



How widely—and how deeply—may a governor wield her veto pen?

In 2003, that question so vexed some Arizona legislators that they took Gov. Janet Napolitano to court. There, they challenged almost a dozen of her line-item vetoes, claiming they improperly expanded the power of the executive.

In December, the Arizona Supreme Court unanimously said they disagreed. The vetoes withstood the challenge.

But did the Court's opinion adequately address the heart of the matter? In the pages that follow, Jim Drake, the Rules Attorney for the Arizona House of Representatives, emphatically says "No." But Tim Nelson of the Governor's Office says the Court was right on target.

What do you think? Send your own opinions to Tim.Eigo@staff.azbar.org.

A Stunning Blow to the Arizona Constitution's Concept of Coequal Branches and the Necessity of Judicial Redress

BY JIM DRAKE

On July 15, 2003, the President of the Arizona Senate, the Speaker of the House of Representatives and the two majority leaders from both chambers brought a special action in the Arizona Supreme Court challenging the governor's use of the line-item veto.¹ In this action, the legislator petitioners asserted that the governor exceeded her constitutional line-item veto authority in 12 instances, but they ultimately challenged only 11 vetoes.² The Arizona Supreme Court heard oral argument on Sept. 9, 2003.

On Dec. 4, 2003, the Arizona Supreme Court published an opinion that failed to address the merits of the case, after wrongly concluding that the legislators lacked standing and improperly allowing an issue not before the Court—the single-subject requirement—to influence its holding.

The *Bennett* opinion dealt a blow to balance of power among the three governmental branches. It also left a big question as to what avenue might be open to the legislature to enforce the constitutional limits on the governor's line-item veto power.

Background

During the second week of June, the Arizona legislature adopted the state's operating budget for 2004. The legislature transmitted the following four bills to the governor:

- the general appropriations act or "feed" bill, House Bill 2531
- the education omnibus reconciliation bill (ORB), House Bill 2534
- the health and welfare ORB, House Bill 2535
- the public finances ORB, House Bill 2533.

Gov. Janet Napolitano timely used her line-item veto to strike 35 provisions of the budget package and sent a message to the legislature outlining the rationale underlying her vetoes.³ After receiving the veto messages, the legislature adjourned *sine die* on June 19, 2003, without taking any action to override the line-item vetoes.

A. Power of the Governor's Line-Item Veto

"It is essential that a sharp separation of powers be carefully preserved by the courts so that one branch of government not be permitted to encroach upon functions properly belonging to another" in violation of Article III.⁴

The power to appropriate funds is the quintessential legislative power and rests solely within the legislature's purview.⁵ However, this power is tempered by both the bill veto and the appropriation line-item veto.⁶ In fact, it is recognized that "the legislature's plenary power to determine the objects and level of support to which the public revenues may be put does not mean that the executive branch has no role in the appropriations process."⁷ The governor has veto power

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over appropriations.⁸

Until the outcome in *Bennett*, the Arizona Supreme Court recognized the limits of this important check on the legislative appropriation power and the court's role in preventing the executive item veto power from being used to create "affirmative legislation without even the concurrence of the legislature."⁹

B. Line-Item Vetoes Challenged by the Legislature

The legislature challenged nine provisions of the general appropriations act and one provision in each of the health and welfare ORB and the education ORB.

1. The General Appropriations Act—Lump-Sum Reductions

On request, the legislature made appropriations to five separate departments with a line item labeled "lump sum reduction." The express reductions followed that agency's operating appropriation and other specifically enumerated appropriations, if applicable.¹⁰ The lump-sum reduction provisions were crafted for the Department of Administration, the Department of Agriculture, the Department of Economic Security, the Department of Health Services and the State Land Department.

Collectively, the lump sum reductions gave the governor greater discretion to allocate the spending reductions of \$4,755,300.¹¹ The governor line-item vetoed all of the lump sum reductions, and the petitioners challenged that action because the legislature never appropriated the higher spending amounts for the agencies.¹²

2. The General Appropriations Act—Other Line-Item Vetoes

The governor exercised her line-item veto power four more times in the general appropriations act.

First, the governor took action on the budget of the Department of Health Services by vetoing \$10 million labeled "offset for receipts."¹³

Second, the governor struck \$14,906,000 in the Department of

Economic Security that the legislature intended to be a reduction for "federal match rate savings."¹⁴

Third, the legislature, through session law, provided for a contingent reduction to the Department of Health Services if the department received certain federal monies for vaccines; the governor vetoed this contingent reduction.¹⁵

Fourth, and most troubling, the governor line-item vetoed the Arts Commission Funding.¹⁶ In this instance, the governor line-item vetoed the source of the funding but not the funding itself. In her veto message, she said that this change would necessitate the appropriation of general fund dollars instead of the source approved by the legislature.¹⁷

The Arts Commission veto is so troubling because it contravenes a long line of cases beginning in 1915 with *Callaghan v. Boyce*,¹⁸ which held that a line-item veto is ineffective if used to disapprove an item inseparable from the item of appropriation itself.¹⁹ The governor's line-item veto power can only act in the negative, and, by designating a funding source, the legislature expressly stated that the general fund was not to be used to fund the commission.

3. Line-Item Vetoes Challenged in the ORBs

In the education ORB, the legislature mandated a 50 percent reduction in the amount of "rapid decline" funding for school districts. In the health and welfare ORB, the legislature eliminated a provision that concerned adult emergency dental care coverage under the Arizona Health Care Cost Containment System.²⁰ The governor line-item vetoed both provisions.

The petitioners challenged both of these line-item vetoes because they were "policy" changes and did not fit the definition of an "item of appropriation" and therefore were not eligible for a "line-item" veto. The line-item veto is limited to "items of appropriation,"

which has been judicially defined to be (1) a specification of a certain sum of money, (2) for a specified object, and (3) that creates the authority to spend the money.²¹

Standing

Standing by legislators in this type of action against a governor was an issue of first impression in Arizona. Quite simply, the Arizona Supreme Court got the issue wrong.

The Court found that “Four members who bring the action without the benefit of legislative authorization should not, except in the most exceptional circumstances, be accorded standing to obtain relief on behalf of the legislature.”²² The Arizona Supreme Court found several federal cases illustrative, but it failed to even mention or distinguish *Silver v. Pataki*²³—though merely persuasive authority, it is absolutely on point.²⁴

In *Silver*, Speaker Sheldon Silver challenged the line-item veto power of New York’s governor when he exercised that power on “non-appropriation” bills that were part of the budget process.²⁵ Indeed, the *Silver* case relied on the same federal cases cited by the Arizona Supreme Court,²⁶ but *Silver* came to a different and far more logical conclusion. Namely, the high court in New York held that the Speaker of the New York Assembly, as a mere member of that legislative body, has standing to sue on a line-item veto challenge.²⁷

As *Silver* explained, “Cases considering legislator standing generally fall into one of three categories: lost political battles, nullification of votes and usurpation of power. Only circumstances presented by the latter two categories confer legislator standing.”²⁸

In *Bennett*, all four legislators voted in favor of all the measures in which the gubernatorial action was challenged.²⁹ To quote *Silver*, “As a member of the assembly who voted in favor of the budget legislation, plaintiff undoubtedly has suffered an injury in fact with respect to the alleged unconstitutional nullification of his vote sufficient to confer standing.”³⁰

In deciding *Bennett*, the Arizona Supreme Court erroneously relied on *Raines v. Byrd*, but *Raines* is wholly inapplicable because the six congressmen in that case voted against the act that they later sought to challenge, so their votes were not nullified. In *Raines*, the four senators and two congressmen voted against the Line Item Veto Act and then challenged the constitutionality of the act the day after it became effective.³¹ In sum, *Raines* was a case that involved a lost political battle, but *Bennett v. Napolitano* is a case of vote nullification because all parties voted “aye.” The Arizona Supreme Court should have granted the four legislator petitioners standing.

The *Bennett* case could have and should have been decided on the merits without delving into arguments on issues not raised by the litigants.

Also, the holding on standing in *Bennett* is not consistent with earlier statements by the Arizona Supreme Court. In *Bennett*, the Supreme Court cited *Sears v. Hull*³² in support of its reluctance to grant standing.³³ But in *Sears*, at footnote 11, the Court agreed with *Management Council of the Wyoming Legislature v. Geringer*,³⁴ which held that legislators or the legislative council had standing to challenge the Wyoming governor’s veto authority.³⁵

The issues in *Silver* are still wending their way through the judicial system of

New York. On Dec. 11, 2003, the New York Supreme Court, Appellate Division, noted:

In our tripartite form of government, it is the judicial branch that has the constitutional obligation and duty, by interpreting the intent of the framers, to define the respective powers of the legislative branches in the budget process. Courts will always be available to resolve disputes concerning the scope of that authority which is granted by the Constitution to the other two branches of government.³⁶

Arizona’s courts similarly should “always be available to resolve disputes concerning the scope of that authority which is granted by the Constitution to the other two branches of government.”

Single-Subject Issue Was Not Properly Before the Court

In *Bennett*, the Court’s decision was predicated, in part, on the “single subject” rule of the Arizona Constitution, but the Court noted that the parties conspicuously avoided this issue in the dispute.³⁷ The single-subject provision requires that acts passed by the legislature shall “embrace but one subject and matters properly connected therewith.”³⁸ This provision is designed to prevent “logrolling” or the “combining of disparate minorities into a majority through combination of unrelated legislative goals in a single bill.”³⁹ In *Bennett*, the single-subject issue was only raised by an *amicus* filing, and the underlying issue addressed by the *amicus* was withdrawn by the plaintiffs prior to oral argument.⁴⁰

All legislative acts carry with them the presumption of constitutionality,⁴¹ and the party challenging the constitutionality of an act “bears the burden of establishing that the legislation is unconstitutional; any doubts are resolved to the contrary.”⁴² Indeed, earlier in the *Bennett* opinion itself, the Arizona Supreme Court quotes *Rios v. Symington*,⁴³ noting that because none of the parties raised the issue of standing “and, because courts traditionally

do not address issues not properly raised, we declined, albeit reluctantly, to address potential standing issues.”⁴⁴ In *Bennett*, none of the parties challenged the constitutionality of the measure under the single-subject mandate, so the issue was not properly before the Court. At the very least, no matter how strongly the justices felt about the single-subject issue, they should have addressed the merits in *Bennett* “albeit reluctantly” because the parties did not raise the single-subject issue.⁴⁵

Last, to quote the Arizona Supreme Court on *amicus* briefs, “Some matters have been raised and argued which were not addressed by the parties. As to these, it is the rule that amici curiae are not permitted to create, extend, or enlarge those raised and argued by the parties. (citations omitted) This Court will only decide issues raised and argued by the parties.”⁴⁶ Because of the weighty constitutional question before the court, the *Bennett* case could have and should have been decided on the merits without delving into arguments on issues not raised by the litigants.

Avenue for Judicial Redress

The Supreme Court “attached significance to the legislature’s failure to exercise available political means by seeking to override the governor’s vetoes.”⁴⁷ The logic in denying standing, absent a veto override attempt, clearly invites the risk of a Catch-22.⁴⁸

If the legislature attempts an override, it acknowledges the political nature of the issue and its preference for a political remedy. However, if the override attempt fails, the Court need not grant a judicial remedy because courts should not review failed political questions.⁴⁹ If the legislature chooses the override avenue and the override succeeds, then any need for judicial review is completely eliminated.

Due to this flawed logic, *Bennett* effectively stands for the proposition that the Arizona Supreme Court will no longer entertain legislative challenges to line-item vetoes, which is an untenable situation for

all Arizonans. Unfortunately, the justices in *Bennett* seemed predisposed to classify this dispute as political when the legislature is controlled by one party and the governor is of a different party.

This poorly decided opinion raises a greater institutional question that will plague us for quite some time: If not the Arizona Supreme Court, then what is the appropriate arena for the review of line-item veto disputes between the executive and legislative branches?

A Final Response

It is true that the *Rios* case doesn't have a big role to play in my analysis of the lack of decision in *Bennett*, because the facts surrounding the line-item vetoes in *Rios* do not remotely resemble those presented in *Bennett*.⁵⁰ Indeed, as noted by counsel at oral argument, *Rios* is factually different and therefore inapplicable. My quote of the *Rios* case relates to its only relevant

part: standing.⁵¹

HB 2533, the public finances ORB, was raised by Mr. Nelson as an example of egregious log rolling. However, not a single line-item veto was challenged in this measure, so it should have played no part in the litigation or the decision. However, the Supreme Court also felt the need to comment on a matter not properly before the justices.⁵²

Finally, and perhaps most troubling, is the misunderstanding regarding holdings and the current status of the *Silver* case.⁵³ There is no "final result" in *Silver* because *Silver* is not yet over. Briefs were filed with the high court in New York as recently as the last week of March. In the ongoing *Silver* litigation, the trial court, on remand, declined to decide the item veto issue, not out of judicial restraint, but because it decided on the merits that the vetoed items were unconstitutionally adopted by the legislature in the first place.⁵⁴ There has

been no change as to the original holding by the high court in New York granting standing to legislators.⁵⁵ The *Silver* trial court holding is not the same as the result in *Bennett*. In *Silver*, the governor won on the merits; in *Bennett*, the governor won because the Supreme Court avoided the merits.⁵⁶ ▲

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endnotes

1. The case caption in *Bennett v. Napolitano*, 414 Ariz. Adv. Rep. 3 (Dec. 16, 2003) is rather lengthy because many state agency directors were named as defendants. But the named petitioners were the presiding officers and members of both bodies, Ken Bennett, President of the Arizona State Senate, and Franklin "Jake" Flake, Speaker of the Arizona House of Representatives; and Tim Bee, majority leader of the Senate, and Eddie Farnsworth, majority leader of the House of Representatives.
2. On Sept. 4, 2003, petitioners conceded that section 10 of the Education omnibus reconciliation bill (ORB) was a proper line-item veto under *Rios v. Symington*, 833 P.2d 20 (Ariz. 1992), leaving only 11 separate vetoes before the Court.
3. ARIZ. CONST. art. V, § 7 reads, in relevant part: "If any bill presented to the governor contains several items of appropriations of money, he may object to one or more of such items, while approving other portions of the bill. In such case he shall append to the bill at the time of signing it, a statement of the item or items which he declines to approve, together with his reasons therefore."
4. *State v. Jones*, 689 P.2d 561, 563 (Ariz. Ct. App. 1984); ARIZ. CONST. art. III.
5. See ARIZ. CONST. art. IV, part 2, § 20; *Rios*,

833 P.2d at 22–23.

6. See generally ARIZ. CONST. art. V, § 7.
7. *Colorado Gen. Assembly v. Lamm*, 700 P.2d 508, 520 (Colo. 1985).
8. *Id.*
9. See *Black & White Taxicab Co. v. Standard Oil Co.*, 218 P. 139, 147 (Ariz. 1923); *Fairfield v. Foster*, 214 P. 319, 322 (Ariz. 1923).
10. By way of example, the State Land Department's budget, after use of the line-item veto (which appears as double strikethrough and underlined text), appears as follows:
Sec. 54
STATE LAND DEPARTMENT 2003-04
FTE positions 174.4
Operating lump sum appropriation \$13,406,600
Natural resource conservation districts 490,000
Environmental county grants 125,000
~~Lump sum reduction (125,000)~~
Total appropriation
State Land Department \$13,896,600
Fund sources:
State general fund \$13,406,600
Environmental special plate fund 490,000
11. See Laws 2003, Ch. 262, §§ 4, 6, 29, 44 & 56.
12. *Id.*
13. Laws 2003, Ch. 262, § 44.

14. Laws 2003, Ch. 262, § 29.
15. Laws 2003, Ch. 262, § 44, was vetoed in relevant part, as follows:
~~If the department receives more than \$1,188,000 in federal 317 monies for vaccines purchase for state fiscal year 2003–2004, the state general fund amount of the state fiscal year 2003–2004 appropriation for the vaccines special line item equal to the amount by which the federal monies exceed \$1,188,000 up to \$576,600 shall revert to the state general fund.~~
16. Laws 2003, Ch. 262, § 9.
17. The Arts Commission budget reads, after exercising the item veto, as follows:
Sec. 9.
ARIZONA COMMISSION ON THE ARTS
FTE positions 11.5
Operating lump sum appropriation \$536,900
Community Service Projects 1,263,100
Total appropriation—Arizona
Commission on the Arts \$1,800,000
~~Fund sources:
Heritage fund \$1,800,000~~
In her veto message, the Governor opined, "As a result of this veto, the \$1.8 million appropriated from the Arts Commission will now be funded by the general fund, rather than the Heritage Fund."

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18. 153 P. 773, 783 (Ariz. 1915).
19. *Id.*
20. Laws 2003, Ch. 264, § 40 and Laws 2003, Ch. 265, § 21.
21. See *Hunt v. Callaghan*, 257 P. 648, 649 (Ariz. 1927); *Rios*, 833 P. 2d at 24.
22. *Bennett*, 414 Ariz. Adv. Rep. at 6.
23. *Silver v. Pataki*, 755 N.E.2d 842 (N.Y. 2001).
24. According to *Bennett*, the federal case that was instructive to the Arizona Supreme Court was *Raines v. Byrd*, 521 U.S. 811 (1997), which distinguished a prior federal legislative standing case, *Coleman v. Miller*, 307 U.S. 403 (1939).
25. "Non-appropriation" bills are New York's version of Arizona's omnibus reconciliation bills (ORBs), and they "contain programmatic provisions and commonly include sources, schedules and sub-allocations for funding provided by appropriation bills, along with provisions authorizing the disbursement of certain budgeted funds pursuant to legislative enactment." *Silver*, 755 N.E.2d at 844.
26. See *supra* note 24.
27. *Silver*, 755 N.E.2d at 846.
28. *Id.* at 849. *Silver* relied on *Coleman v. Miller*, 307 U.S. at 403 (vote nullification); *Dodak v. State Admin. Bd.*, 441 Mich. 547 (1993) (usurpation of power belonging to a legislative body); *Raines*, 521 U.S. at 811 (no standing to challenge lost vote); *Matter of Posner v. Rockefeller*, 26 N.Y.2d 970 (1970) (same).
29. Senators Bennett and Bee voted in favor of HB 2531, HB 2534 and HB 2535 on June 6, 2003, and Representatives Flake and Farnsworth voted in favor, on final passage, of HB 2531, HB 2534 and HB 2535 on June 11, 2003.
30. *Silver*, 755 N.E.2d at 847-48.
31. *Raines*, 521 U.S. at 811. Senators Robert Byrd, Carl Levin, Daniel Moynihan and Mark Hatfield voted "nay" on Mar. 27, 1996, and Congressmen David Skaggs and Henry Waxman voted "nay" on Mar. 28, 1996. The President signed the act, which went into effect on Jan. 1, 1997; the six congressmen filed suit the next day, alleging that the act was unconstitutional.
32. 961 P.2d 1013 (Ariz. 1998).
33. *Bennett*, 414 Ariz. Adv. Rep. at 4 (*quoting Sears*, 961 P.2d at 1013).
34. 953 P.2d 839 (Wyo. 1998).
35. In responding to the second certified question, "Do individual legislators or the Management Council of the Legislature have legal standing to sue the Governor regarding the exercise of his partial veto power under Article V, Section 9 of the Wyoming Constitution?" the court answered "yes." *Id.* at 846.
36. *Pataki v. Silver*, 769 N.Y.S.2d 518 (2003) (internal citation omitted), *relying on Saxton v. Carey*, 44 N.Y.2d 545, 551 (1978).
37. *Bennett*, 414 Ariz. Adv. Rep. at 6. The single-subject mandate appears in art. IV, part 2, § 13, ARIZ. CONST.
38. ARIZ. CONST. art. IV, part 2, § 13.
39. *Litchfield Elementary v. Babbitt*, 608 P.2d 792, 800-01 (Ariz. Ct. App. 1980).
40. See *supra* note 3, relating to conceding point on section 10 of the education ORB.
41. *Chevron Chem. Co. v. Superior Court*, 641 P.2d 1275, 1282 (Ariz. 1982).
42. *Department of Public Safety v. Superior Court*, 949 P.2d 983, 987 (Ariz. Ct. App. 1997), *quoting McClead v. Pima County*, 849 P.2d 1378, 1382 (Ariz. Ct. App. 1992).
43. 833 P.2d 20 (1992).
44. *Id.* at 22 n.2.
45. In *Bennett*, the Court discussed the issue of standing in relation to *Rios*, but it noted that the court in *Rios* was indeed able to review the merits of the controversy "albeit reluctantly" given that the standing issue had not been raised by the parties. *Bennett*, 414 Ariz. Adv. Rep. at 5.
46. *Town of Chino Valley v. City of Prescott*, 638 P.2d 1324, 1330 (Ariz. 1981), *quoting City of Tempe v. Prudential Ins. Co. of America*, 510 P.2d 745 (Ariz. 1973).
47. *Bennett*, 414 Ariz. Adv. Rep. at 6, *citing* art. V, § 7, ARIZ. CONST.
48. Joseph Heller's novel describes the travails of Captain Joseph Yossarian, a WWII bombardier. The Catch-22 dictates that you cannot fly missions if you are crazy, but in order to fly combat missions one must be crazy.
49. See *supra* "standing" discussion and note 28.
50. *Rios*, 833 P.2d at 120; *Bennett*, 414 Ariz. Adv. Rep. at 3.
51. *Id.*
52. *Bennett*, 414 Ariz. Adv. Rep. at 3, n.9.
53. *Silver*, 755 N.E.2d at 842.
54. *Pataki*, 769 N.Y.2d at 518.
55. *Silver*, 755 N.E.2d at 842.
56. *Pataki*, 769 N.Y.2d at 518; *Bennett*, 414 Ariz. Adv. Rep. at 3.