Arizona State Senate
Issue Brief

GUBERNATORIAL LINE ITEM VETO AUTHORITY

The Arizona Constitution gives the Governor two distinct veto powers: 1) a general power, which allows the veto of an entire bill on any subject; and 2) a line item power. The Governor's line item veto power is found in Article V, Section 7 of the Arizona Constitution, which provides:

"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."

RIOS V. SYMINGTON

As part of a budget balancing plan for the state, Laws 1992, Seventh Special Session, Chapter 3 (H.B. 2001) directed transferring of monies from 61 special funds to the state General Fund. The Governor line item vetoed five of these transfers but no override vote was taken by the Legislature. Senate President Peter Rios filed a challenge to Governor Symington's authority to line item veto the transfers.

The Arizona Supreme Court considered whether creating the special funds, from which the transfers were made, constituted appropriations and whether the Governor could properly line item veto transfers from the funds.

Citing earlier cases, the Court held that an appropriation occurs when the Legislature sets aside a certain sum of money for a specified object and creates an authority to spend the money. The Court found that all five of the special funds were considered appropriations. Each one specified a certain sum of money, an object and an authority to spend. The Court noted that a sum of money need not be specified in each case because the amount contained in each fund could be ascertained at any given time.

The Court then considered whether a transfer from a previously made appropriation (each fund) constitutes "an item of appropriation" that is subject to the line item veto. Although the Court noted that the transfers back to the state General Fund did not contain either spending authority or a specified purpose for the money, it held that a

reduction or elimination of a previously-made appropriation must be subject to the line item veto.

 In the opinion, Vice Chief Justice Moeller noted that, "we conclude here that to prevent the Governor from vetoing an amendment to an appropriation would unlawfully allow the Legislature to accomplish indirectly that which it could not accomplish directly. To hold otherwise would give the Legislature plenary authority over appropriations, a result clearly not intended by the Constitution."[1]

This case was also noteworthy because the Court determined an increase made by the Legislature to an earlier appropriation is subject to the line item veto because it is a new appropriation. The Court also determined that a decrease by the Legislature of an earlier appropriation is subject to the line item veto, which reinstates the previous larger amount appropriated. The Governor cannot, however, line item veto and replace it with a different amount.

Additionally, the Governor's veto messages may not direct certain state agencies under the Governor's authority to impound and revert specific appropriated sums. This is a legislative function.

BENNETT V. NAPOLITANO

On June 12, 2003, the Legislature approved and transmitted to Governor Napolitano four bills comprising the state's operating budget for FY 2003-2004: the general appropriations bill and three omnibus reconciliation bills (ORBs).

On June 17, 2003, the Governor line item vetoed 35 provisions from these bills. Subsequently, on July 15, 2003, the President of the Senate, Speaker of the House of Representatives and majority leaders of both houses filed a special action in the Arizona Supreme Court stating the Governor exceeded her veto authority under the Arizona Constitution.

The Arizona Supreme Court found that petitioners lacked standing to challenge the Governor's vetoes made in connection with the legislative budget package for FY 2003-2004 and that "notions of judicial restraint" required the Court to abstain from deciding the substantive issues.

In the opinion, Chief Justice Jones established it is not in the Court's jurisdiction to become involved in a political dispute and petitioners only represented four of the ninety members of the Legislature. The Court also noted the failure to attempt a legislative override, numerous possible violations of the constitutional single subject rule in the ORBs and nonrecurring instances of unconventional budget structuring.[2]

47TH LEGISLATURE V. NAPOLITANO

The 47th Legislature passed Laws 2006, Chapter 1 (H.B. 2661), concerning state employee pay raises, as an emergency measure on January 27, 2006. Section 6 of the act appropriated amounts for employee salary adjustments, and section 5 of the act made technical changes and exempted certain employees from the state merit system.

On January 30, 2006, Governor Napolitano line item vetoed the portion of section 5 that exempted certain employees from the state merit system. The Governor's veto message stated that this section would have created additional expenses for the state unrelated to state employee's salaries, "[b]ecause of the differences in the way exempt and non-exempt employees accrue annual leave."[3]

The Legislature did not attempt to override the veto, but did authorize the President of the Senate and the Speaker of the House of Representatives to bring an action on behalf of

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[1] Office of the Arizona Governor, Budget-Related Court Cases, *Rios v. Symington*, 833 P.2d 20, 22 (Ariz. 1992).

[2] Office of the Arizona Governor, Budget-Related Court Cases, Bennett v. Napolitano, 81 P.3d 311, 316 (Ariz. 2003).

[3] Laws 2006, Chapter 1E, House Bill 2661, Governor *Napolitano Line Item Veto Letter* https://apps.azleg.gov/BillStatus/GetDocumentPdf/332651

the Legislature to challenge the constitutionality of the Governor's line item veto.

The Arizona Supreme Court considered, among other things, whether the substantive portions of section 5 of H.B. 2661 constituted an appropriation. The Court considered a previous definition of an *appropriation* that defined it as: occurring when the Legislature sets aside a certain sum of money for a specified object and creates an authority to spend it. The Court also noted, relying on previous case law, that the Legislature can authorize spending from the state General Fund or it can authorize payments of discernible amounts from a special fund.

In determining whether section 5 constituted an appropriation, the Court noted that statute requires employees to be paid all the wages, including accrued leave pay, upon leaving the service of the employer. The Court found that this is an obligation to pay imposed by the statutes, but does not constitute an appropriation. The Court held that while the employment statutes may obligate the state to make certain payments, they do not set aside any sum of money from the public revenue, and thus cannot be regarded as making an appropriation.

Specifically, in this case, section 5 neither authorized spending from the state General Fund nor did it authorize any defined amount of public revenue from any specific funding source. Since section 5 was not an item of appropriation, it was not subject to the Governor's line item veto power and was reinstated.

The Court also made other important findings in this case, one of which related to the justiciability of line item veto cases. In this case, the Governor argued that her decision to utilize her line item veto authority over an item of appropriation was a political question and therefore the Court could not hear the case. Political questions involve decisions that are made, according to the Constitution, by one of the political branches of government and thus raise issues that are not susceptible to judicial review.

Chief Justice MacGregor noted that this case did not involve a political question. This case concerned the question of whether the Constitution permitted the Governor to exercise her veto power, which is a legal question.[4]

This case is also noteworthy because, unlike the individual legislative members in *Rios*, the Court found that the legislative body had standing to sue. The Legislature sought and received authorization to challenge the Governor's actions and the Legislature alleged a particularized injury to the legislative body as a whole: the Legislature's authority to make and amend laws by a majority vote.

Additionally, the Court found that failure to seek a veto override does not automatically exclude the Legislature from suing to challenge the Governor's line item veto when the challenge involves an allegedly unauthorized act by the Governor.

ADDITIONAL RESOURCES

- Arizona Constitution, Article V, Section 7

- *47th Legislature v. Napolitano*, 143 P.3d 1023

- *Bennett v. Napolitano*, 206 Ariz. 520, 81 P.3d 311 (2003)

- *Rios v. Symington*, 172 Ariz. 3, 833 P.2d 20 (1992)

- Office of the Arizona Governor, Budget-Related Court Cases

- Attorney General Opinion: 79-172 (R79-188)

- Schwem, Susan E., Forty-Seventh Legislature of the State of Arizona v. Napolitano: Appropriations of Authority, 49 Ariz. L. Rev. 179 (2007)

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[4] Arizona Law Review, 47th Legislature v. Napolitano, 143 P.3d 1023.

- Strouse, Daniel, The "Item Veto" Case, *Bennett v. Napolitano*, What about the Merits?, 37 Ariz. St. L.J. 165 (2005);

- Strouse, Daniel, The Structure of Appropriations Legislation and the Governor's Item Veto Power: The Arizona Experience, 36 Ariz. L. Rev. 113 (1994)