system; and established the authority to spend that money, “shall be used.”⁵²

The legislative enactments at issue in *Forty-seventh Legislature* exempted some state employees from the merit pay system, a change Chief Justice MacGregor cast as substantive rather than, for example, merely altering the level of funding.⁵³ The enactments set aside no sums, did not refer to either a specific or a general source of funding, and consequently did not authorize the executive officers to use any funds, thus failing the *Windes* test.⁵⁴ The Governor argued the reclassifications here constituted appropriations because the state would be required to pay more leave as an incident to this reclassification.⁵⁵ The court remained unpersuaded, differentiating an “obligation” from an “appropriation,” or in other words, a promise to make an appropriation from an act of appropriation.⁵⁶ In *Millett v. Frohmiller*, for example, the court held that authorizing an agency to hire employees did not constitute an appropriation even though funds would need to be appropriated to pay the employees.⁵⁷ Similarly, although the new employee classification set out in section 5 compels the state to make payments, the act itself

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45. ARIZ. CONST. art. V, § 7.
 46. 833 P.2d 20 (Ariz. 1992).
 47. *Id.* at 24 (quoting *Hunt v. Callaghan*, 257 P. 648, 649 (Ariz. 1927)).
 48. *Forty-seventh Legislature*, 143 P.3d at 1028 (citing *Windes v. Frohmiller*, 3 P.2d 275, 276 (Ariz. 1931)).
 49. *Id.* (quoting *Windes*, 3 P.2d at 276).
 50. *Id.* at 1028–29 (citing *Crane v. Frohmiller*, 45 P.2d 955, 959 (Ariz. 1935)).
 51. *Rios*, 833 P.2d at 24.
 52. *Id.*
 53. 143 P.3d at 1025, 1029.
 54. *Id.* at 1029.
 55. *Id.* Non-merit employees accrue more leave than merit system employees, and rules require the state to pay employees for their accrued but unused leave time upon termination of their employment. *Id.*
 56. *Id.* (citing *Crane v. Frohmiller*, 45 P.2d 955, 959 (Ariz. 1935)).
 57. 188 P.2d 457, 461 (Ariz. 1948).

did not make an appropriation, set aside a sum, in order to accomplish this objective.⁵⁸ As a result, Chief Justice MacGregor held that the constitution does not allow the Governor's action in this case.⁵⁹

CONCLUSION

In part because the judiciary does not often decide inter-branch matters, the force of this case rests as much in its constitutional interpretation of the line-item veto as in its assessment of the political question doctrine and legislative standing. The case posits a narrowly circumscribed view of the line-item veto, preventing the invalidation of legislative votes on matters that do not specify a funding source. The decision leaves the legislature much room to enact policies that obligate without attaching funding specifications. *Forty-seventh Legislature v. Napolitano* thus draws the constitutional boundary between legislative and executive functions in favor of the legislature when an item is not clearly an appropriation. The legislature's power to challenge line-item veto decisions, however, is not absolute or assured. Rather, Chief Justice MacGregor's analysis of jurisdiction and standing will encourage legislators injured by a line-item veto to clearly express a legal question, make a claim of interference with the legislative process, and obtain authorization from their legislative bodies.

58. *Forty-seventh Legislature*, 143 P.3d at 1029.

59. *Id.*