

## CASE NOTE:

### *CITIZENS CLEAN ELECTIONS COMMISSION V. MYERS*

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#### I. ARIZONA'S CITIZENS CLEAN ELECTIONS ACT IS CHALLENGED ON STATE CONSTITUTIONAL GROUNDS

Campaign finance reform—a prominent issue of the 2000 Presidential Race—remains at the forefront of political debate even after the 2000 Election. Political participants continue to call for legislative action.<sup>1</sup> However, with the call for sweeping legislative reform, legislators should be aware of potential constitutional challenges.

Arizona's version of campaign finance reform, the Citizens Clean Elections Act,<sup>2</sup> underwent several state constitutional challenges, as recently as the summer of 2000. With the then-approaching November 2000 election, the Arizona Supreme Court exercised special action jurisdiction to hear the consolidated petitions<sup>3</sup> of Citizens Clean Elections Commission<sup>4</sup> and Arizonans for Clean Elections.<sup>5</sup> Petitioners sought review of an order of the Superior Court of Arizona, Maricopa County, holding that the Citizens Clean Elections Act violated the Arizona Constitution and was thus invalid.<sup>6</sup>

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1. See *Campaign Finance Crossroads*, N.Y. TIMES, Mar. 7, 2001, at A18; Ruth Marcus & Dan Balz, *Democrats Have Fresh Doubts on 'Soft Money' Ban; Some Fear GOP Would Gain Edge in Campaign Finances*, WASH. POST, Mar. 5, 2001, at A01.

2. A.R.S. §§ 16-940–16-961 (2000).

3. See *Citizens Clean Elections Commission v. Myers*, 196 Ariz. 516 (2000).

4. The Citizens Clean Elections Commission, in addition to being a petitioner in the suit, is the entity responsible for administering the Act. See A.R.S. § 16-955 (1998).

5. Arizonans for Clean Elections is the committee which promoted the Act as an initiative measure. See *Citizens Clean Elections Commission*, 196 Ariz. at 518.

6. See *id.* at 516.

The Citizens Clean Elections Act (the "Act") was adopted in the 1998 November election by ballot initiative. The Act established an elaborate system of public campaign financing.<sup>7</sup> In general, the Act provided for, among other things, matching public funds for participating candidates who agree to limit their spending and fundraising and it sets contribution limits for non-participating candidates.<sup>8</sup>

Prior to the November 2000 Election, VotePac, a political committee, challenged the validity of the Act on state constitutional grounds, arguing that specific provisions of the Act were inconsistent with the Arizona constitution and/or violated the separation of powers doctrine.<sup>9</sup> The challenged provisions under the Act involved: (1) the expansion of the duties of the Commission on Appellate Court Appointments<sup>10</sup> to include selection of candidates for the Citizens Clean Elections Commission; (2) the role of the Chief Justice as the Chair for the Commission on Appellate Court Appointments; (3) the appointment of members to the Citizens Clean Elections Commission by justices of the supreme court; (4) the requirement of a concurrence of the senate before the Governor may remove members of the Citizens Clean Election Commission; and (5) the title of the Act, "Citizens Clean Elections Act."<sup>11</sup> Other than the title of the Act, the challenged provisions primarily deal with the manner in which persons become members of, and are removed from, the Citizens Clean Elections Commission.

While finding the majority of the contested aspects of the Act valid, the Maricopa County Superior court, nonetheless, held that the expansion of the duties of the Commission on Appellate Court Appointments was "repugnant" to the Arizona Constitution.<sup>12</sup> Further, the Superior court ruled that such provision was not severable, thereby rendering the Act invalid.<sup>13</sup>

## II. THE ARIZONA SUPREME COURT SEVERS PROVISIONS FROM THE ACT

The Arizona Supreme Court affirmed only in part and ultimately reversed the Superior court's decision on the severability of the invalid provisions of the Act, thus saving the Act.<sup>14</sup> The Supreme Court held that the provisions of the Act involving the Commission on Appellate Court Appointments were unconstitutional but severable from the Act.<sup>15</sup> In addition, the Court ruled that the provisions of the Act purporting to involve members of the Supreme Court in the appointment of members to the Citizens Clean Elections Commission were

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7. A.R.S. §§ 16-940 to 16-961.

8. *Id.* at § 16-941.

9. *See Citizens Clean Elections Commission*, 196 Ariz. at 516.

10. The Chief Justice of the Arizona Supreme Court is the chair for the Commission on Appellate Court Appointments. ARIZ. CONST. art. VI, § 36.

11. *See Citizens Clean Elections Commission*, 196 Ariz. at 518-24.

12. *Id.* at 520.

13. *Id.* at 519.

14. *See id.* at 523.

15. *See id.*

unconstitutional but also severable from the Act.<sup>16</sup> Finally, as to the title of the Act, the Court affirmed that the title was valid.<sup>17</sup>

*A. The Majority Opinion Relies upon the Doctrine of Implied Limitations*

The majority opinion, authored by Justice Martone, first addressed the issue of the expansion of the duties of the Commission on Appellate Court Appointments (the "Commission").<sup>18</sup> The majority deemed the provision unconstitutional.<sup>19</sup> The Court—treating the issue as one of constitutional construction—reasoned that the textual structure of the Arizona constitution provided no grant of legislative authority for the expansion of the "single" function of the Commission, as provided in article VI, §§ 36 and 37 of the constitution.<sup>20</sup> The majority, applying the doctrine of implied limitations,<sup>21</sup> reasoned that the "implied limitations" of the Arizona constitution prohibited the involvement of the Commission "in activities wholly unrelated to the nomination and appointment of appellate judges."<sup>22</sup> The Opinion explained that the Commission was provided with "but one function," and the expansion of the Commission's duties beyond that of judicial appointments violates the Arizona Constitution.<sup>23</sup> The majority, further supporting its argument, made use of the maxim—*expressio unius est exclusio alterius*—viewing the sole function of the Commission as a "positive direction[]" which by "*implication*" operates to exclude other directions not so enumerated.<sup>24</sup>

Although the expansion of the duties of the Commission violated the constitution, the Court ruled that the provision was severable.<sup>25</sup> The Court explained that the valid portions of the Act could operate independent of the severed provision.<sup>26</sup> Moreover, the Act contained an express severability clause.<sup>27</sup> The court reasoned that the statewide officers assigned the power to make

16. *See id.* at 524.

17. *See id.* at 525.

18. *See id.* at 519.

19. *See id.* at 522.

20. *Id.* at 522. The Court's analysis proceeded by comparing the text of article VI, §§ 36 and 37 with other sections of the constitution that provide a constitutional grant of legislative authority to enact legislation. *Id.*

21. *See id.* at 521. The majority opinion cites *Hudson v. Kelly*, 76 Ariz. 255, 263 (1953), as adopting the doctrine of implied limitations as outlined by Cooley. THOMAS M. COOLEY, 1 CONSTITUTIONAL LIMITATIONS 176 n.4 (8th ed. 1927). "[T]he Constitution by its inherent terms may of necessity prohibit certain acts of the legislature by reason of the inherent conflict that would arise between the terms of the Constitution and the power claimed in favor of the legislature." *Id.*

22. *Citizens Clean Election Commission*, 196 Ariz. at 522.

23. *Id.* at 519.

24. *Id.* at 521.

25. *See id.* at 523.

26. *See id.*

27. *See id.* at 522 (citing A.R.S. § 16-960).

appointments would continue to do so consistent with the standards of the Act, but without a slate of candidates.<sup>28</sup>

### *B. The Court's Consideration of the Separation of Powers Doctrine*

Two of the three remaining issues facing the Court were addressed under the separation of powers doctrine.<sup>29</sup> The Court evaluated the separation of powers claims by applying a four-part test as outlined in *State ex. rel. Woods v. Block*, 189 Ariz. 269, 276 (1997). The test considers: (1) "the nature of the power being exercised; (2) the degree of control of another branch; (3) the purpose of the legislation; and (4) the practical consequences of the action."<sup>30</sup>

Under the four-part test, the Court found that the Acts' requirement of Senatorial concurrence before the Governor could remove a member from the Citizens Clean Elections Commission did not violate the doctrine of separation of powers.<sup>31</sup> The Court concluded that: (1) the power being exercised, concurrence, was not an executive power; (2) the degree of control over the governor was minimal; (3) the purpose was cooperative; and (4) there had been no practical consequence as of the time of the case.<sup>32</sup>

The second issue analyzed under the doctrine of separation of powers involved the role of the Supreme Court justices in the appointment process.<sup>33</sup> The Court ruled that the role of the justices violated the doctrine of separation of powers because the power of appointment is an executive function.<sup>34</sup> In addition, the Court reasoned that the Citizens Clean Elections Commission performed functions completely unrelated to the judicial power of the Supreme Court as vested under the constitution.<sup>35</sup> Further, the Court was troubled by the involvement of party affiliation in the appointment process.<sup>36</sup> Nonetheless, this provision was also found to be severable as a "small and insignificant part of the Act."<sup>37</sup>

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28. See *id.* at 523 (citing A.R.S. § 16-955(B)).

29. See *id.* at 523-24. Feldman's separate opinion argues that all the challenged provisions, except for the title of Act, should have been analyzed under the separation of powers doctrine. See *id.* at 528 (Feldman, J., concurring in part and dissenting in part).

30. *Id.* at 523-24.

31. See *id.* at 524.

32. *Id.*

33. The role of the Chief Justice on the Court of Appellate Court Appointments was mooted by the Court's holding that the Commission was not to partake in the selection of candidates. See *id.* at 524.

34. See *id.* at 524.

35. *Id.*

36. See *id.* at 524. The Act provides for the appointment of candidates such that the Citizens Clean Elections Commission shall not have more than two members from the same party. See A.R.S. §§ 16-955(A) & (C).

37. *Citizens Clean Elections Commission*, 196 Ariz. at 524.

### *C. The Title of the Act Is Deemed Sufficient*

The final issue addressed by the majority was the challenge to the sufficiency of the Act's title.<sup>38</sup> Petitioners argued that the title of the Act was insufficient under article IV, section 13 of the constitution.<sup>39</sup> The Court's analysis was brief and simply held that the Act, as an initiative, was not subject to challenge based on article IV, part 2, section 13, which applies to bills.<sup>40</sup> Thus, the Court affirmed that the title, "Citizens Clean Elections Act," was valid under the constitution.<sup>41</sup>

## III. THE FELDMAN OPINION RAISES SOME PRACTICAL CONCERNS

The majority opinion presents some practical concerns that warrant consideration. Justice Feldman writes a separate opinion outlining some of these potential issues.<sup>42</sup> The Feldman opinion disagreed with the majority's conclusion that the expansion of the duties of the Commission on Appellate Court Appointments violates the Arizona Constitution.<sup>43</sup>

Justice Feldman argues that the majority inappropriately applies the doctrine of implied limitations, thereby instituting a "[c]hange in constitutional doctrine."<sup>44</sup> The Feldman opinion expressed that the majority merely paid lip service to the basic principle of constitutional law—that "the legislature need not look to an express grant of authority in order to justify an enactment."<sup>45</sup> Feldman asserts that the consideration of an implied limitation to legislative plenary power does not arise from an express grant from the constitution but from the structure of government.<sup>46</sup> Thus, from this argument, Feldman asserts that the majority should have analyzed any implied constitutional limitation under the separation of powers doctrine.<sup>47</sup> Further, under the separations of power doctrine, Feldman asserts that there is no usurpation of power nor any violation of Article III by the expansion of the duties of the Commission on Appellate Court Appointments.<sup>48</sup> The goal of the

38. See *id.* at 524–25.

39. See *id.* at 524.

40. See *id.* at 525. The Court affirmed *Iman v. Bolin*, 98 Ariz. 358, 365 (1965) holding that article IV, part 1, section 1(9) applies to initiatives and article IV, part 2, section 13 applies to bills. See *id.*

41. See *Citizens Clean Elections Commission*, 196 Ariz. at 525.

42. See *id.* at 525 (Feldman, J., concurring in part and dissenting in part).

43. See *id.* at 526 (Feldman, J., concurring in part and dissenting in part).

44. *Id.* (Feldman, J., concurring in part and dissenting in part).

45. *Id.* at 527 (Feldman, J., concurring in part and dissenting in part). Both the majority opinion and Justice Feldman's dissent cite *Cox v. Superior Court*, 73 Ariz. 93 (1951) and *Earhart v. Frohmler*, 65 Ariz. 221 (1947). However, Feldman's opinion argues that the majority's use of the dictum from these cases is misplaced. See *id.* (Feldman, J., concurring in part and dissenting in part).

46. See *Citizens Clean Elections Commission*, 196 Ariz. at 528 (Feldman, J., concurring in part and dissenting in part).

47. See *id.* (Feldman, J., concurring in part and dissenting in part).

48. See *id.* (Feldman, J., concurring in part and dissenting in part).

Act parallels the goals of the Commission on Appellate Court Appointments in seeking a "high quality of membership and a lesser degree of partisanship."<sup>49</sup>

Feldman also specifically challenged the majority's conclusion that the Act conflicted with the text of the constitution.<sup>50</sup> Feldman argued that the expanded duties of the Commission on Appellate Court Appointments is "not much different from the Commission's constitutional function."<sup>51</sup>

Finally, the Feldman opinion concludes by warning that, from a practical standpoint, the majority opinion may provide a "basis in precedent" to challenge legislation merely on the grounds that the constitution has not expressly authorized a particular exercise of power.<sup>52</sup> Moreover, Justice Feldman fears that the majority opinion might initiate "a search for implied prohibitions to the state's plenary legislative power—a search that will not stop."<sup>53</sup>

#### IV. CONCLUSION

The lingering question from the holding in this case is the extent to which the doctrine of implied limitations may effectively be utilized to challenge legislation merely on the grounds that the constitution has provided no particular grant of authority. If implied limitations may be found merely from the fact that the constitution has in one instance expressly provided for a specific exercise of power but has failed to in another, then Justice Feldman's fears may well be warranted. Nonetheless, these fears may be premature if the Court remains true to the principle that the "legislature need not look to an express grant of authority in order to justify an enactment"—a principle cited by both opinions in this case.<sup>54</sup> The use of the doctrine of implied limitations arguably still requires a finding that the challenged legislation is incompatible in some manner with the constitution.<sup>55</sup> Further, the potential use of the doctrine of implied limitations might further be curbed if analyzed under the separation of powers doctrine, as suggested by Justice Feldman.

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49. *Id.* (Feldman, J., concurring in part and dissenting in part).

50. *See id.* at 525 (Feldman, J., concurring in part and dissenting in part).

51. *Id.* at 529 (Feldman, J., concurring in part and dissenting in part).

52. *Id.* (Feldman, J., concurring in part and dissenting in part).

53. *Id.* (Feldman, J., concurring in part and dissenting in part).

54. *Id.* at 520, 527 (Feldman, J., concurring in part and dissenting in part).

55. The majority opinion and Feldman separate opinion disagree as to the compatibility of the constitutionally assigned duties of the Commission with those duties assigned by the Act. *See id.* at 525 (Feldman, J., concurring in part and dissenting in part).